

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

Appeal No.: A225/2013

In the matter between:-

GODFREY THABISO MGCINA

Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA, J *et* WRIGHT, AJ

HEARD ON: 4 AUGUST 2014

JUDGMENT BY: G.J.M. WRIGHT, AJ

DELIVERED ON: 28 AUGUST 2014

[1] The Appellant stood trial in the Regional Court in Bloemfontein on a count of murder. He was found guilty as charged and sentenced to 12 years imprisonment. The trial magistrate granted the Appellant leave to appeal against both the conviction and sentence.

[2] Mrs Smith from the Bloemfontein Justice Centre argued the appeal on behalf of the Appellant. She correctly pointed out that the conviction was based on circumstantial evidence.

She submitted that the trial court erred in finding as only reasonable inference that it was indeed the Appellant who fatally stabbed the deceased. She based her submission on the following:

- (i) No eyewitness testimony was led;
- (ii) There is no evidence that the Appellant was armed at any relevant stage;
- (iii) No witness could credibly testify that he saw the Appellant enter the saloon where the deceased was stabbed;
- (iv) There are two businesses (a shop and a saloon) on the premises and people were moving in and out of both;
- (v) The bystanders were consuming alcohol and this could have resulted in altercations not involving the Appellant.

- [3] The first state witness, Sikumbule Phakatwane, testified that on the day in question he was sitting with the deceased and some friends next to the house of the deceased. There was a fight between the Appellant and someone called Moeketsi. The deceased intervened and proceeded to hit the Appellant with fists and an open hand in the face. The Appellant lost the fight and he then ran away. The witness went home to fetch cigarettes. Whilst at home he was informed that the Appellant is returning. He then noticed the Appellant walking to the saloon. He observed that the Appellant had changed his shirt. The Appellant was talking with the deceased and he was pointing to the saloon. Phakatwane re-entered his house in order to look for a weapon. When he left the house

he met with the second state witness, Shuping Dibe, who then told him that the deceased had been stabbed.

- [4] Dibe testified that he also saw the fight between the Appellant and Moeketsi. He confirms that the deceased intervened and that the Appellant ran away. According to Dibe, he and his friends then continued to play soccer. The Appellant later returned and entered the premises. The witness is not certain whether the Appellant actually entered the saloon or whether he entered the shop next to the saloon. After a short period of time the Appellant left the premises. Shortly after the Appellant exited the premises, the deceased came out of the saloon, bleeding. He collapsed on the ground and died there.
- [5] The post mortem report reveals that the deceased died from a stab wound to the chest. No evidence was led as to what weapon or type of weapon was used to stab the deceased.
- [6] The Appellant denied stabbing the deceased. He admits that he had fought with the deceased. According to the Appellant the deceased belittled him. He also testified that the deceased's brother and friends wanted to assault him with *kieries* and iron rods. While the Appellant ran away, they threw stones at him. He admits to throwing stones back at them. According to the Appellant he changed his shirt because it was soaked with blood from the deceased's assault on him. According to the Appellant he did not later return to the premises. He is of the opinion that Shuping

might have seen him walking in the vicinity of the premises and then mistakenly thought that he in fact entered the saloon.

- [7] Importantly, the witness Phakatwane testified that, as the Appellant was running away from the altercation with the deceased and his friends, he shouted that he was coming back and that he was going to stab them. This piece of evidence was never contradicted by the Appellant and his attorney did not cross-examine the witness in regard to this alleged uttering.
- [8] The trial court made favourable credibility findings of both state witnesses. On the other hand, the Appellant was found to be “a very untrustworthy witness” and his version was dismissed. As a court of appeal we are depended on the trial court’s assessment of witnesses and its credibility findings. **[R v Dhlumayo** 1948 (2) SA 677 (A); **S v Francis** 1991 (1) SACR 198 (A)] There appears to be no reason for interfering with the magistrate’s credibility findings and no arguments were advanced on this point.
- [9] The crucial question that needs to be answered is whether the Appellant is the person who fatally stabbed the deceased. There is indeed only circumstantial evidence available. The important aspects thereof are:
- (i) The deceased fought with the Appellant earlier in the day;

- (ii) The Appellant was again seen in the vicinity of the saloon where the deceased was killed, shortly before the deceased was stabbed;
- (iii) The Appellant uttered a threat against the deceased and his friends after he lost the fight.

[10] Mrs Ferreira who argued the appeal on behalf of the State pointed out that there were no other fights or altercations in the vicinity other than those involving the Appellant. After he initially left the premises, the bystanders continued to play soccer. The Appellant was the only person who had a reason to be angry or upset with the deceased.

[11] The dicta in **R v Blom** 1939 AD 188 at 202 – 203 regarding the approach to circumstantial evidence is well known. It may be summarised in the following manner:

“The Court cannot convict an accused unless, on the proved facts, the inference of guilt is not alone a reasonable inference, but is the only reasonable inference.”

[See **R v Sole** 2004 (2) SACR 599 (Les) at 666 h - i]

[12] We are satisfied that the only reasonable inference to be made on all the available evidence is that it was indeed the Appellant who fatally stabbed the deceased. On the day in question and prior to the stabbing, the fight between the Appellant and Moeketsi, and the intervention from the deceased, was the only altercation. There is no evidence

that the group of people fought amongst themselves or with any other person. The Appellant was seen talking to the deceased near the saloon, shortly before the deceased emerged from the saloon bleeding. If the Appellant is indeed innocent, why did he return alone to the premises that he had just fled from pursuant to an assault?

[13] The appeal against the conviction cannot be sustained and should be dismissed.

[14] The Appellant was convicted of an offence that falls within the realms of the minimum sentencing regime. A minimum sentence of 15 years imprisonment should be imposed unless substantial and compelling circumstances are found to exist. The trial court properly considered all the available mitigating and aggravating circumstances and concluded that substantial and compelling circumstances indeed exist. These are: the Appellant spent almost two years in custody pending the finalization of the trial; he was only 21 years old at the time of commission of the offence; there was a fight between the Appellant and the deceased prior to the fatal stabbing. The magistrate took all the circumstances surrounding the particular offence into account and decided that a term of 12 years imprisonment is appropriate in the circumstances.

[15] Mrs Smith for the Appellant put on record that she cannot argue that the sentence is not in order. Her concession is appropriate and appreciated. The Appellant has been found

guilty of a very serious offence; the type of offence that is rife in our country. His conduct in returning to the scene after the fight in order to stab the deceased was unnecessary. The attack on himself had ended and he had managed to safely flee the scene. The deceased's intervention earlier was in any event not such as to provide an acceptable reason or motive for the Appellant to end his life. The Appellant clearly had no regard to the value of the deceased's life. He considered revenge for his own humiliation at coming off second best in a fight as more important.

[16] There is no basis on which we should interfere with the sentence. The sentence is not grossly disproportionate to the crime and the trial court took proper account of all relevant mitigating and aggravating factors. The appeal against sentence should therefore also fail.

[17] In the result the appeal against conviction and sentence is dismissed.

G.J.M. WRIGHT, AJ

I concur.

M.B. MOLEMELA, J

On behalf of appellant: Mr K Pretorius
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN
(REF: K PRETORIUS/pl/x393614012)

On behalf of respondent: Adv M. Lencoe
Instructed by:
Office of the Director of Public
Prosecutions
BLOEMFONTEIN

GW/spieterse