

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

Appeal number: A205/2015

In the matter between:

SENTE JOSEF THAKELI

1st Applicant

SAMUEL ZAMBUK MARUMO

2nd Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J *et* CHESIWE, AJ

HEARD ON: 29 FEBRUARY 2016

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 23 MARCH 2016

CHESIWE, AJ

- [1] The appellants, (accused No. 1 and accused No. 4 in the trial court) were convicted for murder in the Regional Court Division of Welkom on 23 August 2011. The appellants were sentenced to 28 (twenty eight) years imprisonment in terms of section 276(1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA). The appellants applied for leave to appeal in the trial court against

their conviction and sentence. The application for leave to appeal was denied. The appellants petitioned the Judge President of this High Court for leave to appeal against the sentence and conviction. The leave to appeal was granted on August 2015.

- [2] The grounds of appeal are as follows: the trial court erred in finding that appellants, are correctly identified by the state witness as the perpetrators; the trial court erred in amending the charge sheet in terms of section 86(4) of the CPA, as the appellants were unduly prejudiced by this amendment; due to this amendment the appellants were not properly warned about the applicable sentencing regime; that the 28 years term of imprisonment is shockingly harsh and disturbing.
- [3] The facts of the matter are briefly as follows: On the 3 July 2009 at about 19:00 the appellants approached Mr Ivan Motlatsi Mokhele (Mokhele) to enquire about a certain person and he told them he does not know the person. Immediately after talking to the appellants Mokhele ran away, because the appellants had a garden fork, a beer bottle and knives. Mokhele ran to his house and later heard a confusion in the street not far from where he saw the appellants. He then saw the deceased running into a shack and at the same time also saw the appellants, but he was unable to see who stabbed the deceased. Ms Dimakatso Mathejane (Dimakatso) testified that on the mentioned day she saw the appellants holding the deceased and they had knives in their hands; one of them was holding a garden fork. Dimakatso testified that two of the accused stabbed the deceased; she was unable to see if the one holding the garden fork also stabbed the

deceased. Ms Sidiapelo Angelina Mathejane (Angelina) on the same date of 3 July 2009 saw the appellants at the deceased door. They asked the deceased about Molafei and at the same time, they started to stab the deceased. The appellants were charged with the murder of Paseka Godfrey Manyane (the deceased).

- [4] Ms. Kruger, on behalf of the appellants submitted in her heads of argument and oral submissions, that the trial court did not prove the appellants' identification beyond reasonable doubt. She argued that the three state witnesses were all unable to properly identify the appellants. In the heads of argument she submitted that Mokhele, testified that the appellants were unknown to him that is why he could not provide a description of their facial features. In Magadla v S (80/2011) [2011] ZASCA 195 (unreported) the court was of the view that:

“The fact that a witness failed to provide a description of the accused does not always assist him or her, in the event where the witness was in a situation where he or she had ample opportunity to make a proper and reliable observation of the perpetrator, especially where the witness did not have any reason to falsely implicate the perpetrator.”

The trial court record shows that during examination-in-chief, Mokhele testified that: (page 9)

“Prosecutor: These three guys that you saw there were the same as the one that approached you before? Yes”

“Now what makes you to come into that conclusion that these three guys that you saw 500 meters away are the ones that approach you earlier?”

Your worship the reason why I am saying this is because when I went passed the house those three gentlemen or guys as the witness put it, went into the yard it's them.”

- [5] Dimakatso testified that she does not know the appellants, nor could she recognise them as she was scared because they were holding knives. Molafei Solomon Mathejane (Molafei) also testified that he knew the appellants from a long time ago. This is noted from the records of the trial court on what he said during examination in-chief:

“How do you know the accused?”

“Your worship I know them from long ago, we meet each other very often.”

Molafei further states that on the 3 July 2009, the appellants came down the street some distance ahead of him and they had knives and were scaring the people with those knives.

- [6] Our courts have repeatedly stated that evidence of identification must be approached with caution. There is no doubt that honest witnesses may make mistakes because of the fallibility of human observation and therefore the various factors set out in **S v Mthetwa** 1972 (3) SA 766 (A) at 768 A-E are applicable

All these factors need to be considered and should be weighed one against the other in the light of the totality of evidence and

the probabilities. The three witnesses support each other on the aspect that there were three boys that entered the yard of the deceased. They also support each other on the time frame when the incident took place and the fact that one of them was carrying a garden fork. The trial court took cognisance of the fact that there were three witnesses. Sidiapelo was able to identify the appellants, her evidence with regard to the identification of the appellants was reliable. The trial court found that although Sidiapelo was a single witness, her evidence on the identification was reliable. (S v Khumalo en andere 1991 (4) SA 310(A) at 328 E-G. S v Mlati 1984 SA 629 (A) at 632 F- 633 C; Isaacs and another v S 2006 (2) All SA 163 (C) para 4.

