



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

APPEAL NUMBER: **A135/19**

In the matter between:

PASEKA ELVIS NTOMI

APPELLANT

And

THE STATE

RESPONDENT

CORAM: **MUSI, JP et CHESIWE, J**

JUDGMENT BY: **CHESIWE, J**

HEARD ON: **11 NOVEMBER 2019**

DELIVERED ON: **12 DECEMBER 2019**

[1] The appellant was arraigned before the Regional Court in Welkom on a charge of murder (read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997.) The appellant

pleaded not guilty. He was convicted on the 19 March 2019 and sentenced to 15 years imprisonment.

- [2] The trial court granted leave to appeal against conviction and sentence.
- [3] The appellant was legally represented by Mr Thulsie at the trial court.
- [4] The background of this matter is as follows: The appellant testified that on the night of the 15th of April 2018, he was at ZM tavern. The owner of ZM tavern asked the appellant to chase the deceased as the owner said the deceased was one of the people who broke into ZM tavern. The appellant and Katleho chased the deceased and when they got hold of the deceased, Katleho stabbed the deceased, but the appellant testified that he did not see where Katleho stabbed the deceased. The appellant denied that he stabbed the deceased.
- [5] The first State witness, Stephen Thobehi (Thobehi), testified that on 15 April 2018, he was at ZM tavern with Thabo, Thami, Manele and the deceased. According to the witness they were all members of the Zauta gang including the appellant. They wanted to enter the tavern but the security guard refused them entry because they were intoxicated and had knives. Thobehi was able to enter as he had hidden his knife. The deceased had asked Thobehi to enter the tavern. When inside the tavern, Thobehi saw the appellant with Katleho (appellant's friend) and Mamelo (deceased's girlfriend) and another unknown lady. The appellant immediately left the

tavern with the Mamelo and the unknown lady. It was not long thereafter that Thami (Thobehi's friend) called him outside and told him that the deceased was being attacked by the appellant and his friends. Thobehi said he saw the appellant and his friends chase the deceased. The friends approached the deceased from the front and the appellant was behind the deceased. He saw the appellant stab the deceased twice in the back. Thobehi asked the appellant why he stabbed the deceased, instead the appellant insulted Thobehi. Thobehi and Thami chased the appellant and his friends. A Quantum taxi appeared and the appellant and his friends got into it. Thobehi thereafter, went back to check on the deceased, who was by then laying in a pool of sewerage water. Thobehi further testified that he took the deceased out of the sewerage water and took the deceased next to the road, where he discovered that the deceased was quiet.

- [6] The appellant testified that, on the night of the incident he was with Katleho at the ZM Tavern, when Matsietsie (Katleho's girlfriend) told him that the deceased was outside. The appellant went outside. He found the deceased sitting in a corner. The deceased approached the appellant holding a knife. The appellant said he retreated from the deceased. The tavern owner came out and told the appellant and Katleho to catch the deceased as he had previously broken into the tavern. The appellant confirmed that on the night of the incident he and Katlego chased the deceased, but denied that he stabbed the deceased. He said Katleho stabbed the deceased.

- [7] The appellant's grounds of appeal in this matter are that the trial court erred in not taking into account the extent of material contradictions between the evidence of the State witnesses; that the court erred in not properly analysing the evidence of the single state witness and that there was no corroboration of the single witness with regard to the knife; that the appellant's clothes were not sent for DNA analysis. Thus the state did not prove its case beyond reasonable doubt against the appellant. In respect of sentence the appellant is of the view that the sentence is shockingly inappropriate under the circumstances and induces a sense of shock especially in light of the totality of accepted facts in mitigation.
- [8] Ms Abrahams on behalf of the appellant submitted that the trial court incorrectly convicted the appellant. She said the appellant's version was that the deceased wanted to stab the appellant. She submitted that the trial court did not take into consideration the whole evidence. Consequently it was a misdirection by the trial court to have accepted the version offered by the state witness.
- [9] Ms. Moroka on behalf of the respondent submitted that the conviction by the trial court is supported and that the appeal has no merits. She submitted that there was no misdirection on the part of the trial court. She contended that the trial court took cognisance of the single witness' evidence and dealt with it in the utmost caution. Therefore the trial court cannot be faulted nor did it misdirect itself as it came to the correct decision in respect of conviction, and that the appeal against conviction must be dismissed.

[10] The state relied on the evidence of a single witness. The trial court was aware that Thobehi was a single witness and that his evidence had to be treated not only with caution but that the court had to be satisfied that the evidence of that single witness was credible and reliable. In **S v Snyman**¹, the court said:

“...while there is always need for special caution in scrutinising and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense.

And equally important is what was stated in **S v Sauls and Others**,² that

“there is no rule of thumb test or formula to apply when it comes to consideration of the credibility of the single witness”.³

[11] Thobehi (single witness) placed the appellant at the scene of the crime to the extent that he questioned the appellant as to why he stabbed the deceased. Thobehi confirmed that the appellant and Katleho chased the deceased. The appellant on his own version testified that he did chase after the deceased. Thobehi knew the appellant well as they were all members of the same gang. He was honest to concede that he was also a gang member. He explained how he saw the appellant stabbing the deceased twice at the back. His evidence is corroborated by the post-mortem report, Exhibit B that: “There were two stab wounds on the back that penetrated the wall through the 3rd and 7th intercostal spaces and punctured

¹ *S v Snyman* 1968 (2) SA 582 at 585G

² *S v Sauls and Others* 1981 (3) SA 172 (A)

³ *Ibid* at 180E and see also the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 757 that: “the trial Judge will weigh the evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradiction in the testimony, he is satisfied that the truth has been told.”

the right lung upper and lower lobes respectively. Cause of death: stab chest.”

