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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT PRETORIA

DATE: 27/3/2009

CASE NR: A657/08

In the matter between:

JABULANI ROBERT HLATSWAYO

APPELLANT

Versus

THE STATE

RESPONDENT

JUDGMENT

MAKHAFOLA. AJ:

INTRODUCTION:

[1] The appellant stood trial on 12 August 2002 in the Regional Court sitting in Pretoria North on one count of murder and one count of attempted murder allegedly committed on or about 30 September 1999 at MP motors at or along the old Warmbaths Road.

[2] He was represented by an attorney throughout the trial. He pleaded not guilty to both charges. The appellant further made admissions which were recorded in terms of SECTION 220 of ACT 51 of 1977.

[3] He was convicted on both counts and sentenced to 15 years imprisonment in terms of SECTION 51 (2) (a) (i) of ACT 105 of 1997 on count 1 and was further sentenced to 5 years imprisonment on count 2 and the sentence in count 2 was made to run concurrently with the sentence in count 1 in terms of SECTION 280 (2) of ACT 51 of 1977. The appellant was sentenced to serve an effective 15 years imprisonment. The trial court had also found that there were no substantial and compelling circumstances.

[4] The appellant approaches this court on appeal against both the conviction and the sentence after leave was granted on petition on 23 March 2008.

[5] The State called the following witnesses: F [....] J [....] D [....], J [....] J [....] D [....], W [....] S [....] J [....] D [....] and H [....] T [....] B [....]. Their evidence will not be rehearsed except where specific aspects are materially relevant to a point to be decided upon.

[6] According to the first witness three persons came in a tow-truck at MP Motors: Dingaan, the appellant and another person he totally does not know. He was sitting in his motor vehicle because he was not feeling well. Dingaan is the owner of Mercedes Benz which had come for repairs.

[7] It was reported to him by one Ephraim that the driver of the tow-truck has taken something, an alternator. Ephraim and the appellant had a verbal fracas and the appellant took out a pistol. He said he was going to shoot them all At that time Dingaan was

boarding the “breakdown”. This witness was at a distance of about 4 to 5 meters away from the red tow-truck. He saw the appellant taking out his hand through the window and he shot at him because he felt a burn pain and blood oozed from his hands. He was shot on his hand on the little finger and in the face.

[8] Then there was a scream that Kareltjie was shot and had been standing right behind him. When he shouted that his car be brought to him then the red tow-truck drove away. The appellant had fired more or less seven shots. When his father came out of the office, he and Kareltjie were already shot. His father D [...] senior stood there and shot at the appellant.

[9] The evidence of the appellant is exculpatory. He had conceded having fired shots in the air. During the mitigation of sentence under cross-examination he answers to the following question as follows: “Meneer, is u jammer dat u die jong seun dood geskiet het? ... Ja, want ek het, dit was nie my plan om in enige bakleiery betrokke te raak nie.” Vide: Record: Page 184 lines 14-16.

Immediately after admitting shooting the young boy he contradicts himself in answering the following question: “So u erken u het hom geskiet? ... Nee, dit erken ek nie.” Vide: Record: Page 184 line 17.

[10] The state bears the onus of proving its case beyond a reasonable and not beyond every doubt.

Vide: R V MLAMBO 1957 (4) SA 727 (A)

S V PHALLO AND OTHERS 1999 (2) SACR 558 (SCA).

In the absence of any misdirection on the part of the trial court it must be presumed that the Magistrate’s finding of fact is correct and the appeal court will not, without justification,

interfere with it.

[11] I cannot fault the manner in which the trial court went about to find that the state witnesses had corroborated themselves. In rejecting the appellant's version, the Magistrate made a factual finding after considering the totality of the evidence before court. The State has proved the case against the appellant beyond a reasonable doubt.

[12] I turn to deal with the sentence briefly. The sentencing powers are pre-eminently within the judicial discretion of the court that tries the accused. Unless there is a misdirection in the manner in which the trial court had evaluated and assessed the facts or has relied on incorrect facts to sentence the accused the appeal court will not be competent to interfere with sentence.

Vide: R V MAPUMULO & OTHERS 1920 AD 56 at 57.

[13] It cannot be said that the sentence is shocking or inappropriate. In my view, the sentence is proportionate to the crimes on which the appellant had been convicted. There are no substantial and compelling circumstances as the trial court has correctly found. In the circumstances, I suggest that the appeal should fail and the convictions and the sentences be confirmed.

[14] A point in limine taken by the appellant relating to assessors is dealt with in terms of SECTION 93 ter of ACT 32 of 1944 which states: "The Magistrate may be assisted by assessors." Therefore, this point does not stand, because the section gives the trial court a discretion. The point in limine is dismissed.

[15] In the result, the following order is given: The appeal on the convictions and

sentences is dismissed.

K MAKHAFOLA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

AP LEDWABA

JUDGE OF THE HIGH COURT

Advocate for Applicant: Adv. S van Rooyen

Mnr JH van Rooyen

Advocate for Respondent: Adv. SF Klein