

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

Case No: A92/14

In the matter between:-

PULE JOHN MAFOYANE

1st Appellant

JEFREY SINDEPHI MAZETE

2nd Appellant

BOITUMELO SYLVESTER MAKOKO

3rd Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, J *et* TSATSI, AJ

JUDGMENT BY:

TSATSI, AJ

HEARD ON:

11 AUGUST 2014

DELIVERED ON:

14 NOVEMBER 2014

INTRODUCTION

- [1] This is an appeal against the conviction and sentence of the Regional Court, Welkom. The appellants together with two co-accused were charged with murder and attempted murder respectively. The appellants were convicted on the murder charge and were sentenced to life imprisonment. They were found not guilty and discharged of attempted murder. The third appellant was, however, convicted of assault with intent to do grievous bodily harm and was sentenced to two years imprisonment. The three appellants' former co-accused were discharged by the trial court in terms of section 174 of the Criminal Procedure Act 51 of 1977. The appeal against the three appellants' conviction and sentence are with leave of this court. The regional court found no substantial and compelling circumstances that warranted a sentence less than the prescribed sentence of life imprisonment.
- [2] The submission on behalf of the appellant was that the court a quo erred in finding no substantial and compelling circumstances in the case of the appellant. The respondent supported the conviction and sentences imposed on the appellants.
- [3] The events giving rise to the charges upon which the appellants were convicted and sentenced are summarized thus: On 31 December 2012 Moeketsi Ezekiel Polori ("Polori") went to the tuck shop to buy cigarettes. He was accompanied by his brother ("the deceased"), and one Neo. Whilst the deceased was making the purchase, the complainant, met with his sister Martha and Martha's friend. Polori hugged them and wished them a happy new year. As he hugged them he felt a blow behind his

neck, because someone hit him at the back. He was corroborated in this regard by his sister Martha Mabele who also testified that the lighting was good and she could see clearly at the tuck shop and surroundings. As he turned around he found himself surrounded by one Whitey and appellants one and two.

- [4] As Polori looked on he saw one Tablet and the third appellant. They had knives on them. Tablet was the closest to Polori. Tablet pulled out a knife. Polori saw appellants one, two and Whitey stabbing the deceased. The third appellant and Tablet went to the crime scene where the deceased was stabbed. Polori tried to go past them, at which stage the third appellant stabbed him under his armpit.

- [5] Polori noticed that the deceased was surrounded by a group of people who kicked and stabbed the deceased with knives. Polori picked up stones and threw same at the said group of people, whereupon the first and third appellants as well as Whitey chased after him until he reached his home. Once the people dispersed, Polori went to have a look at the deceased and discovered that he had passed away. Polori identified all three appellants. He knew all the three appellants very well before the incident in question.

- [6] Under cross-examination he testified that there was no animosity between him, the first and second appellants but there was “bad blood” between him and the third appellant. Some of the problems ensued way back when the third appellant wanted Polori to buy him a drink. The incident that took place on 31 December 2012 was directly linked to what occurred between him (Polori) and the third appellant previously between

Christmas and New Year of the same year in an incident in which he (Polori) ended up stabbing the third appellant with a screwdriver. The reason for the fight between the third appellant and Polori emanated from the fact that third appellant was a member of a gang. The way the gang operated was that if anyone fought with one member of this gang, then the whole gang would go after that person. The first, second and third appellants belonged to the same gang. He knew that the deceased, who was his brother, together with appellants' former two accused were members of another gang.

[7] One of the state witnesses was Anna Makole who lived near the tuck-shop where the incident happened. At the time of the incident she was sitting on the veranda in front of her house. It was about 22h00. She saw Katie and the deceased at the shop. She then saw boys who were armed with knives. These boys went straight to Polori. The next thing she saw Polori falling on the ground. She screamed and shouted, "Wat maak julle?" Polori stood up and ran away. The said boys ran after him and chased him up to his house. The boys came back and joined a group of people who surrounded the deceased and attacked him. Appellants one, three and Whitey were part of the group. She testified that both appellants one and three grew up in front of her and she knew them well. She testified that she had not observed whether the second appellant was part of that group.

[8] Anna Makole further testified under cross-examination that she knew the third appellant, Whitey and Polori from Mahlakeng. She further testified that after the deceased was stabbed, he fell on the ground. The

deceased tried to rise up but fell again. She further said that she witnessed Polori bleeding after he was stabbed.

[9] Martha Mabele, in addition to her evidence where she corroborated Polori as indicated above, she testified that her brother Polori was in the company of the deceased and a cousin's child. While the deceased was waiting to be served at the window of the tuck-shop, Polori went to her, embraced her and wished her a happy new year. All of a sudden a group of people approached them, shouting that they must leave. She ran away from the scene and then stood aside so as to see what was going on. She noticed that the deceased was being attacked by members of that group. As she was terrified, she managed to identify only one of the deceased's attackers, namely Tablet. She ran home and did not witness the attack on Polori.

