



**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: A302/2017

In the Appeal between:

MOLAHLEHI STEVEN LABONE

1ST Appellant

MOSELE BEAUTY MOALOSI

2ND Appellant

GAUTA JOEL KOTOYI

3RD Appellant

and

THE STATE

Respondent

CORAM: MBHELE, J *et* MATHEBULA, J

JUDGMENT BY: MBHELE, J

HEARD ON: 16 APRIL 2018

DELIVERED ON: 07 AUGUST 2018

- [1] First, second and third appellant were accused no. 1, 5 and 9 respectively in the trial court. For the sake of convenience and ease of reference, parties are referred to as they were in the court *a quo*. They were convicted on 10 January 2017 in the Regional court sitting at Welkom on a charge of murder. They were each sentenced to 15 years imprisonment. They are appealing against both conviction and sentence.
- [2] In the notice of appeal, heads of argument as well as submissions before us, the appellants assail the conviction on the basis that the trial court erred in finding that the state managed to prove its case beyond reasonable and further that it erred by relying on the evidence of the two state witnesses in relation to the identity of accused 1, 5 and 9 as attackers of the deceased.
- [3] The respondent supports both conviction and Mr. Hoffman, on behalf of the respondent submitted that the court properly considered all the evidence and correctly rejected the version of the accused.
- [4] The evidence that led to the conviction of the appellants was as follows:
Lehlohonolo Thomas Labone (Lehohonolo) testified to the effect that on 16 September 2012 he was at Maite Street in Thabong, Welkom at around 19h00. He was on his way from the shop when he saw two groups of people belonging to TDK and FAG gangs arriving near accused 5's house being ferried in two minibus taxis. Accused 11 in the court *a quo* was the driver of one mini bus while the second driver was unknown to him. The people who

alighted from the taxis chased after the deceased until the deceased got into a yard of a house situated at the corner in the same street. The deceased immediately came out of that yard running, with the group chasing him. He was kicked on the chest by someone from the group and he fell to the ground.

- [5] Whilst the deceased was on the ground he saw accused 1 stabbing the deceased with a spade on his back about 5 times; accused no 5, 9 and 13 had knives in their possession while accused 10 had a panga, which he used to stab the deceased.
- [6] The group surrounded the deceased during the attack. They were armed with a spade fork, a spade, pangas and knives. They were stabbing persistently and he did not see how many times each of them stabbed the deceased.
- [7] The deceased's attackers were surrounding him making it difficult to see who the victim was. He later realised that the victim was his brother, the deceased. He recognised him through a bandana that he tied around his neck. He charged at the group and kicked accused 1 on the chest. The spade that accused 1 had in his hand fell to the ground as they both fell.
- [8] Accused 1 told the group to leave after the deceased was stabbed and left lying on the ground. He knew accused 1, 5, 9, 10, 11 and 13 before the incident. He knew accused 1 for over 20 years, they grew up together. He knew accused 5 for almost a

year. He knew accused 9 for 10 years, they were playing soccer together.

- [9] He admitted that he and his brother, the deceased, belonged to a gang called LKG. The two taxis that were carrying the people who attacked the deceased left the scene thereafter. He called the ambulance and the deceased died at the scene. His mother, Lisebo Zuma was close by when the incident was unfolding.
- [10] Lisebo Zuma (Zuma) confirmed the evidence of her son Lehlohonolo in relation to how the deceased was attacked. She further testified that there was a fight earlier in the day between the deceased and accused 1, 5 and 9. The accused arrived in the evening driving in two kombis. As soon as they arrived people ran away from the street.
- [11] During the fight earlier that morning the deceased and some community members were threatening to burn accused 5's house. They were angry at accused 5 whom they accused of housing and protecting a criminal and gangster in the form of accused 1.
- [12] Accused 1, 5 and 9 simply denied involvement in the commission of the crime. Accused 1 testified to the effect that he was not at the scene where the deceased was killed. His testimony was that he was inside accused 5 and 9's house when he witnessed two groups fighting against each other.

- [13] It was his testimony that earlier in the day members of the two gangs were stabbing each other with knives. The deceased and his gang members went away only to come back later when they got inside accused 5 and 9's house. They started throwing bricks at the house, damaging windows and furniture inside the house. They went further to remove valuable items from the house including corrugated iron sheets used to roof the house. In that incident the deceased went away with his shoes.
- [14] Him and the two state witnesses knew each other before the incident. He believes Zuma is implicating him falsely because he once told his friend to end a love relationship with Zuma because she was too old for him.
- [15] Accused 5 testified that she was not involved in the killing of the deceased and she was not at the scene where the deceased was killed. She confirmed that members of the deceased's gang broke the windows of her house and took furniture and other valuables items from the house. She left the house upon advice from the police to accused 9's parental home. She did not see the deceased nor his mother on that day. She was never at the scene of crime. She was inside her house when gang members vandalised it earlier in the day. She was not there in the evening when the deceased was killed.

