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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED

DATE: 10 JUNE 2024

SIGNATURE

CASE NO: A147/2023

In the matter between:

BONGANI JULIUS UBISI

Appellant

and

THE STATE

Respondent

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Senior Judge's secretary. The date of this judgment is deemed to be 10th JUNE 2024

JUDGMENT

COLLIS J (Kubushi and Mahosi JJ concurring)

INTRODUCTION

1] The appellant was arraigned before Baqwa J in the Local Division of the Delmas Circuit District. He was charged together with his co-accused on the following charges namely, murder, robbery with aggravating circumstances, possession of an unlicensed firearm and unlawful possession of ammunition.

2] He was convicted as charged and sentenced as follows:

2.1 Murder-Life imprisonment;

2.2 Robbery with aggravating circumstances-15 years imprisonment;

2.3 Possession of an unlicensed firearm-4 years imprisonment; and

2.4 Possession of unlawful possession of ammunition-2 years imprisonment.

3] Throughout the trial the appellant was legally represented by Mr. Mhlahlo. His appeal to this court is with leave from the Supreme Court of Appeal granted on petition, after the trial court had refused him leave to appeal. The appeal is against both the conviction and sentence imposed by the trial court.

4] The genesis of the conviction and sentence involves the ghastly events which occurred on the evening of 9 December 2011. In brief Ms. J[...] C[...] (the complainant in the charge of robbery with aggravating circumstances) testified that on the evening in question, she was with the deceased Wayne Bergh on the patio of their house, playing a game of darts. As they were sitting on their patio, they suddenly heard a firearm being cocked behind them. They turned around and saw two (2) black males, both carrying firearms. From the reaction of the deceased, she realized that they were in

actual danger. The suspects instructed them to keep quiet and they tried to push them towards the house. During this process, the deceased picked up a chair and tried to throw it towards them. It was then that she ran into the house, with the hope that the deceased was behind her. She slammed the security gate and only thereafter realized that she had locked the deceased out.

5] The assailants grabbed the deceased and put a firearm against his head and instructed her to open the door or they will shoot the deceased. She then opened the door. It was then that they proceeded to push the deceased inside the house. They ordered them both to lie face down. One of the suspects went

6] One of the suspects went to fetch shoelaces and a red band, which items were used to tie them up. Whilst struggling to tie up the deceased, the latter managed to push one of the assailants away and he ran to the kitchen to get his firearm from where he kept it.

7] The assailants followed the deceased. She ran towards the opposite direction down the passage. She then heard gun fire and after a while she went to the lounge where she found the deceased lying face down, moaning in pain. She also saw the assailants exiting the security gate, assisting each other, as if one of them or both were injured.

8] It was Ms. C[...]s' evidence that although it was in the evening the area was well lit with electricity lights being the source of light. She also testified that the entire incident lasted approximately 15 -20 minutes. During the investigation she later attended an identity parade where she identified the appellant as one of the suspects that had been present at her house on the night of the incident. According to evidence she was able to identify the appellant in a lineup of other people with similar build and looks under two (2) minutes. When she saw him she just knew it was

him.

9] Ms Molatelo Maggie Kganyago also testified during the trial. It was her evidence that she knew the appellant. She stated that she worked at a funeral undertaker and recognizes him as a person that came to make a payment at her workplace on 7 December 2011. The receipt, which serves as proof of payment made by the appellant was accepted as Exhibit "H" into the record.

10] Appellant also testified in his defense. It was his testimony that at the time of the incident, on 9 December 2011, he was not at the scene of crime. He was in Mozambique. He therefore raised an *alibi* defence. He testified that he left South Africa on 5 December 2011 and returned on 15 December 2011. He left again on 28 December 2011 and returned on 2 October 2012. He was arrested in 2012 for another matter.

11] The nub of the appellants' grounds of appeal is that the trial court, misdirected itself on the identity of the perpetrator and that the trial court imposed a sentence which was shockingly inappropriate in the circumstances. It therefore follows that where it is found that a misdirection occurred by the trial court, the appeal should succeed on either the conviction and or the sentence.¹

AD CONVICTION

12] In criminal proceedings the *onus* rests on the State to prove the guilt of the accused beyond a reasonable doubt. The accused does not have to prove his innocence. What is expected of him is to give the court a version that is reasonably possibly true. The court does not have to believe that his version is truthful.

¹ Quartermark Investments v Mkhwanazi 2014 (3) SA 96 SCA at 103.

13] It is further trite that evidence of identity should be approached with caution.

14] As regards the identity of the perpetrator, counsel for the appellant argued that the State's evidence regarding his identification cannot be relied upon. In substantiation of this contention, it was argued that the incident happened during the night and the State had only one eye-witness who testified that he was at the scene. It was argued further that the said witness, Ms. C[...], had filed two contradictory statements which are Exhibit Land Exhibit M respectively.

15] Exhibit M was not dated and not commissioned.² In this statement the witness set out that "I am not sure if I will be able to recognize them again if I see them, one of them is light in complexion but the other one had a mask and I could not see him clearly".

16] Counsel contended on the basis that the appellant does not fit the description as his complexion is dark, that the trial Court could not have been convinced that indeed appellant was one of the assailants on the scene.