[10] She added that she went home and told her mother about the incident. Both Martha and her mother stood next to the gate, where they saw Polori running towards the house while being pursued by his assailants. Martha Mabele's testimony was not shaken under cross examination.

[11] The first appellant testified as follows:

He denied that he was at the scene of the crime on the day when the incident happened. He alleged that he was in a tavern called Bone Shaka around 18h00. The police arrested him between 21h00 and 22h00 on 31 December 2012. He also denied that he was a member of the same gang as the second appellant. He was in the same gang as the deceased. He knew nothing about the deceased's murder. He denied that he stabbed

the deceased with a knife. Under cross examination he testified that the police told him at the police station that he was arrested for the murder of Maruping, the deceased. The first appellant's evidence was disputed by the prosecutor, when the latter told the first appellant that he was arrested on 2 January 2013, not 31 December 2012 as previously alleged by the first appellant. The prosecutor told the first appellant that he was trying to mislead the court.

[12] The first appellant told the court that he did not understand why Anna Makole and Martha Mabele told the court that they saw him at the crime scene. The first appellant further testified that he and his deceased friend owed Anna Makole, the second state witness money. Ms Makole opened a case against the first appellant and his deceased friend. The first appellant told the court that Ms Makole was told that she could not lend money to the first appellant and his deceased friend at the same time charge ineptest on it. It is not clear from the record who told the first appellant all this. It seems as if the first appellant was referring to the same authorities to whom Ms Makole reported the matter to. According to the first appellant Ms Makole threatened the first appellant and his deceased friend. She told them that she was going to get them, meaning that she was going to avenge herself one way or the other. The first appellant knew Anna Makole from 2001, which was more than ten years.

[13] The first appellant further stated under cross-examination that Polori's brother was married to the first appellant's niece. He testified that he was a member of a criminal gang called 28: He stated that the deceased was the member of gang 28 also. The first appellant denied that he knew Tablet.

- [14] The second appellant denied that he was at the scene of the crime. He testified that he never left his parental home on 31 December 2012. He testified that he was at his parental home when the deceased was murdered. He denied that he was in the same gang as the first appellant. He testified that he was in a different gang. He told the court that the police came to his house and asked him about Polori. Under cross-examination he could not explain why he decided to stay at home on 31 December, the day when people enjoyed themselves.
- [15] Under cross-examination the second appellant testified that he was not acquainted with Polori but knew him from long ago. The reason why he did not go out on 31 December 2012 was because he did not have money to enjoy himself. He denied that Polori saw him at the crime scene. He added that since Polori himself testified that everything happened so fast and in a matter of seconds, therefore it would not have been possible for him to see the second appellant. He pointed out that Polori could not describe the clothes that he was wearing on the night in question and suggested that there was a possibility that Polori confused him with somebody else. He denied that he assaulted Polori.
- [16] The third appellant also denied that he was at the scene of the crime on 31 December 2012. The third appellant testified that there was bad blood between him and Polori. As a result the third appellant and his other friends assaulted Polori. None of the appellants were involved in that fight. Those friends were all in jail at the time of the incident. Polori then retaliated and stabbed the third appellant in the right eye and robbed him. All this happened before the incident in question. He denied that he stabbed Polori under his armpit.

- [17] Under cross-examination the third appellant denied that he was a member of a gang. He testified that he had a tattoo of Humble Africa gang. He testified that he knew Polori from prison but did not know him that well. He told the court that the stab wound under Polori's armpit was from a previous altercation with Polori and not from the events of 31 December 2012. He could not furnish a plausible reason why this was not put to Polori that, Polori misled the court by saying that the third appellant stabbed him under the armpit on 31 December 2012.
- [18] The third appellant further testified that he knew Anna Makole very well and they lived in the same area. However he denied that Anna Makole saw him at the crime scene as he was not there.
- [19] The *crux* of this matter is whether or not the learned magistrate misdirected himself when he found that the state had proven its case beyond reasonable doubt. The other issue is whether or not the magistrate erred in finding that there were no substantial and compelling circumstances when sentencing the appellants as envisaged by section 51 of the Criminal Law Amendment Act 105 of 1997.
- [20] It was submitted on behalf of the appellants that the conviction was bad in law and against the weight of evidence. It was further submitted that the sentence was excessive in the circumstances. The appellants contended that they were wrongly convicted as they had nothing to do with the murder of the deceased at all on 31 December 2012. It was submitted on behalf of the appellants that the court *a quo* erred in finding no substantial and compelling circumstances in the case of the appellants.

