



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A132/2017

In the matter between:

ANDILE COFA

1st Appellant

TEBELLO NTISA

2nd Appellant

MONGEZI JOHANNES MATIWANE

3rd Appellant

and

THE STATE

Respondent

HEARD ON: 10 DECEMBER 2018

JUDGMENT BY: MATHEBULA, J et CHESIWE, J

DELIVERED ON: 22 MARCH 2019

- [1] The appellants appeared before the regional magistrate, Welkom charged with murder read with provisions of section 51 (2) of Act 105 of 1997. An additional charge of assault with intent to do grievous bodily harm was also preferred against the 2nd appellant.

The trial court convicted all the appellants with murder and the 2nd appellant with a further charge of assault with intent to do grievous bodily harm. They were all sentenced to fifteen (15) years imprisonment. In respect of the 2nd appellant a further sentence of three (3) years was handed down to the aforementioned sentence. In terms of section 280 of Act 51 of 1977 it was ordered that the sentence run concurrently with the sentence imposed on the murder charge.

- [2] Aggrieved with both conviction and sentence the appellant applied for leave to appeal. This appeal is before us with leave granted by the trial court. Before us appeared Mr L Tshabalala for first and third appellants. The second appellant was represented by Mr P.P. Mile. Mr D. Pretorius appeared for the State. All counsel did not make any submissions and stood by their heads of argument.

- [3] The facts are briefly as follows. The events of 23 November 2012 unfolded at Mahlomola's Tavern, Welkom. The deceased and his friends arrived there to have a drink but they were barred from entering. After persuading the lady in charge they were allowed to buy beer. As they were leaving an altercation erupted and one Mokhele Thys Thebeladi was stabbed at the back by the second appellant after chasing him for approximately 200 metres.

- [4] The situation deteriorated very fast and all three accused were observed in a stabbing frenzy against the deceased who was lying on the ground after being tripped by the first appellant. The deceased tried in vain to defend himself but he was no match against the three appellants. All the appellants denied any involvement in a fight that resulted in the death of the deceased.

The crux of the defence of the first appellant is that he left the tavern before the fight started. The second appellant testified that he chased after Mokhele and on his return the deceased was already lying on the ground. According to the 3rd appellant he did not participate nor see what happened to the deceased.

[5] The fundamental rule is that the court of Appeal is not at liberty to depart from the factual and credibility findings of the trial court unless they are clearly wrong.¹ The presumption is that the trial court's conclusions on the facts is correct. The appeal court will only reverse such conclusion(s) where it is convinced that the trial court is wrong.

[6] It is trite law that the State must prove its case against an accused person beyond reasonable doubt. The proper approach in evaluating evidence was instructively explained by Heher AJA (as he then was) in *S v Chabalala* in the following terms:-

“The correct approach is to weigh up all elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude reasonable doubt about the accused's guilt”²

[7] I note that the trial court was alive to this approach and set out to apply the appropriate legal principles to the facts. The trial court also dealt with the evidence of state witnesses corroborating each

¹ *S v Leve* 2011 (1) SACR 87 (ECG) at para 81

² 2003 (1) SACR 134 (SCA)

other. The appellants which were well known to the witnesses were all seen stabbing the deceased while he tried in vain to defend himself. According to the post mortem report he sustained multiple stab wounds. Nobody else except the three were seen attacking the deceased. The second appellant chased Mokhele and stabbed him on the back. The trial court correctly concluded that this was an attack. It could not by any stretch of imagination be considered as self-defence.

- [8] It is so that the version of the accused person must only be reasonably possibly true. If the accused's evidence surpasses this threshold, then an acquittal must follow. However, confronted with such formidable evidence against them, the version of the appellants does not measure up to the threshold.
- [9] Therefore I come to the conclusion that the trial court did not commit any misdirection to the extent of vitiating its findings. The appeal on conviction ought to fail.
- [10] I now turn to the last leg of the appeal namely sentence. The appellants were charged under section 51 (2) of Act 105 of 1997. The section provides that in the event of conviction, a first offender may be sentence to fifteen (15) years imprisonment unless the court finds substantial and compelling circumstances justifying deviation from imposing the prescribed minimum sentence. The trial court concluded that there were no substantial and compelling circumstances and proceeded to impose the aforementioned sentence.

[11] Sentencing is the prerogative of the trial court and the court of appeal must not replace the sentence imposed by the trial court with its own, unless it is justified to do so.³ The trial court took into consideration the personal circumstances of all the appellants, the nature and gravity of the offence and interest of the community. Having balanced these against each other, the trial court correctly concluded that the prescribed minimum sentence is the appropriate sentence. I have no doubt that the heinous nature of the offence and in particular the predatory manner it was committed deserve such stern punishment. I am persuaded that the trial court has not misdirected itself and the sentence imposed cannot be faulted nor is it shockingly inappropriate.

[12] Accordingly I make the following order:-

12.1. The appeals against convictions and sentences are dismissed.

MATHEBULA, J

I concur

CHESIWE, J

³ S v Obisi 2015 (2) SACR 35 (W) at 35 I - J

On behalf of first and third applicant:

Instructed by:

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On behalf of second applicant:

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On behalf of respondent:

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