- [16] Accused 9, confirms accused 5's testimony that they were in the house when they witnessed two gangs fighting near the house in the morning of the incident. Accused 5 was his girlfriend at the time of the incident. The deceased and his gang members started pelting stones and bricks at accused 5's house, breaking windows, television set and some furniture. They threatened to burn down accused 5's house. Accused 5, left the house to go to his parental home on the advice from the police.
- [17] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the version of the appellants as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by trial court of oral evidence and conclusion thereon are presumed to be correct, absent misdirection. (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.) A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See **R v Dhlumayo & another** 1948 (2) SA 677 (A) at 705-706).
- [18] It is clear from the above that the powers to evaluate and appraise evidence belong to a trial court which had an opportunity to see and hear witnesses and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion.

- [19] I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellants' version is inherently improbable and fell to be rejected.
- [20] The trial court correctly found that the corroboratory evidence of the two state witnesses was true, honest and reliable. The argument that the deceased's attackers were not correctly identified because of poor illumination in the area is without basis. The two state witnesses knew accused 1, 5 and 9 very well before the incident. Under cross examination Lehlohonolo said he initially did not see that it was his brother who was being attacked because the deceased was lying on the ground surrounded by a mob. The minute he saw a bandana around the deceased's neck he was certain that it was his brother who was being attacked and immediately ran towards the crowd and assaulted accused 1. He had all the opportunity to observe the attackers. Zuma had an interaction with accused 5 earlier in the day when a fracas ensued and the community members threatened to burn her house. The state witnesses were honest even to a point of admitting that the deceased provoked accused 1, 5 and 9 in the morning of the date of the incident. The appeal against conviction must fail.
- [21] Sentencing is pre-eminently a matter for the discretion of the trial court. An appeal court is only entitled to interfere with a sentence where there has been a material misdirection by the trial court or

when the sentence imposed by the trial court is shocking and startlingly inappropriate. In determining an appropriate sentence, the court should pay attention to the fundamental principles of sentencing which are, that “punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy.” The court must not lose sight of the main purposes of punishment, which are deterrent, preventive, reformatory and retributive. In sentencing, one element must not be accentuated at the expense of and to the exclusion of others, the court must always strike a balance between all relevant factors.

(See **S v Pieters** 1987 (3) SA 717 of 727. See **S v Malgas** 2001 (1) SACR 469 (SCA). **S v Rabie** 1975 (4) SA 855 (A) **R v Swanepoel** 1945 AD 444 at 455. **S v Whitehead** 1970 (4) SA 424. **S v Banda** 1991 (2) SA 352 (B).

- [22] The sentence imposed must reflect the objective seriousness of the offence and it must be reasonably proportional to the circumstances surrounding the crime committed. The trial court correctly found that there were substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment. The trial court considered accused 1, 5 and 9's following personal circumstances before sentencing.
- [23] Accused 1 was 32 years old, unmarried and a father of 2 minor children aged 3 and six years respectively. He was unemployed at the time of the offence but he was selling food in Thabong, generating an income of R2 500. 00 per month.

[24] Accused 5 was 27 years of age, unmarried and a mother of two minor children aged 7 and 2 years respectively at the time of sentencing. She is a first offender. She was cohabiting with accused 9 and had accused 1 as her tenant at her house. Her house was burnt to the ground after the death of the deceased. She lost everything on the date of this offence.

[25] The court correctly found that the deceased was murdered as a retaliation to the attack that him and his gang members unleashed on accused 5's property earlier on the day of the incident.

Accused 9 was 21 years at the time of the commission of the offence, he is a first offender and a father of a six year old child. At the time of sentencing, his girlfriend was 10 weeks pregnant with his baby. He went to school up to grade 12 and has never been employed. He was in custody for 3 and a half years awaiting trial before he was released on bail.

[26] Mr. Nel, on behalf of accused 1, 5 and 9 submitted that the sentence imposed by the trial court is shockingly startling and inappropriate.

[27] The court *a quo* was correct in imposing a sentence of fifteen (15) years imprisonment. The taking of life is abhorrent in a democratic society like ours. The deceased must have suffered tremendously from the ferocious attack by the accused. The court *a quo* took into consideration all the factors individually and cumulatively before imposing the appropriate sentence. I cannot

find any fault or misdirection in the reasoning provided thereof.
This appeal ought to fail.

[28] The following order is made:

28.1 The appeal against both conviction and sentence is dismissed.

28.2 The conviction and sentence are confirmed.

N.M. MBHELE, J

I concur

M.A. MATHEBULA, J

On behalf of appellant: Adv. P. Nel
Instructed by: Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent: Adv. R. Hoffman
Instructed by: Office of the Director: Public Prosecutions
Bloemfontein