

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A326/2014

5 DATE: 13 FEBRUARY 2015

In the matter between:

NIGEL GEORGE Appellant

And

THE STATE Respondent

10

J U D G M E N T

RILEY, AJ:

15 The appellant was convicted in the Regional Court at Wynberg
on 1 count of murder and 3 counts of attempted murder and
sentenced on 20 August 2013 as follows:

On count 1, 15 years imprisonment and on the remaining
20 counts of attempted murder, 5 years imprisonment on each of
the 3 counts. The court *a quo* ordered that the half of the
sentences imposed on counts 2, 3 and 4 run concurrently with
the sentence imposed on count 1, which resulted in an
effective term of 22 years and 6 months imprisonment being
25 imposed upon the appellant. The court *a quo* granted
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appellant leave to appeal against his conviction and sentence. The main thrust of the appellant's appeal against his conviction is that the State had failed to prove the identity of the perpetrator of the crimes beyond a reasonable doubt. The
5 appellant denied that he was on the scene at the time that the crimes were perpetrated and raised an alibi. The appellant's grounds of appeal in respect of sentence can be summarised as follows:

- 10 (1) That the sentence imposed was shocking, startling and disturbingly inappropriate considering its cumulative effect.
- (2) That the court *a quo* erred and misdirected itself by not finding that substantial and compelling
15 circumstances existed which necessitated a departure from the prescribed minimum sentence in respect of count 1.

The backdrop to the events that resulted in the fatal shooting
20 of the deceased and the attempted murder of three others are the ever present gang wars that exist between opposing gangs in the Manenberg area. In the present matter the opposing gangs involved are the Americans and the Junky Funky Kids. It is necessary to mention at the outset that the appellant was
25 at the time of the incident a member of the Junky Funky Kids

and that two of the persons who were shot at were members of the Americans gang.

The following facts are common cause and not in dispute: that
5 between 21h00 and 22h00 on 9 August 2007, the deceased,
Andrew Phillips ('Phillips'), Denzil Jeremy Morris ('Morris') and
Stanley Hector ('Hector') were sitting in a shack in the
backyard of the premises at 1 Letaba Road, Manenberg, where
they were smoking dagga. A person entered the shack and
10 fired several shots at them. As a result of the shooting the
deceased suffered a penetrating wound to the head and was
killed. The State witness, Phillips, sustained a gunshot wound
to his right upper arm. Morris and Hector narrowly escaped
death.

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The State called Phillips, Constable Ashley Conradie
(('Conradie')), and Constable Jeffrey Martin Witbooi ('Witbooi')
whereafter it closed its case. The State successfully applied
to re-open its case after the appellant and his defence
20 witnesses, Morris and Hector testified. I pause to mention that
both Morris and Hector had made statements to the police
about the incident and that they were in fact initially State
witnesses. They were however not called to testify due to
inter alia the fact that the prosecutor in the court *a quo* had
25 great difficulty in getting them to court to testify.

After the defence closed its case, the State re-called Witbooi who was the investigating officer in the matter and in addition called Wayne Malcolm Beukes ('Beukes'), a detective, to
5 testify about the circumstances surrounding the taking of the witness statements of Morris and Hector. Phillips testified that on the night of the incident he was in the shack in the backyard with the deceased, Morris and Hector, where they were smoking dagga.

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Neither he nor the deceased were gangsters but Morris and Hector were members of the Americans gang. The appellant entered the shack and proceeded to fire shots at them. The deceased was struck in the head and he was wounded in the
15 right arm. Morris and Hector managed to flee from the shack. While Phillip was lying on the floor the appellant came up to him, pointed the gun at him and pulled the trigger but no shot was discharged, presumably because there were no rounds left in the gun.

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He heard a 'click' sound as the trigger was pulled. He lay there pretending that he was dead. He then heard police sirens. The appellant fled the scene. The police and ambulance arrived and he was taken to hospital where he
25 remained for a week.

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Phillips testified that he knew the appellant very well, as the appellant had grown up before him and they had socialised together before the incident. According to him the shack was
5 lit by an electric globe and the lighting was good. After the incident he went to live in George as he feared for his life. He testified that sometime after the incident the appellant asked him to forgive him for what he had done. During cross-examination he was adamant that he could see properly in the
10 shack at the time of the shooting, that he could not think of a reason why the appellant had shot him and that he had no reason to falsely implicate the appellant. Although the appellant had a 'Pagad scarf' over his mouth, he could see the appellant's face. He was certain that the person who shot him
15 was the appellant.

Conradie testified that he attended at the scene of the shooting at about 21h50. On his arrival he found a person who had been shot in the head and another who had been shot in
20 the upper right arm. Neither of these persons could explain who had shot them. He later established that there had been another shooting in close proximity to the scene of this shooting. According to him there was gang warfare at the time accompanied by shooting.

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Conradie was not surprised that no witnesses came to the fore on the night in question. He testified that although he could see inside the shack, the lighting was poor and that they had to make use of a torch when they were looking for evidence.

