

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

Appeal number: A190/2014

In the Appeal of:

TAHLEHO JOSEPH THEBE

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, AJP *et* MURRAY, AJ

JUDGMENT BY:

RAMPAL, AJP

HEARD ON:

8 DECEMBER 2015

DELIVERED ON:

29 JANUARY 2015

- [1] These were appeal proceedings. The appellant was convicted in the regional court on a charge of murder. He was then sentenced to 15 years imprisonment. He was aggrieved by the conviction and the sentence. The respondent opposed the appeal on both fronts.
- [2] An incident occurred at Kroonstad on 1 May 2011. The victim, Mpho Gerald Mphore, a 16 year old teenager, was stabbed to death. Two days later, on 3 May 2011 to be precise, the appellant was arrested.

- [3] The incident precipitated criminal proceedings which culminated in the current appeal. The appellant was charged with the murder of the victim. The prosecution alleged that he intentionally and unlawfully killed Mpho Gerald Mphore at Kroonstad on 1 May 2011.
- [4] The appellant was tried in the Kroonstad Regional Court. On 8 June 2014 he pleaded not guilty to the charge. He did not disclose the basis of his defence. However, he made certain admissions which were formally noted as such in terms of section 220 of the Criminal Procedure Act 51 of 1977. Mr I R Smith presided. Mr Campher appeared for the appellant and Mr Wiegand for the respondent.
- [5] Notwithstanding his plea, the appellant was found guilty on 23 November 2012. On the same day a custodial sentence of 15 years imprisonment was imposed on him. He was aggrieved by the conviction as well as the sentence.
- [6] On 2 May 2014 the appellant applied for leave to appeal against the conviction as well as the sentence. His application in the regional court was unsuccessful.
- [7] On the 22 May 2014 the appellant petitioned the judge president of this division. His petition for leave against the conviction and sentence was favourably considered. He therefore came to us with the leave of this court granted by Kruger J et Wright AJ on 14 August 2014.

[8] As regards the substantive merits, the trial court found:

“Teen die geloofwaardigheid en betroubaarheid van die getuies Modiko en Moolla Moolla se getuienis kan geen kritiek uitgespreek word nie. Trouens die hof is tevrede dat hulle getuienis wesenlik die stempel van die waarheid dra.”

[9] On behalf of the appellant it was contended that the aforesaid finding by the trial court was against the weight of the evidence. Accordingly, counsel submitted that the trial court committed a misdirection in finding that the appellant had inflicted the fatal *actus reus* on the victim.

[10] On behalf of the respondent it was contended that the aforesaid finding by the trial court was, on the strength of the evidence, justified. Therefore, Ms Liebenberg, counsel for the respondent, submitted that the trial court committed no misdirection as regards the identity of the perpetrator criminally responsible for the infliction of the fatal *actus reus*.

[11] The issue in the case was whether the evidence established, beyond reasonable doubt, the identity of the perpetrator who fatally stabbed the victim.

[12] On the one hand, the appellant contended that one Bonolo stabbed the victim. On the other hand the respondent contended that the appellant, and nobody else, stabbed the victim.

[13] The version of the respondent was narrated by two witnesses namely:

- Mr Pule Vincent Modiko, and
- Mr Lehlohonolo Ephraim Moolla.

[14] Mr Modiko testified that he knew the victim, Mpho Gerald Mphore. On 1 May 2011 he met Mpho and Ponzaat at a certain shop. From there he accompanied them to a certain house. They went over there because there were suspects whom Mpho wanted to question about his robbery the previous night. During that previous incident Mpho was robbed of his shoes and hat.

[15] On their arrival at the house, there was a ceremony of some sort going on. Mr Modiko entered the premises and proceeded to the tent. Mpho remained outside. Mr Modiko found the appellant in the tent. Later on the appellant went outside. A little while later Mr Modiko also went outside. Mpho confronted the appellant and accused him as one of his robbers. Mpho demanded his shoes from the appellant. Mr Modiko begged the appellant to give Mpho's shoes back. However, his plea fell on deaf ears.

[16] During the course of the argument, another young man called Shimmy appeared on the scene wearing Mpho's stolen hat. The focus shifted to Shimmy who was carrying a bag. Mr Modiko became suspicious. He asked Shimmy to open his bag because, so it seemed to me, he suspected that the victim's stolen shoes might be in Shimmy's bag. But Shimmy refused to open his bag. Mr Modiko gave up. He walked away from the volatile situation and went back into the tent.

[17] A short while later Mr Modiko went outside again. In front of the garage he met a traditional healer. The healer asked him about the commotion at the gate. The next moment he heard someone behind him exclaiming: 'Eina!', in other words, 'Ouch!'. He turned around and saw that the person who exclaimed was Mpho. Mpho was retreating. He then saw a knife in the appellant's hand. The next moment Mpho ran away from the scene. The appellant pursued him. Mpho ran into a certain residential property where he collapsed. He was later picked up by an ambulance crew.

