



**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: A93/18

In the matter between:

**TSELA PEACEMAKER TLALI
MOJALEFA ELIAS MAKAU
TSEPISHSO CHARLES SEBILOANE**

**APPELLANT 1
APPELLANT 2
APPELLANT 3**

Versus

THE STATE

CORAM: REINDERS, J *et*, CHESIWE, J

JUDGMENT BY: CHESIWE, J

DELIVERED ON: SEPTEMBER 2018

JUDGEMENT

- [1] The appellants (accused 1, 2 and 3 at the trial court) were convicted in the regional magistrate court in Botshabelo on **COUNT 1- MURDER and COUNT 2- THEFT**

All three pleaded not guilty and were sentenced to life imprisonment in respect of count 1 and 4 years imprisonment in respect of count 2.

- [2] The appellants have an automatic right to appeal a sentence of life imprisonment. The appellants were legally represented at the trial court.

- [3] The appeal lies against conviction and sentence.

- [4] The issue is whether the appellants are the perpetrators who murdered the deceased and stole the items of the deceased and pertinently if their identification was proven beyond reasonable doubt by the State (respondent) at the trial court.

- [5] The background of this matter is that the appellants on the night of 18 May 2013 the appellants followed Moeketsi Godfrey Hlalele (the deceased) into his yard and went into the house where the deceased was stabbed and killed and they stole items of the deceased to the value of R3298.08. Two of the State witnesses testified that Appellant 2 told them he killed because the deceased knew them.

- [5] The grounds of appeal in this matter is that the trial court erred to the extent that material contradictions between the evidence of the State and the appellants was not taken into account, that

there is no direct evidence as to what happened in the house as circumstantial evidence before the court that the items stolen did not have the finger prints of the appellants. That the identification of the appellants was not proven beyond reasonable doubt and the State did not present any DNA in the form of finger prints of the appellants. In respect of sentence the appellants are of the view that the sentence is shockingly harsh and inappropriate. That appellant 2 and 3 are first offenders.

[6] Mr Van der Merwe on behalf of the appellants in oral submission stated that the version of Molapo contradicts the version of the first two State witnesses and that this contradiction is a major contradiction, thus it is a misdirection by the trial court to have accepted two contradicting version of the State witnesses. He submitted that it is probable that the two witnesses made up their own stories to implicate the appellants.

[7] Mr Botha on behalf of the respondent submitted in oral argument that the issue of identity of the appellants was not really an issue as the trial court cannot be faulted in respect of identity of the appellants as the State has proven the identity of the appellants at the trial court beyond reasonable doubt. He further submitted that the appellants went into the deceased house, they came out carrying a hifi and tv, the State witnesses saw the appellants. The contradiction by the third state witnesses does not take the case any further as the people who chased the deceased were the three appellants. Mr Botha submitted that the conviction and sentence must stand and that the appeal be dismissed.

[8] The dangers of incorrect identification are well known.

Section 37 (1) (2) of the CPA of 1971 provides that:

“any police official may make a person referred to on paragraph

- (a) (i) available or cause such a person to be made available for identification in such conditions, positions or apparel as the police may determine.”

[9] In this matter an identity parade was not held, nor any finger prints of the appellants except the testimony of Constable TP Makhothi, who testified that appellant 1 (accused 1) refused for his finger prints to be taken. The appellants were identified by the first two State witnesses who knew them very well as Mzwane was with the appellants on the night of the incident. According to Mzwane’s testimony the record shows that appellant 2 said to him:

“He said I have killed someone and I then became frightened, that they killed someone” page 7 line 20 the record shows further on page 8 line 24,

“and he said if I can say anything or if I can talk he is going to kill me. I then told my mother but was afraid of reporting to the police because he said he will kill me.”

[10] Ndaga the second state witness testified that he knew Tsela, appellant 1 and Mojalefa appellant 2 as he was also with the appellants on the night of the incident and confirmed that he walked with appellant 1 and 2 from the tavern towards the direction

of the deceased's house. He even pointed the appellants 1 and 2 in the dock at the trial court.

[11] The dangers of incorrect identification are well known. The pointing out of a wrong person by witnesses who act in good faith has led to notorious cases of injustice. The evidence of identifying the appellants, because of the ever present possibility of honest mistake being made by witness's evidence of identification has to be treated with caution. In this regard I aligned myself with what Holmes JA said in **S v Mthethwa 1972 (3) SA 766 A** at 786 A-C.

[12] Identification is often the central question in a trial. An identity parade is a safety mechanism. The danger of identification in the dock are compounded when witnesses are asked to point out an accused in court. In **S v Maradu**, the court said:

"Dock identification may be relevant evidence, but generally unless it is shown to be sourced in an independent preceding identification, it carries weight."

