

REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA
 (LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date <i>26/3/2020</i>	

 APPEAL CASE NO: AA 10/2016
 COURT A QUO CASE NO: CC 51/2011

In the matter between:

MURENDI LODRICK VHAVARI

APPELLANT

and

THE STATE

RESPONDENT

 JUDGMENT

MAKGOBA JP

- [1] This is an appeal against the conviction and sentence imposed by a single Judge of this Division (Webster J) on 12 March 2012. The Appellant was sentenced to two terms of life imprisonment on two counts of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 and three months imprisonment on a charge of theft. The sentences were ordered to run concurrently.
- The appeal is with leave of the Court *a quo* per Muller J.
- [2] There were no eye witnesses on the incidents of murder and theft. The conviction is based on circumstantial evidence presented by a number of state witnesses and the confession or admission made by the Appellant to two state witnesses.
- [3] It is common cause that the Appellant was together with the two deceased, Muvhango Emmanuel Vhavari, a male and Thokozile Maswanganyi, a female on the 24 December 2009 when they were last seen alive. The naked lifeless bodies of the two deceased were discovered on the same spot on the 27 December 2009.

It is further common cause that the deceased in Court one, Emmanuel Vhavari's cellphone was found in possession of the Appellant in the morning of the 25 December 2009.

- [4] Mr Norman Vhavari ("Uncle Norman") is the relative of both the deceased in count 1 and the Appellant. His evidence is that the deceased and the Appellant left home to attend a function at a tavern in a nearby Nkuri village late in the afternoon of the 24th December 2009 and that he last saw the deceased alive on that day.

He further testified that in the morning of the 25th December 2009 when he saw the Appellant, he asked him how the previous night outing was and where was the deceased in count 1, to which the Appellant replied that the outing went well and that the Appellant left the deceased in count 1 asleep in his bedroom, that is Appellant bedroom. Uncle Norman further testified that the Appellant informed him that there was a caller who is calling him on the mobile phone belonging to the deceased in count 1 asking him about the whereabouts of her child ("the deceased in count 2") and that the Appellant told him that he told the caller that the deceased in count 1 was not present.

He further testified that shortly thereafter, whilst he was still in the company of the Appellant at his homestead the mother of the deceased in count 2 arrived and asked about the whereabouts of the deceased in count 2 who was last seen in the company of the deceased in count 1. When asked about the

whereabouts of the deceased in count 2, the Appellant's explanation was to the effect that he last saw the deceased in count 2 in the company of the deceased in count 1 at Nkuri village outside the tavern.

- [5] According to this witness, the Appellant's conduct and responses left much to be desired and it resulted in the family organizing a search party that went to search for the bodies of the deceased at the place where the Appellant said he last saw them alive.

He also testified that after the Appellant was arrested, he and other family members (including a family member of the deceased in count 2) went to visit the Appellant at Giyani police station where the Appellant told them that he killed the two deceased with the assistance of two other persons with the sole intention of selling their body parts.

- [6] Mr Phumulani Goodwill Vhavari is an elder brother to the deceased in count 1 and a cousin of the Appellant. He testified that on the 24th December 2009 at around 20:00 at night he met with deceased in count 1, the Appellant and some other people who were in the company of the deceased in count 1. He then gave the deceased in count 1 R50-00 which he had requested from him with the understanding that this money would be returned to him by the deceased in count 1 the following morning.

He stated that after spending few minutes with the deceased in count 1 and the Appellant, he then left for Giyani. On the morning of the 25th December 2009 at around 07:00, his sister woke him up and asked for money to buy bread from him and he there and then told his sister to go to collect the money from the deceased in count 1, but his sister told him that the deceased in count 1 was not in his room. He there and then telephoned the deceased in count 1 to demand the R50-00 he had borrowed him the previous night, but the mobile phone of the deceased in count 1 was answered by the Appellant who told him that the deceased was at his homestead. That he left the deceased at the deceased's homestead.

- [7] He further testified that on the 26th December 2009 in the morning he was at home when the mother of the deceased in count 2 arrived at his homestead to report that the deceased in count 1 took along the deceased in count 2 on the 24th December 2016 and that she was never seen again since then. He then went to Uncle Norman with the mother of the deceased in count 2 to report what she had told him. Uncle Norman then called the Appellant who was also around Uncle Norman's homestead to ask him about the whereabouts of the deceased in count 1 and 2, to which the Appellant responded that he left both deceased at a rock near a tavern at Nkuri village.

He further stated that the mother of the deceased in count 2 asked the Appellant why was he answering the calls made to the mobile phone of the deceased in count 1, to which the Appellant offered no reasonable explanation and simply just looked down.