- [7] Adv. Liebenberg on behalf of the State in her heads of argument and oral submissions submitted that the trial court made no mistake with regard to the identity of the appellants. She argued that the witnesses all placed the appellants shortly before the incident in the vicinity of the murder scene; that the witnesses corroborate each other, that the appellants had knives and one of them was in possession of a garden fork. The appellants were seen by Mokhele. Molafei indicated that he knew the appellants well and often met them.
- [8] The issue with regard to the identity of the appellants was settled by the trial court. The trial court was satisfied that the witnesses were able to place the appellants at the scene of the crime.
- [9] Ms Kruger submitted in the heads of argument that the appellants denied any involvement in the incident and were each other's alibi

witnesses. The version of the appellants is fraught with improbabilities and inconsistencies. The records of the trial court show that, on their own version the appellants placed themselves together at the night of the incident. The first appellant testified that:

“I was alone when arrived at the tavern, I was joined by Zamback.”
(second appellant)

When the first appellant was asked during examination-in-chief, if he was on the 3 July 2009 in the company of accused no. 2, he denied it. (page 76 of the records)

[10] The second appellant during examination-in-chief when asked if he knew accused 1 and 4, also denied he knew them, but testified he knew them only from prison. A false alibi is one of the factors to be considered when weighing the evidence as a whole and to consider (**S v Khumalo en andere** 1991 (4) SA 310 (A) at 328 G). The State has the duty to prove that the accused committed the crime and it must therefore disprove the alibi. The trial court disproved the alibi of the appellants. The court was able to show that the appellants' alibi for each other was improbable and inconsistent (**R v Hlongwane** 1959 (3) SA 337(A) at 341 A).

[11] The appellants' version in the trial court was inconsistent and unconvincing. The magistrate could safely reject their evidence as not being reasonably or possibly true. The witnesses for the state all corroborated each other's evidence. The trial court was satisfied with the witnesses' evidence. The court was further

satisfied that there was a common purpose between the appellants. Consequently all accused persons were found guilty on murder and sentenced to 28 years each.

[12] In my view, the appellants were correctly convicted by the trial court, It evaluated the evidence properly and did not commit any material misdirection on the evidence presented in court which warrants a no-interference by this court. **S v Malgas** 2001(1) SACR 469 (SCA) at 478 D-E.

[13] The prescribed minimum sentence in terms of section 51 of Criminal Law Amendment Act No 105 of 1997, for murder, where the offence was committed by a person or a group of persons acting in the execution or furtherance of a common purpose or conspiracy is life imprisonment (part 1, schedule 2). In the instant case, murder was the common purpose of the accused persons. All the witnesses testified that they saw the accused persons walking together in the street welding dangerous weapons and scared the people. The requirements for common purpose are clearly stated in (**S v Nooroodien en andere** 1998 (2) SACR 510 (NC)). In sentencing the appellants, the trial court found that there were substantial and compelling circumstances to justify the sentence it imposed in respect of murder, which was less than the prescribed minimum sentence. The sentencing of an offender is primarily the discretion of the court of first instance. The appeal court cannot merely interfere with the sentence because it has the jurisdiction to do so (**S v Malgas** 2001 (1) SACR 469 (SCA) at 478D-G or para 12.; **S v Botha** 1998 (2) 206 (SCA).

[14] The appellants could not show any misdirection which the trial court committed; or if the trial court did not take into account all the factors (mitigating and aggravating). There is therefore no justification to interfere with the conviction of the trial court. It is clear that the trial court correctly considered all relevant factors before it, in concluding that there were no substantial and compelling circumstances. In my view, I am not persuaded that the court misdirected itself or that the sentence is shockingly inappropriate.

[15] Lastly Ms. Kruger further submitted that the trial court changed the sentencing regime at the end of the proceedings. She argued that the appellants were not informed in time that the sentence regime had changed. As a result thereof the appellants' rights to a fair trial have been infringed. Adv. Liebenberg conceded that the amendment may have been unconstitutional, but the appellants suffered no harm. The trial court in terms of section 86 of the CPA made the following amendments:. The first amendment :

“On the annexure to the charge sheet on the annexure that specifies the change it's written murder that the accused is or are, so is, is replaced with are.”

Second amendment:

“are guilty of the crime of murder”

Read with the provisions of section 51, its written, section 51 (2) of the Criminal Amendment Act 105/1997, the amendment there is

read with provisions of section 51 of the Amendment Act 105/1997.

Third amendment:

“In that upon or about 3rd of July 2009 and near Thabong in the regional division it is written presently of Welkom. That is amended to say Regional Division of the Free State.”

[16] Section 86(1) of the Criminal Procedure Act 51/1977 provides that:

“Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in this defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.”

[17] The trial court did not infringe on the appellants’ constitutional rights to a fair trial. This was more of a typing error which did not go to the substance of the charge preferred against the appellants nor the sentence regime. The defence also concedes that the appellant suffered no harm due to the amendment. In terms of

section 35 (3) of the South African Constitution, every accused person has a right to a fair trial. Of all the factors included in section 35, none of these factors were infringed. The appellants' trial was handled fairly and the appellants were legally represented at all times. The trial court record show that the magistrate even gave the defence and the prosecutor an opportunity to address him on the amendments and none had any objections.

[18] Accordingly, I would make the following order.

ORDER

'The appeal against conviction and sentence is dismissed.'

S. CHESIWE, AJ

I concur

B.C. MOCUMIE, J

On behalf of 1st & 2nd applicant:
Instructed by:

S. Kruger
Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent: Adv. E. Liebenberg
Instructed by: Office of the Director Public Prosecutions:
Free State
Bloemfontein

/pc