[13] The State witnesses placed all three appellants on the scene to the extent that appellant 2 forced Mzwane to carry the suitcase whereby when he refused appellant 2 stabbed Mzwani on the right shoulder. The third State witness, Mpho Molapo who was with the deceased on the day of the incident, he testified that he saw a person going into the deceased's yard, he was able to identify this person as witness 1, Mzwane.

[14] The inferences one can draw in that, the state witness were in the company of the appellants on the night of the incident. The

appellants were pointed out in the dock at the trial court. Cumulatively all the factors make identification of the appellants stronger. In **Magadla v State**, the court was of the view that:

“Where the witness was in a situation where he notice has ample opportunity to make proper reliable observation of the perpetrator, especially where the witness did not have any reason to falsely implicate the perpetrator”

- [15] The trial court’s evaluation of the evidence demonstrates that it was alive to the fact that the state witnesses were reliable and and truthful and had no reason to falsely implicate the appellants. As state witness 2 stated that appellant 2 told him the deceased was killed because the deceased knew the perpetrators. The inference drawn is that this was further done to prevent future identification of the perpetrators.
- [16] Mzwane and Ndaga did not even know each other and therefore had no time to conspire against the appellants they met the first time at the police station when they had to give the police their statements.
- [17] The trial court correctly concluded that the identification of the appellants by the state witnesses was truthful, reliable and credible and nor did the State witness had any reason to implicate the appellants falsely.
- [18] Therefore the State witnesses at the trial court correctly identified the appellants. The witnesses were credible and reliable. Therefore the issue of identification of the appellants was settled at the trial court. The trial court was satisfied that the

witnesses were able to place the appellants in the vicinity of the crime scene.

[19] I agree with Mr Botha that the contradictions by the third state witness do not take the matter any further as the appellants were the ones who were seen by the state witness chasing the deceased and entered his house.

[20] As it is trite law that a court of appeal will not tamper with the trial courts credibility findings, considering the advantage which the trial court had of hearing and appraising the witnesses.

[21] I am satisfied that the state at the trial court proved its case beyond reasonable doubt though no direct evidence was lead in to what happened in the house as the evidence was circumstantial by nature.

[22] In S v Reddy 1996 (2) SACR 8 paragraph C-Y the court said

“In answering circumstantial evidence one needs to be careful to approach such evidence upon piece meal basis, and to subject each individual piece meal of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by the accused is true.”

[23] Therefore the trial court correctly found the appellants to be untruthful witnesses and correctly rejected their version as false beyond reasonable doubt. Therefore the conviction stands.

[24] As regards sentence, it is trite that a court with appellate jurisdiction has limited powers to interfere with the sentence imposed by the trial court. The sentencing discretion lies with the trial court and its sentence will be interfered with on appeal only if the discretion in question was not exercised judicially and

properly¹, or if there is disparity between the sentence imposed and the one that ought to be imposed. In *S v Malgas*² the court stated as follows:-

“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.”

- [24] It is evident from the record that the trial court properly considered the triad of sentence. The appellant’s personal circumstances were considered by the trial court and their circumstances are not exceptional. The first appellants previous convictions read like a book and second and third appellants are first offenders. However, the aggravating factor is that the offence the appellants were convicted off was so brutal and merciless, that according to

¹ S v Rabie 1975 (4) SA 875 (AD)

² 2001 (1) SACR 469 (SCA) at 478 d-h

the pathologist report the deceased had 37 stab wounds and was hacked on the head. The deceased was attacked in the safety of his home. Therefore the brutal and merciless manner in which the deceased was killed outweighs the appellant's personal circumstance. To the extent that the trial court made mention about courts having to deal with many cases relating to the "**BTK**", though the appellants at the trial court explained that it was "**Baby to Kiss**". The trial court took cognisance of the fact that it is the "**Born to Kill**" gangs. I must admit that this court is also aware of the "**BTK**" as it has done several cases of the "**BTK**"

- [25] The trial court was thorough in its judgement and dealt with all the issues comprehensibly. It started by pointing out that it was bound to evaluate all the evidence before it as a unit, and patiently detailed each and every witness's testimony and that of the appellants, and correctly concluded that there are no compelling and substantial circumstances to deviate from the imposition of the prescribed sentence.
- [26] The aggravating factors far outweigh the mitigating factors. Having considered all these circumstances, I am satisfied that the trial court did misdirect itself in sentencing the appellants to life in respect of count one. Therefore this court will not tamper with the imposed sentence of all three appellants.
- [27] In the result, the following order is granted:
1. The appeal is dismissed and the conviction and sentence is confirmed

S. CHESIWE, J

I CONCUR

C REINDERS, J

On behalf of appellants: Adv. Van Der Merwe
Instructed by Legal Aid Bloemfontein

On behalf of respondent: Adv. Botha
Instructed by: The DPP
BLOEMFONTEIN