[18] On the appellant's behalf the following suggestions were put to Mr Modiko:

- that a certain Bonolo was on the scene;
- that the appellant was not with Mpho but rather with Mr Modiko himself at the time Mpho painfully exclaimed;
- that Bonolo and not the appellant chased Mpho from the scene;
- that Mr Modiko was prompted by a personal vendetta to falsely implicate the appellant; and
- that he and the appellant were enemies.

Mr Modiko denied all those allegations as untrue.

[19] The gist of Mr Moolla's evidence was that he saw how the appellant stabbed Mpho in the neck with a knife. He denied the allegations that he falsely implicated the appellant because he and the appellant belonged to rival gangs; that the appellant was a passive bystander at the time Mpho was stabbed; that a certain Bonolo was the person who actually stabbed Mpho and that the

alleged Bonolo even chased the wounded Mpho as he was running away from the scene.

[20] The version of the defence was narrated by the appellant himself, Mr Tahleho Joseph Thebe aka Thako. He admitted that he was on the scene. He also admitted that Mpho confronted him and accused him of being one of the persons who robbed him the night before. While he was telling Tsekiso, in other words Mr P V Modiko, about Mpho's accusations, he saw a certain Bonolo chasing Mpho. He saw that Bonolo was armed with a knife. He heard from Tsietsi Edwin Noge aka Shimmy, that Mpho was stabbed by Bonolo. The state witnesses falsely incriminated him because he was not on good terms with them.

[21] The trial magistrate was impressed by the two prosecution witnesses and accepted their evidence as credible and reliable. He found no inherent improbabilities in their evidence. Both saw the appellant on the scene armed with a knife; both saw the victim retreating from the armed appellant and both saw the armed appellant chasing the wounded victim. Unlike Mr Modiko, Mr Moolla saw the actual stabbing of the victim. According to him the appellant, and not Bonolo, knived the victim. Both state witnesses testified that the appellant pursued the wounded victim and that he was armed with a knife. It must also be kept in mind that the victim confronted the appellant of all the people attending the ceremony. That much the appellant admitted. It appeared unlikely that Bonolo, a person who was not confronted and accused of having robbed the victim, would have attacked, stabbed and chased the victim for no apparent reason. However,

there was a proven motive for the appellant to carry out all those acts of aggression against the victim.

[22] There were contradictions between the two prosecution witnesses. For instance, according to Mr Modiko, the victim confronted the appellant about his stolen shoes only. However, according to Mr Moolla, the victim confronted the appellant about his stolen hat as well. In considering these contradictions and other apparent discrepancies, it must be kept in mind that Mr Moolla was in a more privileged position to make reliable observations than Mr Modiko. He was very close to the action outside whereas the latter kept on walking in and out of the tent.

[23] Consequently, I am of the view that where the evidence of Mr Modiko differs from that of Mr Moolla, the latter's evidence must be preferred. Mr Moolla was an impressive witness. He gave a credible and reliable account of what took place on the scene. The victim's stolen shoes were recovered. With those shoes in his hands, he ran behind the man who was chasing the victim. He identified that man as the appellant and not Bonolo. It was his evidence that Bonolo was not even on the scene. Notwithstanding those contradictions and other unfavourable aspects of the prosecution evidence, I am not persuaded that the trial court materially erred in convicting the appellant.

[24] The case of the appellant was that a certain Bonolo stabbed the victim. His own evidence suggested that he did not personally witness the stabbing by Bonolo. He exonerated himself and blamed Bonolo on the strength of what he allegedly heard from a

certain Tsietsi. The foundation of the appellant's defence was virtually destroyed on 23 November 2012. On that day the gentleman, Mr Tsietsi Edwin Noge aka Shimmy attended the court hearing as a defence witness. The appellant's legal representative, Mr Campher, did not actually call him. Instead he informed the trial court that Mr Noge's evidence would not advance the defence case. From that it could be deduced that the gentleman could not support the important exculpatory statement the appellant attributed to him. Therefore, the evidence of the appellant about Bonolo's alleged involvement was not confirmed by its alleged original source, Mr Noge, who appeared to be the appellant's friend. Accordingly the appellant's evidence concerning the alleged role of Bonolo was inadmissible hearsay. Such evidence by the appellant was probably untrue which was why his friend could not testify to confirm it.

- [25] Sitting as we are in an appellate mode, we cannot lightly interfere with the trial magistrate's observations and his evaluation of the oral evidence because he was in a privileged position to observe all the witnesses. (See **S v Francis** 1991(1) SACR 198 (A) at 204C-E and **S v Abels** 1948 (1) SA 706 (O)).

- [26] The trial magistrate concluded that the version of the appellant was not reasonably true and rejected it, as false beyond reasonable doubt, to the extent that it differed with the version of the prosecution.

- [27] The conclusion of the trial court that the guilt of the appellant was established beyond reasonable doubt was correct. I cannot, on

appeal, hold that conclusion to be wrong. In coming to this conclusion I was fortified by the implicit concession made by the appellant's counsel, Mr Tshabalala, in the appellant's written heads of argument and Ms Smith during the course of her oral argument.

