



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

Reportable / Not reportable

Case no: A194/2023

In the matter between

NKARENG DAVID SEHLOHO

OFENTSE JOHANNES SEKGAPANE

FIRST APPELLANT

SECOND APPELLANT

and

THE STATE

RESPONDENT

Coram: NAIDOO J, et GROENEWALD AJ

Heard: 27 MAY 2024

Delivered: 03 OCTOBER 2024

ORDER

1. The appeal on both the conviction and sentence is dismissed.
2. The conviction of and sentence imposed on each appellant is confirmed.

JUDGMENT

Groenewald AJ (Naidoo J concurring)

[1] On 31 May 2023 the appellants were convicted by the Regional Court in Theunissen of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). The appellants were subsequently both sentenced to life imprisonment. The appellants have, as a result of the imposed sentence, an automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977. The appeal is directed against both the conviction and the sentence.

The Conviction

[2] Mr Paseka Kevin Motlolisi (Mr Motlolisi) testified on behalf of the State. Mr Motlolisi was a friend of the deceased and he knows the appellants. On 4 June 2020, the deceased asked Mr Motlolisi to accompany him to the first appellant's home. Upon their arrival, they met the appellants and consumed liquor together. However, after an argument between the deceased and the first appellant, the deceased left announced. After the deceased left, the first appellant noticed that his wallet was missing.

[3] According to Mr Motlolisi, he and the appellants went looking for the deceased. They arrived at a certain Moshanyana's place where they were informed that the deceased was at the RDP house close by, where they found him around midnight. The first appellant asked the deceased where his wallet was, and deceased said that he did not take the wallet. When the appellants endeavoured to search the deceased, he ran away. Mr Motlolisi and the appellants chased after the deceased, but the deceased accidentally ran into a wire fence and fell on the ground.

[4] Mr Motlolisi testified that the appellants proceeded to assault the deceased while he was on the ground by kicking and stamping on him and hitting him. The deceased was screaming while he was being assaulted and begged the appellants to stop. Mr Motlolisi

also tried to intervene, but he was forcefully prevented from doing so by the appellants. After the assault, the appellants dragged the deceased away into the darkness. Mr Motlolisi went to the police and was told upon his arrival that the police will search for the deceased, but they only had one vehicle available at the time. Mr Motlolisi then left the police station and later learned that the deceased passed away.

[5] Mr Khotso Eddie Phara (Mr Phara) was a further witness for the State. Mr Phara testified that he knows the appellants because they used to be members of the same gang. He also knew the deceased. On the day of the incident, he was sitting at his parental home with one of his friends. The two appellants passed by the place where they were sitting, carrying the deceased. The appellants stopped for a while and Mr Phara had a discussion with them. According to Mr Phara, he inspected the deceased and found him snoring.

[6] Dr Thulani Lancelot Nkosi (Dr Nkosi) also testified on behalf of the State. He is a medical practitioner who specialises in forensic pathology. Dr Nkosi conducted a post-mortem on the deceased and found that the deceased suffered multiple blunt force injuries consistent with that sustained during an assault. The deceased suffered from head injuries, blunt neck trauma and had abrasions on his face, back, torso and buttocks. According to Dr Nkosi, the cause of death of the deceased was on account of his head injuries and blunt neck trauma.

[7] During cross-examination Dr Nkosi was asked whether the wire which the deceased ran into could cause the injuries. Dr Nkosi testified that, if one has regard to the nature and the extent of the injuries, it is unlikely that the injuries were caused by the wire fence.

[8] According to the appellants the court *a quo* erred in finding that Mr Motlolisi, who according to the appellants, was a single witness, was a credible witness. According to the appellants the court *a quo* did also not duly consider the 'inherent improbabilities' in the State's case. I disagree with the appellants. The court *a quo* duly found that Mr Motlolisi's version of events was corroborated by Mr Phara who confirmed that the two accused carried the deceased in an unconscious state. The *post mortem* report of Dr Nkosi

also revealed various injuries which, according to the court *a quo*, correlated with the observation of Mr Motlolisi that the deceased was indeed assaulted. The version of the State was not improbable and there was no reason for the court *a quo* to reject the version of Mr Motlolisi and the other state witnesses.