5 He was not sure whether or not the room was lit by a candle at the time that he was there. Witbooi testified that after the incident he had taken the witness statements of Morris and Hector and that what was contained in their statements was the correct version of what they had told him.

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Beukes, who was also stationed at Manenberg SAPS at the time, was responsible for taking the further witness statement of Morris. He testified that the contents of Morris' statement was the correct version of what the witness had told him. In

15 his evidence in the court *a quo* the appellant denied shooting the deceased and the others. He testified that on the date that the shooting occurred he had been at home the whole day. He confirmed that he knew Phillips, respected him and that Phillips had seen him grow up. He did not know why Phillips

20 was falsely implicating him in the commission of these crimes.

He testified that at a stage prior to the incident he had had an affair with Phillips' girlfriend (whilst Phillips had been in a relationship with her) and that this was in all likelihood the reason why Phillips had testified against him. In short, that

25 Phillips had a grudge against him because of this.

Morris, who was called as a defence witness, confirmed that he was in the shack with the deceased and others where the shooting incident took place. He confirmed that they were
5 busy smoking dagga when he heard shots being fired and that the deceased and Phillips were struck by bullets. He did not see who fired the shots. He denied that it was the appellant who fired the shots.

10 Hector, who was also called as a defence witness, essentially confirmed the version of Morris. According to him he knew the appellant as they had gone to school together. He testified further that whilst they were in the shack smoking dagga, he heard the sound of gunshots coming from a road close to
15 where they were. They left the shack to investigate and resumed smoking thereafter. Approximately ten minutes thereafter the door of the shack opened. He saw someone standing in the door and then heard gunshots.

20 The person who shot into the shack then fled. He also fled. He did not see the person who fired the shots at them. He denied making a statement to the police and testified that the police came to him with a prepared statement. He further denied that he told the police that the appellant was the
25 shooter.

On a consideration of the evidence, I am satisfied that the trial magistrate was alive to the fact that he was dealing with the evidence of a single witness and that the witness was
5 testifying in regard to the identity of the perpetrator, and that there was accordingly a need for caution when evaluating the evidence of such witness. After a thorough and critical analysis of the evidence of Phillips the trial magistrate came to the following conclusion:

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“Daar is niks in Mnr Phillips se getuienis wat aanduidend is dat hy nie die waarheid praat nie. Daar is genoegsame korroborasie en stawing van sy getuienis te vind in die ander getuies se
15 getuienis. Daar is ook geen aanduiding in sy getuienis dat hy enige motief sal hê om die beskuldigde valslik te inkrimineer nie. Hy ken die beskuldigde goed, beskuldigde het voor hom groot geword. Beskuldigde kan ook aanvanklik
20 geen rede gee waarom die getuie hom valslik inkrimineer nie. Die beskuldigde wil later ‘n basis vir die motief probeer opper deur te sê dat hy en die getuie, Mnr Phillips, met dieselfde meisie op dieselfde tyd ‘n verhouding gehad het.
25 Die hof kom later hierna terug.

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Daar is geen redes vir hierdie Hof om Mnr
Phillips se getuienis te verwerp nie: hy het 'n
goeie indruk op hierdie hof gemaak, hy's 'n
eerlike, geloofwaardige getuie en 'n getuie op wie
5 se getuienis die hof kan staatmaak.”

I agree with the trial magistrate's assessment and the
conclusions that he reached in regard to the evidence of
Phillips. The evidence of the appellant that Phillips had a
10 motive to falsely incriminate him because he had a relationship
with his girlfriend, that he therefore bore a grudge against the
appellant, and that he had been paid by the American gang to
testify against the appellant, was correctly rejected by the trial
magistrate as false and a recent fabrication. I pause to
15 mention that the appellant's version that Phillips bore a grudge
against him and therefore falsely implicated him, and that he
probably received money from the Americans gang to falsely
testify against the appellant was never put to Phillips during
cross-examination.

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In considering the weight to be attached to the evidence of
Hector and Morris, it must be borne in mind that in their
statements made to the police they identified the appellant as
the person who shot at them. I am satisfied that at the time
25 they made their statements, they did so freely and voluntarily

and that no irregularities occurred. The statements were therefore properly taken. The trial magistrate correctly rejected the allegations by the witnesses that the police had out of their own included in their respective statements the portions where both witnesses identified the appellant as the shooter.

I agree with the magistrate's evaluation of the evidence and with the approach adopted by him in regard to the weight to be attached to the statements made by them to the police. The approach adopted by the trial magistrate in this matter, is in line with the approach of our courts when confronted with this kind of situation. In S v Mafaladiso en Andere 2003 (1) SACR 583 (SCA) [2002] 4 All SA 74 at 584 (SACR), the court held that where there were material differences between the witness's evidence and a prior statement, the task of the trial court was to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it was reliable or not and whether the truth was told, despite any shortcomings.