He further testified that at that gathering at Uncle Norman's homestead, he was tasked by Uncle Norman to go and report a case of missing people at Giyani police station, a task which he did. He further testified that he was part of the search party that went to search and ultimately found the bodies of the two deceased.

[8] The witness further testified that on the 31st December 2009 after the Appellant was arrested he visited the Appellant at the Giyani police station together with Uncle Norman and a Mr David Maswanganyi with the aim of understanding what had happened to the two deceased persons and in response thereto, the Appellant told them that he is the one that stabbed and killed the deceased in count 1 with a screwdriver whilst his accomplices Jeffrey and Patrick were holding the deceased in count 2.

[9] Mr Ndifelani Mulaudzi who is a cousin of the Appellant testified that on the 25th December 2009 at around 15:00 he was at his homestead in the company of his mother, his grandmother and the Appellant. The Appellant uttered certain words directed to them. The Appellant told them that he

dreamt that the deceased in count 1 was killed and that his body was laid underneath the bushes next to the valley.

He further testified that his grandmother asked the Appellant if he knew the identity of the deceased's friend to which the Appellant responded that he does not know him, but only knew that person by sight.

- [10] Warrant Officer Zondo Baloyi is a police officer who attended the scene where the bodies of the two deceased were discovered on the 27th December 2009. He testified that after attending to the scene of crime, he ended up at the homestead of the Appellant to question him after being told that the Appellant was in possession of the mobile phone of the deceased in count 1. He stated that after questioning the Appellant about the mobile phone which belonged to the deceased in count 1, the Appellant admitted that he was in possession of same and the Appellant gave an explanation to the effect that he was given the mobile phone by the deceased in count 1 in the presence of one Mr Michael Mulaudzi. He further testified that he then went to the home of Michael Mulaudzi and questioned him about the Appellant being given the mobile phone by the deceased in count 1 in his presence. Michael Mulaudzi told him in the presence of the Appellant that the Appellant was not telling the truth.

- [11] Mr Khadi Vhavari is the father of the Appellant. He testified that on the 25 December 2009 he was at his homestead when his younger brother, Norman Vhavari (Uncle Norman) arrived and then called the Appellant to question him about the whereabouts of the deceased in count 1. He further testified that the Appellant told Uncle Norman that the deceased in count 1 was asleep in the bedroom after which the Appellant was then released and he went away.
- [12] The Appellant on the other hand testified in his own defence and to a large extent confirmed the version of the state witnesses. He testified that he was with the deceased in count 1, David Mudau, Michael and other unknown female persons whom he met for the first time at Nkuri village on the night of the 24th December 2009. He testified that after they consumed liquor, he then indicated to the deceased in count 1 that he was going home. He stated that before he left the deceased in count 1 handed him his mobile phone for safekeeping as the deceased in count 1 was scared of losing or misplacing the mobile phone because he was under the influence of liquor. The Appellant together with David Mudau then left leaving the deceased in count 1 behind. He further testified that the following morning, the 25th December 2009 he woke up and went to the homestead of the deceased in count 1 and that on his arrival, he went to the deceased's bedroom and found the younger brother

of the deceased (one Owen) sleeping in that bedroom. He enquired from Owen where the deceased was. Owen told him that the deceased in count 1 did not return home.

- [13] The Court *a quo* in its evaluation of the evidence preferred and accepted the version of the State over that of the Appellant. The Court *a quo* cannot be faulted in this regard. In **S v Francis 1991 (1) SACR 198 (A) at 204d** it was stated that the appeal Court's powers to interfere with findings of fact of a trial Court is limited.

In **S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f**, it was held that: *"In the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong"*.

In **S v Monyane and Others 2008 (1) SACR 543 (SCA) at 548b** it was also held that:

"Bearing in mind the advantage that a trial Court has of seeing, hearing and appraising a witness, it is in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony".

- [14] Accordingly, this Court accepts the version of the State and rejects that of the Appellant. The Appellant's version is not reasonably possibly true given the inconsistency and contradictions in his evidence regarding his explanation of

the whereabouts of the deceased in count 1 and his possession of the deceased's cell phone.

[15] It is trite that where a trial Court draws inference from a set of facts in a case dealing with circumstantial evidence, the inference sought to be drawn must comply with the two cardinal rules laid down in **R v Blom 1939 AD 188** which are:

- (a) Firstly, that the inference sought to be drawn must be consistent with the proved fact;
- (b) And secondly, the proved facts should be such that they exclude every reasonable inference from them save for the one sought to be drawn

See also **R v De Villiers 1944 AD 493 at 508-9**; and

S v Reddy 1996 (2) SACR 1 (AD).

[16] In *casu*, the following facts are found to have been proved or established:

- (1) The Appellant was the last person seen in the company of the two deceased on 24 December 2009.
- (2) The Appellant gave wrong or false account of events when he was questioned about the whereabouts of the deceased in count 1.
- (3) The Appellant was in possession of the cellphone belonging to the deceased in count 1 and the fact that he in fact answered some of the calls that were made to this cellphone.