- [28] There being no material misdirection, no appellate interference is justified. I would, therefore, dismiss the appeal and confirm the conviction.

This completes the first leg of the appeal. Now I proceed to consider the second leg.

- [29] As regards sentence, the court found that there were no substantial and compelling circumstances to justify the imposition of a sentence less severe than the prescribed minimum sentence. In my view, that finding was correct.

The appellant was born on 20 June 1991. He was 19 years of age at the time he committed murder. The mere fact that he was relatively young did not, without more, substantially compel the conclusion that imposing the prescribed minimum sentence would render the punishment unjust. In my view the appellant has not shown that his relative youth so impaired his judgment that he failed to act rationally like a 19 year old youth but instead acted immaturely like a child far younger with immature intellect. (See **S v Matyityi** 2011 (1) SACR 40 (SCA) par. 14 per Ponnann JA.)

[30] I was not persuaded by the appellant's further contention that he was provoked by the victim to act as he did. The evidence showed that the victim confronted the appellant because he reasonably suspected that the appellant was among the persons who robbed him of his belongings the night before the incident. The victim's suspicion was seemingly well-grounded. Firstly, the appellant's friend, Shimmy, was seen wearing the victim's stolen hat. Secondly, the victim's stolen shoes were recovered on the scene of the confrontation. It appeared, therefore, that there was probably some substance in the accusation of robbery which the victim levelled against the appellant.

[31] In the circumstances, there was no substance in the appellant's contention that he was provoked. The evidence indicated that he became extremely violent when the victim confronted him and his friend Shimmy about his stolen goods and his assertion that they had robbed him the previous night. The guilty cannot fairly claim provocation when the innocent confronts him about the true facts. Besides, mere provocation is not treated as a mitigating factor.

[32] In his work: 'Straf in Suid-Afrika', the author, Etienne du Toit comments on provocation as follows:

"Provokasie of uitlokking kan in gepaste gevalle as 'n strafversagtende faktor geld, veral waar dit uit die feite blyk dat 'n opwelling in die gemoed van die beskuldigde weens die uitlokking plaasgevind het en 'n rol by die pleging van die misdryf gespeel het. Blote provokasie of uitlokking is uiteraard nie voldoende nie — die feite moet aantoon dat dit 'n emosie, 'n reaksie by die beskuldigde tot gevolg gehad het wat sy morele verwythbaarheid, die laakbaarheid van sy daad verminder."

There was no concrete evidence to show that the appellant's extremely violent conduct towards the victim was an outward manifestation of emotional reaction triggered by the victim's unfounded accusation deliberately intended to provocatively enrage or to irritate him for no good cause. The victim did not try to provoke the appellant into losing his temper. He merely and peacefully demanded from the appellant what was lawfully his. In my view the victim said and did nothing provocative at all. Yet the appellant decided to violently silence the victim forever.

[33] About the gravity of the crime of murder the trial court correctly said:

“U is skuldig bevind aan ‘n baie ernstige misdryf. U het die betrokke dag op geslepe, brutale en durf die hof dit sê, lafhartige wyse die jong oorledene se lot verseël deur hom van agter met die mes te steek. Hy het nie eers die geleentheid gehad om sy aanvaller in die oë te kyk nie. Hy het hom eenvoudig van agter betrek en op ‘n geslepe wyse doodgesteek. Dit is vir die hof duidelik dat in die geweldskultuur wat hom so stewig hier in ons land gevestig het, die menslike lewe goedkoop geword het. Daar rus ‘n geweldige taak op hierdie hof en ander howe se skouers om deur middel van die vonnisse wat hulle oplê in hierdie tipe van sake, aan te toon dat tenminste in die oë van die reg, in die oë van howe die menslike lewe nog waarde het. As die hof in gebreke gaan bly om dit te doen, gaan hy sy plig gruwelik versaak.”

I am in respectful agreement.

[34] About the interest of the community, the trial court correctly said:

“Die gemeenskapsbelang is ook ‘n faktor wat swaar weeg by vonnisoplegging wat die tipe van misdrywe aan betref. Die gemeenskap in die breë is siek en sat daarvoor dat geweld die norm geword het aan die hand waarvan probleme opgelos word.”

I share those sentiments.

[35] I am not persuaded, and Ms Smith did not attempt to persuade us, that the trial court materially erred in sentencing the appellant. In my view the trial court committed no material - and thus appealable - misdirection either on any matter of fact or on any question of law. That being the case, we are not at liberty to interfere. Therefore, I am inclined to dismiss the appeal as regards sentence as well.

[36] Accordingly, I make the following order:

36.1 The appeal fails in toto.

36.2 The conviction and the sentence are confirmed.

M. H. RAMPAL, AJP

I concur.

H. MURRAY, AJ

On behalf of the appellant: Adv L Smith
Instructed by:
Bloemfontein Justice Centre
Bloemfontein

On behalf of the respondent: Adv E Liebenberg
Instructed by:
The Director: Public Prosecutions
Bloemfontein

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