In S v N 1979 (4) SA 632 (O), the State witness had deviated from the sworn statement that he had made to the police. The court held that the primary task of the court is to find the truth in the interest of justice. Striving to achieve that goal may

make it necessary to determine whether the statement to the police or the evidence in court reflects the truth. In S v Mathonsi 2012 (1) SACR 335 at 345, para [44] Madondo J, with reference to section 35(3)(d) of the Constitution of the Republic of South Africa and S v Mugudu 2008 (1) SACR 71 (N) at 77, held on page 345 at para [46] that:

“Although the witness denied the truth of the facts contained in the statement, the safeguards for admitting the statement as evidence existed. The witness had made the statement under oath to the police. Also, as the declarant, be the witness, testified at the trial on the statement. He was subjected to full and effective cross-examination by both the prosecution and the defence. He was thereby afforded an opportunity to explain the inconsistencies in his prior statement and the truth of the facts contained therein. The purposes of cross-examination are to elicit evidence which supports the cross-examiner’s case and to cast doubt upon the evidence given for the opposing party. The police officer who took down the statement also testified as to the circumstances under which the statement was made and that the witness had

personal knowledge of the truth, of the facts
therein.”

I am satisfied that the trial magistrate had correctly applied the
5 principles as outlined in the authorities referred to herein
before in regard to the facts of the present case. The trial
magistrate also correctly found that he was entitled to make
‘substantive’ use of the previous inconsistent statements made
by the witnesses and to give the statements (as evidence) the
10 appropriate weight, after taking into account all the
circumstances. See S v Mathonsi *supra*, para [52].

It follows that the trial magistrate correctly evaluated and
weighed up the evidence in its totality in order to come to the
15 truth. See S v Trainer 2003 (1) SACR 35 (SCA) at 41b-c and S
v Zitha 1993 (1) SACR 718 (A) at 720i-721a. On the totality of
the evidence presented in the court *a quo*, I am satisfied that
the State had proved beyond a reasonable doubt that it was
indeed the appellant who murdered the deceased and
20 attempted to murder the others. Accordingly the appellant was
correctly convicted of the murder and the 3 counts of
attempted murder. In the premises I do not find any merit in
the appeal against the conviction and the appeal against the
conviction is dismissed.

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It is trite law that a court of appeal will only interfere with the sentence of a lower court where that court has not exercised its discretion in regard to sentence properly or judicially. In considering an appropriate sentence for the appellant in this matter the trial court took into account the appellant's personal circumstances, the gravity of the offences and the interest of the community. The trial court made a detailed and thorough assessment of the existence of substantial and compelling circumstances, in considering whether or not it could impose a lesser sentence, and in my view correctly came to the conclusion that there were no substantial and compelling circumstances present which justified the imposition of a lesser sentence to the one prescribed by the Legislature on count 1.

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It is clear that a trial court considered the element of mercy and further considered the cumulative effect of the sentences, by ordering that part of the sentences imposed on counts 2 to 4 run concurrently with the sentence in count 1. In my view the trial court adopted a balanced approach in the determination of what it thought to be an appropriate punishment, taking into account all relevant factors without over- or underemphasising any of the relevant factors that have to be taken into account in the determination of an appropriate sentence.

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The trial court correctly took into account the following aggravating factors when considering sentence:

- 5 (1) That the murder and attempted murders were committed in the context of opposing gangs fighting each other.
- (2) They were committed in circumstances where the attack was pre-planned and was characterised by
10 revenge.
- (3) Ordinary residents living in the townships such as Manenberg and other townships on the Cape Flats live in constant fear of their lives being lost due to the gang violence.
- 15 (4) Children and innocent victims, such as the deceased and Phillips, are regularly caught in the crossfire of these indiscriminate and brazen attacks by gangs, which attacks continue unabated.
- (5) Parents are scared to send their children to school
20 due to the fear that they may be injured and / or killed due to the gang violence.
- (6) The police have great difficulty in combating gang violence and their task is made more difficult when witnesses refuse to testify in these matters for fear
25 that they may be killed, resulting in low conviction

rates in matters of this nature.

(7) Appellant had previous convictions for offences containing elements of violence.

5 Violent crime of this nature is endemic in this country and in an attempt to combat this kind of crime the Legislature has provided for a prescribed minimum sentence of 15 years for a first offender who commits murder. There can be no doubt that in crimes like the present punishment and deterrence are
10 factors that stand out in determining an appropriate sentence.

I am unable to find that the sentence imposed by the trial court is so disproportionate to the nature of the offences that it can be typified as gross and thus constitutionally offensive. See S
15 v Vilakazi 2009 (1) SACR 552 (SCA) at 560. Accordingly I am not persuaded that the sentences imposed by the trial court are shocking, startling or disturbingly inappropriate. There is no basis to interfere with the magistrate's exercise of his discretion and the appeal against the sentence is accordingly
20 dismissed.

In the result I would make the following order:

THE APPEAL AGAINST THE CONVICTION AND THE
25 **SENTENCE IS DISMISSED.**

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RILEY, AJ

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I agree. The convictions and sentences of the court *a quo* are confirmed.

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GAMBLE, J

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