



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **A141/2023**

In the matter between:

MZWAKHE ADOONS

Appellant

and

THE STATE

Respondent

CORAM: M OPPERMAN J *et* MB NEMAVHIDI AJ

HEARD ON: 06 MAY 2024

DELIVERED ON: 23 MAY 2024

JUDGMENT BY: MB NEMAVHIDI AJ

Introduction

- [1] The appellant was tried and convicted on a charge of murder read with the provisions of Section 51(2) of Act 105 of 1997 and was sentenced to 15 years' imprisonment. The murder was committed by appellant and his two brothers. This crime was committed on the 14th of April 2019 and all three brothers were sentenced on the 30th of November 2022. The appellant's application for leave to appeal was granted by the court *a quo*. He is appealing against both conviction and sentence.

- [2] The appellant avers in the notice of appeal that the court *a quo* erred in convicting him of murder and stated the following:
- (a) The court erred in finding that the State proved the case against him beyond reasonable doubt whereas the evidence of the state witnesses was contradictory in material respects.
 - (b) The court erred in finding that the contradiction of the state witnesses were justified by the fact that they were hiding in different places and were running away.
 - (c) The court erred in finding that on that day the BTK (Born to kill) gang, which deceased belonged to, confirmed the identity of the appellant as the one who stabbed the deceased.
 - (d) The court erred in rejecting his evidence as not being reasonably possibly true.

Background Facts

- [3] The deceased was in the company of Lebohang Lemelwane, Andile Tini and Nkosinathi Bujeje at Pitseng Tavern after midnight on the 14th of April 2019.
- [4] They were consuming a quart of beer when appellant approach them, a while later he looked at them in a demeaning manner and then entered the tavern.
- [5] He came back with an empty beer bottle banged it against the wall and continued banging it against the door and until it broke.
- [6] The deceased then stated that they should move out of the premises of the tavern.

- [7] As they moved out, they noticed the presence of accused 2 and 3. Accused 3 emptied the school bag which he was carrying and three knives fell on the ground. Each one was given a knife by accused 3.

Once they were outside the gate appellant and his two co-accused approached them while holding their knives.

It was at that time that the deceased threw a bottle at them in order to prevent the appellant and his two brothers from reaching them.

- [8] The three started running while the appellant and his cohort pursued them. Deceased fell and accused 3 stabbed him on the back of his neck. There was a flood light outside the tavern and as such visibility was good.

- [9] Deceased got up and tried to run and fell again. Appellant then started stabbing the deceased on his chest while sitting on his stomach. Accused 2 held the deceased's feet while chopping him with a panga. Accused 3 also stabbed him on his head.

At the time the appellant and his brothers were stabbing the deceased, Lemelwane picked up two stones and threw the assailants with it.

Appellant and his cohort were stating that the accused must die. They appeared to be enjoying the situation in that they celebrated the death of the deceased by singing that they must tell deceased's friend, Reddison, that they are ready to kill him.

Appeal on merits

- [10] The ground of the appeal is premised mainly on the identity of the appellant. Case law: **See S v Mthetwa 1972 (3) SA 766 A on 768 A - C** where Holmes JA stated that:

"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's 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 totality of the evidence, and the probabilities; see cases such as *R v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310C; *S v Mehlahe*, 1963 (2) SA 29 (AD)."

- [11] The court *a quo* found that the three State witness gave their testimony in a satisfactory manner without any material contradiction. They testified on what happened on that night and what caused the death of the deceased. They did not know the appellant and they were adamant that they were not mistaken about what they saw on that night.

- [12] The appellant placed himself on the scene but denied any involvement in the attack.

- [13] The court *a quo* found that the appellant and his two brothers stabbed the deceased jointly. Accused 3 was the one who stabbed the deceased when he first fell down. After he rose, ran and fell again, appellant sat on his stomach and proceeded to stab him on his chest several times. Accused 2 and 3 joined him in the attack by stabbing and chopping him with a panga.

- [14] The area was well lit with an Apollo light, which helped the state witnesses to correctly see and identify all assailants.

Applicable principle on appeal

- [15] The approach adopted by a court of appeal when dealing with the factual finding of a trial court is guided by the collective principles laid down in **Mkhize v S (16/2013) [2014] ZASCA 52 (14 April 2014)**:

"A court of appeal will not disturb the factual findings of a trial court unless the latter had committed a material misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it".

Just as Marais JA puts it in **S v Hadebe 1997 (2) SACR 641 SCA at 654 E-F**:

"Before considering these submissions, it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary".

In applying the principle above, our call is to consider if there was any indication by the court *a quo* to warrant our inference with its findings. What appears to be contradictions were raised in this appeal. It is important to highlight at this stage that some of what was raised as contradictions are not actually contradictions but different observation by different witnesses.

See **S v Liesching and Others 2019 (4) SA 219 CC para 96** where the court stated: "Two witnesses seldom give identical accounts of the same evidence so not all errors or contradiction between their evidence will affect their credibility".

- [16] The findings by the court *a quo* that the evidence presented by the appellant is improbable and not reasonably possibly true cannot, therefore be faulted. The appeal should therefore as a result be dismissed.

Appeal on Sentence

- [17] As indicated above the appellant was sentenced to a term of fifteen years' imprisonment in terms of section 51(2) of Act 105 of 1997.

- [18] It is trite law that a court of appeal will only interfere with a sentence if it is not suitable or if an irregularity occurred during sentencing.
- [19] The appellant contends that the sentence is inappropriate because of the following:
- (a) The sentence is shockingly inappropriate and induces a sense of shock.
 - (b) The severity of the offence was overemphasized at the cost of his personal circumstances.
 - (c) The court erred in finding that there were no substantial and compelling circumstances present to deviate from the imposition of a minimum sentence.
- [20] Witness Andile Quinton Tini told the court *a quo* that appellant was released from jail three months earlier where he had been serving a 15 - years term of imprisonment for rape. This conviction appears on the appellant's SAP 69; which conviction the appellant confirmed.

Murder is a very serious offence and the court *a quo* did not find the existence of substantial and compelling circumstances.

- [21] Appellant did not show any remorse and he was the principal aggressor on the night in question.

The appellant and his brother celebrated after killing the deceased who they stated that he was the boss of the BTK (Born to kill) gang.

- [22] In **S v Hewitt 2017(1) SACR 309 (SCA) para 8** it was held that:
- "It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its

own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

[23] There was no finding of the presence of substantial and compelling circumstances in favour of the appellant to justify the imposition of a lesser sentence.

[24] Appellant was convicted of murder read with the provisions of section 51(2) of Act 105 of 1997, therefore the court *a quo* was bound to impose a minimum sentence in terms of Part 2 of Schedule 2 of not less than fifteen years' imprisonment.

[25] Consequently, the following order is made:

Order

1. The appeal against both conviction and sentence is dismissed.

I concur



MB NEMAVHIDI AJ



M OPPERMAN J

On behalf of the Appellant:
Instructed by:

P.L VAN DE MERWE
LEGAL AID SOUTH AFRICA
BLOEMFONTEIN

On behalf of the Respondent:
Instructed by:

N.M TSHEFUTA
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