- (4) The Appellant told Uncle Norman and Khadi Vhavari that the deceased was asleep in his (Appellant's) bedroom on the morning of 25 December 2009 and later changed his version to say that he left the deceased at a rock near Nkuri bar lounge.
- (5) The Appellant looked down when he was asked why he used the deceased's cellphone and answered various calls.
- (6) The Appellant did not join the search party at the bush near Nkuri bar lounge and did not go to the scene where the two deceased were found.
- (7) The Appellant made voluntary confession or admission to private individuals that he and his accomplices are the killers of the deceased in both counts.

[17] The circumstances surrounding the extra-curial confession or admission by the accused is outlined as follows: Uncle Norman and Phumulani testified that they visited the accused at the police cells as they wanted to find out exactly what happened to the deceased. The accused was not threatened and the conversation was cordial.

They further testified that the accused had spoken freely and voluntarily. They also testified that the accused admitted that he stabbed the deceased and his accomplices stabbed the other deceased. Lastly the accused told them that there was a person who required body parts of a human being and that

person's name is Nthangiseni Mudau who had offered to buy him a Quantum combi for the work done.

[18] Section 217(1) of the Criminal Procedure Act 51 of 1977 provides:

"(1) Evidence of any confession made by any person in relation to the commission of offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings".

Section 219 A of the Criminal Procedure Act 51 of 1977 provides as follows:

"(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence".

[19] The evidence of Uncle Norman and Phumulani Vhavari complied with the provisions of sections 217(1) and 219A of Act 51 of 1977 and is admissible against the Appellant in that the confession or admission was made freely and voluntarily and the Appellant was not unduly influenced. There is no evidence that the Appellant was not in his sound and sober senses.

In the circumstances the conviction of the Appellant on murder and theft cannot be faulted.

[20] Regarding sentence the Court *a quo* correctly made a finding that the provisions of section 51(1) of Act 105 of 1997 were applicable and that there were no substantial and compelling circumstances to justify the trial Court's deviation from the prescribed sentence.

Section 51(1) reads as follows:

"51(1) Notwithstanding any other law, but subject to subsection (3) and (6), a Regional Court or High Court shall sentence a person it has convicted of an offence referred to in part 1 of schedule 2 to imprisonment for life."

Part 1 of schedule 2 reads as follows:

"murder; when –

(a) it was planned or premediated

.....

(e) the victim was killed in order to unlawfully remove any body part of the victim; or a result of such unlawful removal of a body of the victim."

[21] Uncle Norman and Phumulani testified that the Appellant told them that the deceased were killed because someone wanted body parts of a human being. It was also submitted by the Appellant's legal representative during mitigation

of sentence at the trial that the deceased was killed because someone asked the Appellant to find him human body parts. The first leg of Part 1, Schedule II (e) does not require actual removal of body parts.

The Appellant killed the two deceased for financial gain and in order to remove body parts for muti purpose. The motive is morally unacceptable.

In **S v Mogaramedi 2015 (1) SACR 427 (GP)** at par 20, it was stated that in South Africa, cultural practices pertaining to a believe in witchcraft and muti killings are prevalent.

In *casu* the murder was well planned and therefore premeditated as provided for in section 51(1) of the Act, in particular Part 1 of Schedule 2(a) thereof.

[22] In **State v Petkar 1988 All SA 550 (A)** at 550, it was held that;

"This Court's powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable Court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate".

Also see **S v Monyane and Others 2008 (1) SACR 543 (SCA)** at 550.

We do not find any justification to interfere with the sentence imposed by the Court *a quo* and in the circumstances the Court *a quo* correctly exercised its

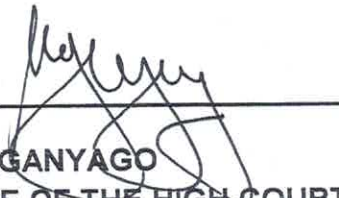
discretion judiciously in imposing the prescribed sentence of life imprisonment.

[23] In the result the appeal against conviction and sentence is dismissed.



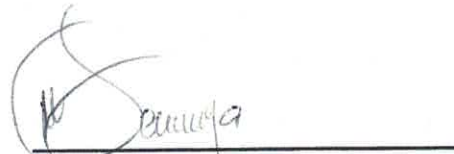
E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

I agree



M F KGANYAGO
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I agree



M V SEMENYA
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on

: 13 March 2020

Judgment delivered on

: 26 March 2020

For the Appellant

: L M Manzini

Legal Aid South Africa

Polokwane

For the Respondent

: T E Mabapa

Director of Public Prosecution,

Polokwane