[12] The trial court analysed and evaluated the evidence of the single witness and applied the cautionary rule. The witness did not downplay the deceased’s involvement in the gang activities. The witness confirmed that all the members had knives on the night in question, including the witness himself. He did not exclude or distance himself from the events of that night. The witness testified that he was closed to the appellant and the deceased. His observation of the incident was not obstructed by anything. The mast light was bright enough for him to see what happened between the appellant and the deceased. As a single witness, he gave his evidence in a clear, logical and satisfactory manner.

[13] In **Masiu v S**⁴, the court was of the view that:

“...where the witness was in a situation where he or she had ample opportunity to make a proper and reliable observation of the perpetrator, such factor will be taken into consideration to consider the value to be attached to such evidence, especially so where the witness did not have any reason to falsely implicate the perpetrator.”⁵

[14] The trial court’s evaluation of the evidence demonstrates that it was alive to the fact that the state witness was reliable, truthful and had no reason to falsely implicate the appellant. For the fact that the appellant and the state witness were not rival gang members

⁴ *Masiu and Others v S* (A8/2014) [2014] ZAFSHC 246 (11 December 2014)

⁵ *Ibid* para [16] and see also *Magadla v S* (80/2011) [2011] ZASCA 195 (16 November 2011) – unreported para [32].

but members of the same gang. The single witness was consistent in his testimony that he saw the appellant stab the deceased twice in the back. The trial court correctly concluded that the single witness's evidence was not only reliable, but also truthful.

[15] It is trite that a court of appeal will only tamper with the trial court's credibility findings in certain circumscribed circumstances, considering the advantage which the trial court had of hearing and appraising the witnesses.

[16] Furthermore, the trial court correctly found the appellant to be an untruthful witnesses and correctly rejected his version as false beyond reasonable doubt. I am satisfied that the State had proven its case beyond reasonable doubt.

[17] In my view the trial court correctly convicted the appellant and there is no reason to tamper with the trial court's findings on the conviction. As such the conviction ought to be confirmed.

[18] Regarding sentence, it is trite that a court with appellate jurisdiction has limited powers to interfere with the sentence imposed at the trial court. The sentencing discretion lies with the trial court. Its sentence will only be interfered with on appeal if the discretion in question was not exercised judicially and properly⁶, or if there is a disparity between the sentence imposed and the one that ought to have been imposed. In **S v Malgas**⁷ the court stated as follows:

⁶ *S v Rabie* 1975 (4) SA 855 (A)

⁷ *S v Malgas* 2001 (1) SACR 469 (SCA)

“...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned...”⁸

- [19] Ms Abrahams submitted that the trial court misdirected itself by not taking into consideration that there was compelling and substantial circumstances, in that the appellant was still a youth at the time the offence was committed; his girlfriend was pregnant; he did odd jobs; he finished school at grade 10; he owned immovable property; and the offence occurred on the spur of the moment and

⁸ Ibid at 478 D-H

that the appellant was a first offender and was capable of being rehabilitated. Counsel submitted that an appropriate lesser sentence will still meet the objectives of sentencing.

[20] Ms Moroka submitted that the trial court failed to attach weight to the mitigating factors of the appellant that the trial court did not properly take into account that there were compelling and substantial circumstances. She conceded that a sentence of 10 years would be an appropriate sentence.

[21] It is evident from the record that the trial court properly considered the triad of factors relevant to sentence, but did not take the appellant's personal circumstances into consideration, since they were found not to be exceptional. In the matter of **Bailey v The State**,⁹ the court said: "The most difficult question to answer is always what substantial and compelling circumstances are? The term is so elastic that it can accommodate even the ordinary mitigating circumstances."

[22] In **Malgas**¹⁰ supra, the court said:

"The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that only be because it is satisfied that the circumstance of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial

⁹ (454/2011) [2012] ZASCA 154 (1 October 2012) para [21].

¹⁰ *S v Malgas* para [22]

and compelling and such as to justify the imposition of a lesser sentence.”

[23] In my view the trial court did not accord due weight to the personal circumstances of the appellant. The appellant presented to the trial court substantial and compelling circumstances as follows: That the appellant was 24 years of age at the time of the offence; he attended school up to Grade 10; he was not married, but his girlfriend was pregnant; he earned R1500 per month by doing odd jobs; he owns immovable property; he has no previous convictions and is a first offender.¹¹ In light of the mentioned personal circumstances, and seeing that the respondent also conceded that the sentence of the trial court may be tampered with, this warrants the court with appeal jurisdiction to tamper with the sentence of the trial court. Thus the appeal against sentence ought to succeed.

ORDER

[24] In the result, the following order is granted:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence of the trial court of 15 years imprisonment is set aside and replaced with the following:

The appellant is sentenced to 10 years imprisonment.

The sentence is antedated to 19 March 2019.

4. The order in terms of section 103 of the Firearms Control Act 60 Of 2000 is confirmed.

¹¹ See *S v Wood* 1973 (4) SA 95 (RA) 96H-97B.

S. CHESIWE, J

I CONCUR

CJ. MUSI, JP

On behalf of Appellant: Adv. V. Abrahams

Instructed by: Legal Aid SA
 Bloemfontein

On behalf of Respondent: Adv. MMM. Moroka

Instructed by: Office of the DPP
 BLOEMFONTEIN