- [21] Submissions on behalf of the respondent were that the imposed sentence was fully supported. The sentencing discretion lies primarily with the trial court. It is the duty of the trial court to determine which factors will influence the sentence (**S v Kibido** 1998 (2) SACR 207 (SCA) at 216g – h. Counsel for the respondent stated in his heads of argument that by referring to the judgment in **S v Ntuli 2003 (1) SACR 613 (W)**, counsel for the appellants indirectly conceded, correctly, so that the trial court was correct in convicting the appellants.
- [22] In **S v Mthethwa 1972 (3) SA 766 (A) at 766 at 768 A-C** Holmes JA said the following regarding the testimony of identifying witnesses: “Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene; corroboration; suggestibility, the accused face, voice, build, gait, and dress; the result of identification parades, if any; and of course the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the evidence, and the probabilities”.
- [23] The appellants were convicted of murder on the basis of having acted with common purpose. It is trite that the doctrine of common purpose in the case of murder is the following: where a number of persons have a

common purpose to commit a crime and they assist one another in the commission of that crime, all are guilty of murder if someone is killed in the process, and if one had intent to kill whether the conduct of each is causally connected with the victim's death is not considered (**S v Khambule and Others** 2001 (3) All SA 274 (A)). The reason why the requirement of causality is not set for the culpability of each participant in the commission of the crime is because the actions of the participants are imputed to one another on the ground of the common purpose. This was confirmed in **S v Sefatsa** 1988 4 All SA 239 (A), Where it was held that active association was sufficient to sustain a conviction of murder.

[24] If the state relies on common purpose it must prove beyond reasonable doubt that each accused person had the requisite *mens rea* concerning the unlawful outcome at the time of when the offence was committed. The accused must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself recklessly as to whether the result was to ensue. (**R v Blom** 1939 (AD) 188at 202 - 203). Based on the evidence placed before us and submissions made, I am satisfied that the conduct of the appellants complied with the requirements of common purpose.

[25] I am of the view that the conviction is in order. The appellants have in my view failed to establish that the magistrate erred in finding the identification of them by the two state witnesses to be correct. Three witnesses, Polori, Anna Makole and Martha corroborated each other on the lighting at the scene. All of the state witnesses testified that the tuck shop was well-lit. This lighting facilitated a positive identification. Both

Polori and Anna Makole identified people that were well-known to them. Although the third appellants suggested that Polori might have falsely implicated him due to a grudge that he held against him, there was no plausible explanation why Anna Makole would falsely implicate them. She knew and identified first appellant, third appellant and Whitey. She was honest enough to readily indicate that she did not know the other persons. Her evidence bore no contradictions. It was clear that she was an honest and reliable witness and the trial court correctly accepted that she had made a positive and reliable identification. Polori's evidence also bore no contradictions. He readily related the prior incident between him and third appellant. He readily stated that the appellants' co-accused (who were subsequently acquitted), were not present at the scene. He did not try to falsely implicate them. He also readily mentioned that his brother, the deceased, also belonged to a gang and did not try to hide this from the court. He was an honest and reliable witness. He decided to tell the truth. His evidence about what happened at the scene is largely corroborated by two witnesses. He positively identified appellant one, two and three, who were well known to him before the incident. His identification of appellants one and three was corroborated by Anna Makole. The contradictions between his evidence and that of Martha Mabele were not material.

- [26] Anna Makole corroborated Polori's testimony and told the court that the area where the incident occurred was properly lit. A person could easily identify another. Anna Makole identified appellants one, three and one Whitey. She testified that she knew them as children who grew up in her area of residence. The identification of the appellants by the two state

witnesses passed muster when measured against the well-known cautionary approach in **S v Mthethwa (supra)**.

- [27] There is no merit in the appeal against conviction. The appellants' version that they were not at the crime scene on 31 December 2012 when the deceased was murdered and Polori stabbed is not reasonably possibly true. The appellants had a motive to murder the deceased and stab the complainant as these fights were criminal gang related. The appellants knew Polori before the incident in question and there was "bad blood" between the appellants, Polori and the deceased. Allegations that the appellants were at the crime scene were reasonably possibly true.
- [28] The first appellant testified that he was at another Tavern between 21h00 and 22h00, where the police arrested him over the death of the deceased. The learned magistrate rightly indicated that it was highly unlikely that the police would arrest the first appellant for the murder that had not yet occurred. He further stated that the first appellant was with his friend when he was arrested. Despite this, the first appellant did not have the courage to call the said friend as a witness. Therefore it was the learned magistrate's view that the first appellant's evidence weighed against that of the state witnesses should be rejected. As regards appellant number two he raised an alibi defence. He told the court that he was at home on the night of the incident. He failed to call any witnesses to corroborate his version. The learned magistrate correctly rejected appellant number two's evidence as false. Appellant number three also raised an alibi defence. He alleged that he was at his home on the day of the incident. He too failed to call any witnesses to corroborate his evidence. The learned magistrate correctly rejected his evidence as false.