17] In Exhibit L³, the witness set out that: "I would not be able to identify the suspect if seen again". The suspect in question as referred to in this statement is Accused 2 since Accused 1 was identified clearly by this witness, therefore, it is clear that as it is in the statement that the witness is not able to describe accused 2 and she cannot be able to identify him if she sees him again.

18] In regard to the identity parade which had been held, counsel had submitted that same was conducted unfairly and unconstitutional on the basis that the appellant requested legal representation which was not

² Record p 522 para 12

³ Record p 516 para 8.

provided to him and the identity parade still continued. The identity parade was further conducted years after the incident and only after the appellant was arrested for another case in a different court.

19] The appellant is said to have made several appearances in that matter and it could therefore be possible that Ms C[...] was once invited by the members of the SAPS to be present before she identified him during the parade.

20] The leading authority on identity parade is *S v Mthethwa* where it was held that:

*"because of the fallibility of the 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 the various factors such as lighting, proximity of the witness, opportunity of observation, extent of prior knowledge of the accused, corroboration etc."*⁴

21] On the strength of the above decision, coupled with the time span of the entire incident, the fact that the area was well lit up and the fact that Ms. C[...] was in close proximity to the assailants when the firearm was cocked, I conclude that Ms. C[...] had sufficient time to observe and identify the appellant as one of the assailants.

22] It is further of no moment that the witness in her statements was unable to identify or describe the appellant as one of the assailants. The witness statements at best serves as a recordal of what had transpired during the incident. It serves to refresh a witness when eventually called to testify on the incident on the whole.

⁴ 1972 (3) SA 766 (AD).

23] During trial in the court *a quo*, the appellant had also raised an *alibi* during his plea explanation. Whilst there is no duty on the part of the appellant to prove his innocence, it is relevant that he never called a witness to support his *alibi*.

24] The *alibi* as it is, is unsupported by either a family member or a passport. According to the Department of Home Affairs, the passport used by the appellant to cross the border into Mozambique was not in his name. The passport itself had expired and the information in the passport that he wanted to use as proof that he had crossed into Mozambique was fraudulent as it was not captured in the Home Affairs' records. To make matters worse for him, a witness from the funeral undertaker, Ms Kganyago, told the court that the appellant came to make a payment at their offices at the time that he alleged to have been in Mozambique. This, to my mind, destroys any potential *alibi* he could have placed reliance upon.

25] The court *a quo*, carefully considered, evaluated and scrutinized the evidence of the complainant, together with the corroborating evidence of the identity parade and the independent evidence presented by Ms. Kganyago, which effectively destroyed the *alibi* defence raised by the appellant.

26] Given the conspectus of evidence presented before the court *a quo*, I am satisfied that the conviction of the appellant should stand as his guilt was established beyond a reasonable doubt.

AD SENTENCE

27] On sentence counsel appearing for the appellant had argued that the trial court should have been lenient on sentencing the appellant. He stated that the court *a quo* erred in over-emphasizing the seriousness of the offence and gave little weight to the personal circumstances of the accused and too much weight was attached on the interest of the community

resulting in the imposed sentence being too harsh. It is on this basis that counsel had argued that the sentencing court had failed to have regard to the aims of punishment.

28] Counsel had submitted that the trial court misdirected itself in finding that there are no substantial and compelling circumstances justifying deviation from the prescribed sentence of life imprisonment. He contended further that the imposed sentence is shockingly inappropriate and induces a sense of shock.

29] In every appeal against sentence, whether imposed by the magistrate or a Judge, the court hearing the appeal - (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court, and (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.⁵

30] Section 51(1) of Criminal Law Amendment Act 105 of 1997 as amended, prescribes a minimum sentence of life imprisonment for an offender convicted of an offence listed Part I of Schedule 2. This shows how serious the legislature views these offences. This applies in respect of murder charge.

31] In *S v Malgas* 2001(1) SACR 469(SCA) the court further held that:

"A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

⁵ *S v Rabie* 1975 (4) SA 855 (A).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardized and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co- offenders are to be excluded."

32] In casu the trial court found that the appellant had failed to show any remorse.

33] On behalf of the respondent it was argued that the cumulative *effect* of the appellant's personal circumstances and the ultimate impact thereof, do not amount to compelling and substantial circumstances. It is also clear that the appellant's personal circumstances, the circumstances of the case and the *effect* the offence had on the next of kin of the deceased and the seriousness of the offence, when taken together do not amount to compelling and substantial circumstances which can persuade the court to deviate from the prescribed minimum sentence of life imprisonment.

34] These sentiments expressed by counsel for the respondent, I agree with and as such, this court will be reluctant to interfere with the sentence of the trial court unless it can be shown *inter alia*, that the sentence is

strikingly shocking or that the court has misdirected itself.⁶ In *casu*, I find that this had not been the position and that the sentence imposed cannot be seen as shockingly inappropriate in respect of which this court can interfere with.

35] Consequently, I propose the following order:

35.1 The appeal in respect of both conviction and sentence is refused.

C. COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

I agree

M KUBUSHI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

I agree

D MAHOSI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

APPEARANCES

Attorney for the Plaintiff: T Mukovhanama

⁶ S v Petkar 1988(3) SA 576(A).

Instructed By: Mukovhanama Tshilidzi Attorneys

Counsel for the Defendant: Adv. E.S Sihlangu

Instructed By: National Director of Public Prosecution.

Date of Hearing: 04th MARCH 2024

Date of Judgment: 10th JUNE 2024