[9] After the close of the State's case, both appellants testified. The appellants admitted that Mr Motlolisi and the deceased visited them at the home of the first appellant during the night of the incident. According to their testimony, after the deceased left unannounced, the wallet of the first appellant was missing. The appellants further admit that both of them and Mr Motlolisi left the home of the first appellant and found the deceased, whereupon they confronted him and wanted to search him.

[10] According to the appellants they arrived at Moshanyana's and were informed by someone at the door that the deceased was at the house next door. They went to the house next door and found the deceased sitting inside, along with approximately four other people. The appellants and the deceased went outside and an argument ensued between them when the appellants wanted to search the deceased. The other people came out from the house and confronted them. These people were armed with sticks and other weapons. However, the deceased started running and the appellants followed. After a while the appellants realised that the people were no longer chasing them and they decided to go back to look for the deceased. They found the deceased lying on the ground and he was snoring.

[11] In the judgment of the court *a quo* reference was made to *S v Chabalala*¹ where the Supreme Court of Appeal held the following:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

¹ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[12] The court *a quo* rejected the evidence of the appellants after evaluating it in its totality and found that their versions cannot be considered as reasonably and possibly be true. The court *a quo inter alia* questioned why the people would suddenly chase the deceased if he was in fact sitting with them in the house just prior to that.

[13] Having considered the evidence and judgment of the court *a quo*, I am unable to find that the court *a quo* erred in convicting the appellants.

The Sentence

[14] In terms of s 51(1) of the Act, the crime of which the appellants were convicted carries a prescribed sentence of life imprisonment, unless there are substantial and compelling circumstances present that justify a departure from imposing the prescribed sentence.

[15] In *Bailey v S*² the Supreme Court of appeal dealt with the approach to be followed by a court on appeal when dealing with Act 105 of 1997:

'What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. **It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.**' (Emphasis added.)

[16] The first appellant was previously convicted on 21 October 2009 of assault with the intent to do grievous bodily harm and was sentenced to 6 months' imprisonment. He was also declared unfit to possess a firearm. On 23 May 2013 the first appellant was convicted of rape and was sentenced to 7 years' imprisonment. On 20 November 2016 the first appellant was again convicted of assault with the intent to do grievous bodily harm and was sentenced to 24 months' imprisonment.

² *Bailey v S* [2012] ZASCA 154; 2013 (2) SACR 533 (SCA) para 20. See also *Morille v S* [2022] ZAFSHC 138.

[17] The second appellant was convicted of assault on 3 May 2014 and paid an admission of guilt fine of R100.00. The appellants did not present any evidence in mitigation of sentence. There is, therefore, no evidence before Court that the appellants had any remorse for their crimes.

[18] The court *a quo* considered that the age of the appellants is 32 and 28 years respectively. The court *a quo* also duly considered the personal circumstances of the appellants and found that there are no compelling circumstances to justify a departure from the prescribed sentence of life imprisonment.

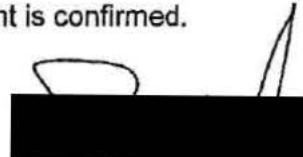
[19] Having considered the evidence and the judgment of the court *a quo*, I am not persuaded that the Court erred by not deviating from the prescribed minimum sentence of life imprisonment.

Order

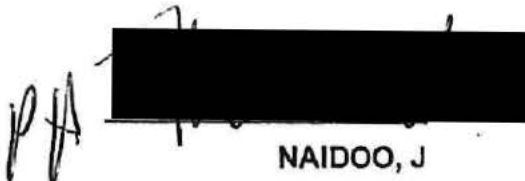
[20] In the result, I propose that the following order is made:

20.1 The appeal on both the conviction and sentence is dismissed.

20.2 The conviction of and sentence imposed on each appellant is confirmed.


WJ GROENEWALD, AJ

I concur, and it is so ordered


NAIDOO, J

Appearances

On behalf of the Appellants: Me. V Abrahams
Legal Aid
Bloemfontein

On behalf of the Respondent: Adv. MS Matsoso
Office of the Director of Public Prosecutions
Bloemfontein