

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

Appeal Number: A167/2015

In the matter between:

TSIETSI PIET SOLO

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J *et* BOKWA, AJ

JUDGMENT: BOKWA, AJ

HEARD ON: 2 NOVEMBER 2015

DELIVERED ON: 3 MARCH 2016

INTRODUCTION

[1] The appellant was charged in the Regional Court of Botshabelo, Free State Province, on one count of murder and one count of assault with intent to do grievous bodily harm. He pleaded not guilty to both counts.

[2] The Regional Court Magistrate, after having considered all the submissions on behalf of the state and the appellant, convicted the appellant and sentenced him to 15 years imprisonment in respect of the murder charge and 3 years wholly suspended sentence for assault with intent to do grievous bodily harm.

[3] The appellant came before us by way of an appeal with the leave of the trial court. He was granted leave to appeal the sentence only. The respondent opposed the appeal.

BACKGROUND FACTS

- [4] The state's version was narrated through the evidence of two witnesses, Lemisa William Mosekula and Ditaba Matsie.
- [5] LM Mosekula was in the company of his younger brother Matsepe Isaac Mosekula, the deceased, at Peter's tavern, in Botshabelo at around 02:00am on the morning of the 28th September 2013.
- [6] On arrival at the tavern, they met two men outside namely, Nomphe and Phule. The deceased went first inside the tavern. The witness later followed him. In a short while, both deceased and witness came out of the tavern. At this stage, they were accosted by a group of six men. One member of this group pointed at them and said:
- "They are the people".
- [7] The appellant proceeded to stab the deceased once on his left breast on his chest. Immediately thereafter, he charged towards the witness and stabbed him once on the left top of his shoulder. When the witness realized what had happened, he pulled the deceased and tried to run away with him. The deceased fell on the ground. The appellant set chase on the witness, caught up with him and stabbed him again on the upper arm. The witness managed to outrun the appellant.
- [8] Later on, the witness learnt that his brother (the deceased) had passed away. He had never seen the appellant before this incident. Although it was dark, he testified that visibility was clear enough because of the lights at the tavern to enable him to properly identify the appellant. According to him, the whole incident including the stabbing of the deceased, was a result of mistaken identity. The witness was able to describe the clothes the appellant was wearing during the incident and that he also wore dreadlocks.

- [9] The second state witness, Ditaba Matsie testified that he went to the tavern on the night in question to fetch his brother. He saw the appellant stabbing the deceased on his chest. He also described the clothes the appellant was wearing as well as the fact that the appellant wore dreadlocks. The two witnesses' testimony corroborated each other in a material way with respect to the identity of the appellant.
- [10] When the state closed its case, the defense called the appellant to testify in his own defense. On the day in question he was at Peter's tavern. He saw both the deceased and the second state witness at the tavern. He also saw a group of gangsters fighting each other. He witnessed the stabbing of the deceased by one Piet Solomon. He was standing 3 meters away and although it was dark he could clearly see the stabbing of the deceased, by this person called Piet Solomon.
- [11] The defense closed its case after the testimony of the appellant without leading any further evidence.
- [12] The *court aqua* accepted the evidence on identification, tendered by the two state witnesses, and ultimately rejected the version of the appellant for not being reasonably possibly true.
- [13] In assessing the evidence, the court took a cautionary approach and had regard to the decision of **S v Mthetwa** 1972(3) SA 766 (AD), where the court considered the relevant factors that needs to be explored and weighed one against the other in the light of the evidence and the probabilities. In our view the trial court correctly made a finding that the state had proven its case beyond reasonable doubt. In the circumstances the appellant's conviction was correct.

THE APPEAL

[14] The appellant appeals his sentence on the basis that it is too “shockingly harsh” and induces a sense of shock. The sentence of the trial court is further impeached on the grounds that the Magistrate misdirected herself by over emphasizing the interests of the community whilst under emphasizing the personal circumstances of the appellant.

[15] During arguments in mitigation at trial, the following submissions were made in mitigation of sentence on behalf of the appellant:

15.1 That the appellant was still young at the age of 21 years having attended school until grade 7.

15.2 He supported himself by doing garden service occasionally.

15.3 He had a minor child of 2yrs and 6 months.

15.4 Before sentencing, he had been in custody for more than 10 months, which period the court was asked to consider.

15.5 The court was asked to deviate from imposing prescribed minimum sentences because of the youth of the appellant and that he had a minor child.

15.6 It was submitted on behalf of the appellant during arguments at the appeal hearing, that the trial court misdirected itself in failing to consider the appellant as a candidate for rehabilitation and further that it erred in finding that there were no substantial and compelling circumstances warranting deviation from imposing the prescribed minimum sentences.

ANALYSIS AND FINDINGS

[16] It is trite that sentence must always be individualized, in order for the punishment to fit the crime as well as the circumstances of the case.

[17] It was stated as follows in **S v Rabie** 1975 (4) SA 855 (A), Holmes JA held:

"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to circumstances"¹.

[18] These principles must be applied to the facts and the seriousness of the crime should be weighed with all relevant considerations. What is needed is a balanced judicial assessment of all the facts.

[19] Counsel for the respondent submitted in its heads at paragraph 5.1 as follows:

"It is trite law that a Court of Appeal will only in limited circumstances interfere with a sentence. As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court imposing it exercised its discretion properly and judicially, mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree of seriousness that it shows, directly inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably, **S v Pillay** 1977 (4) 531 (A) on 535 E - F."². I agree.

[20] In considering an appropriate sentence this court took into account the fact that the trial court assessed all the evidence to arrive at an appropriate sentence. The trial court took into cognizance the triad principles of sentence in the light of the Minimum Sentence Act which prescribes a minimum imprisonment of 15years for first offenders in respect of count one. The trial court took a view that it could not deviate from the prescribed minimum sentences for flimsy reasons especially where there was no substantial and compelling circumstances. See **S v Malgas** 2001 (1) SACR 469 (SCA)³.

¹S v Rabie 1975 (4) SA 855 (A).

²S v Pillay 1977 (4) 531 (A) on 535 E - F.

³S v Malgas 2001 (1) SACR 469 (SCA).

[21] The appellant stabbed the deceased without any provocation. He also proceeded to stab the first state witness, not once but twice, which conduct could have resulted in fatal consequences on its own.

[22] He showed no remorse for his victims and took no responsibility for his actions.

[23] It remains the prerogative of the trial court to impose sentences. The exercise of its discretion is not to be interfered with merely because the appellate court could have imposed a heavier or lighter sentence.

[24] Having regard to the court a quo's findings, in my view, the imposed sentence in the circumstances, is not shocking or inappropriate.

ORDER

[25] In the premises the following order is proposed:

1. The appeal is dismissed;
2. The sentence of the court a quo is confirmed.

I. R. O. BOKWA, AJ

I agree and it so ordered.

C. VAN ZYL, J

On behalf of the appellant:

Mr. S. S. Kambi
Instructed by:
Legal Aid
BLOEMFONTEIN

On behalf of the respondent:

Adv. L. Zweni
Instructed by:
The Director: Public Prosecutions
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