[29] I am of the view that the court correctly rejected their versions as false beyond reasonable doubt and correctly found that the state had discharged the onus of proving their guilt beyond reasonable doubt. Based on the evidence and the findings of the court below, I am satisfied that the appellants' convictions must stand and the appeal against the convictions fail.

[30] Regarding sentence it was stated in **S v Banda and Others** 1991 (2) SA 352 (BGD) at 355A – D that: “The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and exclusion of the others. This is not merely a formula, not a judicial incantation the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try and balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and incompatible with anything less”.

[31] In **S v Vilakazi** 2009 (1) SACR 522 (SCA), para 15 the Supreme Court of Appeal per Nugent JA dealt with the question determining of whether there are substantial and compelling circumstances as follows:

“It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon consideration of all the circumstances of the

particular case, whether the prescribed sentence is indeed proportionate to the offence.”

- [32] The court further remarked as follows regarding personal circumstances of an accused person:

“Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three whether or not he is in employment, are in themselves largely immaterial to what that period should be and those seems to be kind of flimsy grounds that Malgas said should be avoided.”

- [33] Regarding the appeal against sentence, the sentencing discretion lies primarily with the trial court. There is also no merit in the appeal against sentence. A court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence imposed by the trial court was not of proportion to the seriousness of the offence or was vitiated by a misdirection showing that the trial court exercised its discretion unreasonably (**S v Romer** 2011 (2) SACR 153 (SCA), paragraph 22. I am satisfied that the court *a quo* struck a balance between the personal circumstances of the appellants and the present sentence. Both mitigating and aggravating factors of the appellants were taken into account.

- [34] The offence the appellants were convicted of, warrants in terms of the Criminal Law Amendment Act, No 105 of 1997, a minimum sentence of life imprisonment, unless it can be shown that there are factors which

amounts to substantial and compelling circumstances justifying the court to deviate from imposing such a sentence.

- [35] The first appellant's mitigating factors as presented in court were that he was 25 years old at the time of the offences. He was self-employed and earned R280.00 per week before his arrest. He was not married and he had a seven year old child. He passed grade 10. He had been in custody for the period of ten months awaiting finalisation of the matter. He is not a first time offender as he had two previous convictions.
- [36] The mitigating factors of the second appellant as presented in court were that he was 27 years old; employed by a construction company and he earned R1 850.00 per month. He passed standard 10, not married and had no children. He has been in custody for the period of ten months awaiting finalisation of the matter. He had one previous conviction.
- [37] The third appellant's mitigating factors as presented in court were that he was 24 years old, unemployed, not married and had three dependents. He passed grade 10 and has been in custody for the period of ten months awaiting finalisation of the matter. He had no previous convictions.
- [38] Regarding aggravating circumstances, the appellants did not show any remorse. When an accused person shows genuine remorse, this must be reflected in the sentence imposed by the court. Murder is a serious offence and the court has to send out a clear message to would-be perpetrators that unlawful killing of another human being will not be tolerated. The community must be protected against criminal gangs' attacks. Counsel for the respondent referred us to the case of **S v Jiminez** 2003 (1) SACR 507 (SCA) at 522 f, Olivier JA quoting with approval **S v**

Lister 1993 (2) SACR 228 (A) said the following:
“To focus on the wellbeing of the accused at the expense of other aims of sentencing such as the interest of the community, is to distort the process and to produce in all likelihood, a warped sentence”.

[39] The appellants failed to meaningfully challenge the evidence of the two state witnesses but opted to deny their involvement in the murder of the deceased and the assault of Polori. I am satisfied that the trial magistrate was correct in finding that there were no substantial and compelling circumstances. The appellants have been convicted of very serious offences and deserve a sentence of direct imprisonment. Communities have to be protected against criminal gang violence. Having regard to all the relevant factors, I am of the considered view that the sentences imposed on all the appellants are appropriate under the circumstances. The appeal against conviction and sentence was devoid of any merit and should be dismissed.

ORDER

[40] In the result, the following order is made:

40.1 The appeal against the conviction is dismissed and the conviction is confirmed.

40.2 The appeal against sentence in respect of all the appellants is dismissed.

40.3 The sentences imposed by the court *a quo* are confirmed, including the two years sentence against the third appellant; the latter sentence is to run concurrently with the life imprisonment sentence.

E. K. TSATSI, AJ

I agree.

M.B. MOLEMELA, J

On behalf of appellants: L. Tshabalala
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. D.W. Bontes
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN