

SOUTH AFRICA / JUDGMENT

Mahase and Others v S (A139/2020) [2021] ZAFSHC 57 (11 March 2021)

[2021] ZAFSHC 57

COURT

Free State High Court, Bloemfontein

BEFORE

MATHEBULA, CHESIWE

CASE / FILE NUMBER

A139/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:

NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Case number: A139/2020

In the matter between:

TUMELO JOHN MAHASE

1st Appellant

SABATA SENTOEDI

2nd Appellant

NDABENI MAQOSHA

3rd Appellant

TANKISO MALGAS

4th Appellant

MOLAHLEHI PATRIC MOSIOUA

5th Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J et CHESIWE, J

HEARD ON: 08 FEBRUARY 2021

DELIVERED ON: 11 MARCH 2021

- [1] The appellants were charged with two counts; count one of murder and count two of malicious damage to property, in the Regional Court sitting in Virginia on 4 November 2019. The appellants were convicted on the charge of murder and acquitted on the charge of malicious damage to property. On 12 November 2019, appellants were sentenced to life imprisonment.
- [2] The appellants approached this court on their automatic right to appeal in terms of s 309(1) (a) of the Criminal Procedure Act 51 of 1977. The appeal lies against conviction and sentence.
- [3] The grounds of appeal are that:
1. The trial court erred in finding the state witness properly identified the appellants as the murders;
 2. The trial court erred in finding that the state had proved its case beyond reasonable doubt and erred by rejecting the appellants' case as false and improbable;
 3. The trial court erred in rejecting the alibi defense of the appellants.
- [4] Mr. Van der Merwe on behalf of the appellants in oral argument submitted that he stands by the written heads of argument and was unable to argue for any compelling and substantial circumstances, except to submit that the identification of the appellants by the state witnesses was independent and accurate.
- [5] Adv. Lencoe on behalf of the respondent submitted that the appeal against conviction and sentence must be dismissed.
- [6] Background on this matter briefly is that the appellants are members of (belong to) the Makaota gang. In the early morning of 21 October 2018, the Makaota (Gang) and Viyella gangs approached the Portuguese Gang, who were at a traditional ceremony. A fight ensued between the rival gangs. Phumlani Brian Modise (the deceased), was killed in these gang attacks. The state presented evidence of the five witnesses who are members of the Portuguese gang. The state witnesses testified about how the deceased was stabbed, kicked and hit with a panga on the head by the appellants. The state witnesses gave detailed testimony on the incident as it unfolded on the morning of 21 October 2018.

- [7] The appellants raised issue in respect of their identification by the state witnesses. Indeed, evidence on identification must be approached with caution, as the dangers of incorrect identification are well known. The attack on the deceased happened around 07h00 in the morning of 21 October 2018, to which the court found that it was broad day light. The five state witnesses knew the appellants and they have known each other over the years, as they belonged to different gangs namely, Makaota, Viyella and Portuguese, grew up with each other, played football together and are residents of the same township. The gangs have been engaged in fights over a prolonged period of time. Therefore, the appellants' identification by the five state witnesses cannot be faulted.
- [8] In *S v Mthethwa*[1], Holmes JA tabulated the factors that must be taken into consideration in the following terms:
- “...because of 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 probabilities.”*
- [9] The issue of identification of the appellants was well evaluated by the trial court. The court was alive to the fact that the evidence of the state witnesses ought to be approached with caution, for the mere fact that the court was dealing with rival gangs. Two of the state witnesses were not far from the scene and they could clearly observe how the appellants attacked the deceased. The trial court could not reject their evidence, in spite of the appellants attempt to place themselves away from the scene and denied involvement in the attack of the deceased. The trial court was well alive to the totality of the evidence by the state witnesses, as well as the evidence of the appellants.
- [10] Therefore, identification of the appellants was settled at the trial court. The trial court was satisfied with the evidence of the state witnesses and did not misdirect itself in respect of the identification of the appellants.
- [11] In *S v Francis*[2], the court said the following:
- “This court's power to interfere on appeal with the findings of fact of a trial Court are limited. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with the trial Court's evaluation of oral testimony.”*

- [12] The appeal court will only tamper with the trial court's findings were it is clearly wrong. Furthermore, an appeal court's powers to interfere with the findings of the trial court on credibility are limited. When consideration is paid to all consistencies, improbabilities and contradictions, there is no reason to doubt the correctness of the credibility findings made by the trial court. In my view, the trial court correctly convicted the appellants and there is no reason to tamper with its findings.
- [13] It is trite that the sentence of the appellants must be balanced between the interests of society, the offence and their personal circumstances. Furthermore, the appeal court will only interfere with the sentence if it is of the view that the sentence is unreasonable, unjust or is vitiated by irregularity or the trial court has misdirected itself.[3]
- [14] The trial court considered all relevant mitigating factors of the appellants and whether there were compelling and substantial circumstances to deviate from imposing the prescribed minimum sentence.[4]
- [15] The appellants brutally killed the deceased. The appellants used extremely dangerous weapons. The postmortem report gives a gruesome detail report on the injuries the deceased sustained. These injuries are corroborated by the state witnesses who testified that the appellants hit the deceased on the head repeatedly with a panga, stabbed him all over his body, in full view of many witnesses, including community members. It is no secret that these gangs have taken over the communities. This court has to, on frequent basis, deal with gang related murders. The community needs to be protected from such horrible criminal activities.
- [16] The trial court was very much aware of its responsibilities in this regard and dealt with both the aggravating and mitigating factors.

The appellants lacked remorse. The appellants have previous convictions that are of a violent nature, except appellant

three (3), but that is not an exceptional circumstance given this gruesome crime. The court correctly found that there were no

substantial and compelling circumstances that warranted the imposition of a lesser sentence than the prescribed minimum sentence

of life imprisonment.

- [17] When weighing up the mitigating factor against the aggravating circumstances, the seriousness of the offence as well as the

interests of the community, I am not persuaded that the sentence imposed is unjust. As stated above, this was a barbaric attack on the deceased. No human being should be killed or deserves to be killed, in such a horrible manner. Therefore, there is no justifiable cause for us to interfere with the sentence. The appeal against sentence should be dismissed.

[18] I therefore make the following order.

1. The appeal against both the conviction and sentence is dismissed.
2. Conviction of the trial court is confirmed.
3. The life sentence imposed by the trial court is confirmed.

S. CHESIWE, J

I CONCUR

M.A. MATHEBULA, J

On Behalf of Appellants: Adv. P.L VAN DER MERWE

Instructed by:

BLOEMFONTEIN JUSTICE CENTRE

BLOEMFONTEIN

On Behalf of Respondent: Adv. M LENCOE

Instructed by:

The Director of Public Prosecutions

[1]1972

(3) SA 766 (A)

[2] 1991

(1) SACR 198 (A)

[3] S v Pillay 1977 (4) SA 531 A at 535 e-g and S v Peters 1987 (3) SA 717 (A) at 728 B-C).

[4] S v Matyityi 2011 (1) SACR 40 SCA.

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Prepared on 11 October 2026 · Esheria