

SOUTH AFRICA / JUDGMENT

Mtshweni v S (A69/2019) [2023] ZAMPMHC 11 (17 April 2023)

[2023] ZAMPMHC 11

COURT

Middelburg High Court, Mpumalanga

BEFORE

Mtimunye, Langa

CASE / FILE NUMBER

A69/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
MPUMALANGA
DIVISION (MIDDELBURG LOCAL SEAT)
CASE
NO. A69/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

DATE: 17 April 2023

SIGNATURE:

In the matter between: SIBUSISO
PAPISA MTSHWENI
APPELLANT
And
THE
STATE
RESPONDENT

JUDGEMENT

MTIMUNYE AJ:

Introduction:

- [1] The Appellant, Mr. Mtshweni, was charged in the Regional Court sitting at Evander on three counts; namely, count 1: murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, (“the CLAA”), count 2: housebreaking with intent to rob and robbery with aggravating circumstances read with the provisions of Section 51(2) of the CLAA and count 3: possession of a firearm without a license, in contravention of Section 3 of the Firearms Control Act 60 of 2000. He was subsequently convicted of all the three charges and sentence to life imprisonment for count 1 murder, life imprisonment for housebreaking with intent to rob and robbery with aggravating circumstances on count 2 and five years’ imprisonment for count
3. The magistrate ordered the sentences to run concurrently in terms of Section 280(2) of Act 51 Of 1977. The appellant enjoyed legal representation during the trial and sentencing.
- [2] Due to the imposition of the sentence of life imprisonment by the Regional Court, the appellant has an automatic right of appeal by virtue of section 309(1) of the Criminal Procedure Act 51 of 1977 read with sections 10, 11 and 43(2) of the Judicial Matters Amendment Act 42 of 2013. The appellant now appeals against the convictions and the sentences imposed.

The Issues for

determination:

- [3] The appellant contended firstly that the trial court erred in finding that there was direct evidence that the appellant shot the deceased with an intention to kill him. Secondly, that the trial court erred in not treating the evidence of the first witness Tshepo Motloun with the necessary caution as he was a single witness.

Background facts

- [4] Most of the facts are common cause. The deceased died as a result of injuries he sustained when his spaza shop was robbed. Tshepo Motaung, an eye witness and a co-perpetrator’s evidence was that he was together with the appellant and two others on the day of the incident. They went on a drinking spree until they ran out of money. They then decided to go and rob a spaza/tuck shop. The appellant stood guard outside in possession of a firearm. The two other males broke the burglar door an, the wooden door of the spaza shop and stole various items (groceries, airtime vouchers and cash) inside. After they exited the shop, the appellant went inside and he heard two gunshots. They left and shared the spoils. It is common course that on the day of his arrest Mr. Motaung was with the appellant. The police

found some of the stolen items in his room and some in the appellants' room. The appellant pointed the firearm to the police. However, under cross examination he indicated he was the one who pointed the firearm to the police.

- [5] Jabulani Johannes Ngobeni, the owner of the property confirmed that the he also heard two gunshots and thereafter he went to investigate. He saw the deceased come towards the main house and he had gunshot injuries on the neck and leg. The police and an ambulance were summoned. The police attended the scene. Other persons recovered a cartridge inside the spaza shop and it was handed over to the police.
- [6] Constable Ntshangase testified that he and Sergeant Mashego arrested the appellant and the Tshepo (the first witness) on the street and took them to their places of residence. Tshepo pointed out the first shack that he said belongs to him, which they searched and found nothing. In the second shack which Tshepo pointed as belonging to the appellant, they found groceries scattered on the floor. Tshepo also pointed out the firearm that hidden in rubbish. The appellant was, however, not cooperative throughout.
- [7] The appellant denied that he was present during the robbery. He also denied that he was in possession of a firearm and that shot the deceased. He, however, confirmed that he was with Tshepo and one Danger when he was arrested by Constable Ntshangase. He denied that any stolen item was found in his room and alleged that he was arrested solely because he was with Tshepo.

Ad conviction:

- [8] It is trite that in every criminal matter the onus is always on the State to prove the guilt of the accused beyond reasonable doubt before a conviction can result. See *S v T* 2005 (2) SACR 318 E. An accused person bears no onus to prove his innocence. Where his version is reasonably possibly true in substance, the court must accept that version. While the accused's version cannot be accepted willy- nilly against the inherent probabilities, it also cannot be rejected merely because it is improbable. It can only be rejected if it can be said to be so improbable that it cannot reasonably possibly be true. See *S v Shackell* 2001 (4) SA 1 (SCA) at 30.
- [9] Furthermore, the appeal court is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. In this regard I proceed to refer to *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 644e-f where the court held:

"... 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".

[10] It is common cause that the appellant was convicted on the murder charge on the evidence of a single witness, Tsepo Motaung. In my view, the trial court was alive to the fact that it was dealing with the evidence of a single witness and the applicable cautionary rules were applicable. This is further clear as the trial court also correctly referred to Section 208 of the Criminal Procedure Act 51 of 1977 in concluding that it can convict on the evidence of a single competent witness. After assessing and evaluating the evidence, the

trial court in my view correctly found the evidence of Tsepo Motaung to be credible and reliable. As far as the credibility finding in respect of a single witness is concerned, the Supreme Court of Appeal held in *S v Pretorius* 2014 (2) SACR 315 (SCA) at para 30 that “It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong”.

[11] I am aware that the trial court made a factual error in the judgement by stating that Mr. Jabulani Ngobeni corroborated Mr Motaung in that he saw the accused shooting the deceased. It is clear from the evidence that Mr Ngobeni did not see the perpetrators of the crimes. He only came after hearing the shots and found the deceased already injured. This is clearly an error on the part of the Magistrate as he evidently dealt with the evidence of Tshepo Motaung regarding the shooting as evidence of a single witness. This error in any event does not materially change the findings made by the Magistrate as these were clearly based on evidence of a Tshepo Motaung who the Magistrate recognized was a single witness. However, in evaluating the evidence of Tsepo Motaung the trial court also found that it was corroborated in some respects by that of Ngobeni. For instance, the fact that Tsepo Motaung heard two gunshots was corroborated by Mr. Ngobeni who also heard two gunshots. Furthermore, the deceased also had two gunshot wounds. However, over and above this evidence the court a quo also relied on the forensic or ballistic evidence. It accepted the so-called chain evidence regarding the ballistic report and found that evidence that the projectile found inside the spaza/tuck shop and the fired bullet found in the deceased's body were positively found to have been fired from the same firearm which was found by the police in the shack where the appellant was

staying. The trial court correctly found that this uncontroverted evidence also positively linked the appellant to the crimes.

[12] I am therefore satisfied that from the Magistrate's reasoning in the judgment, the conviction of the appellant in respect of the charges is above board. The trial court's findings of fact and credibility are not irregular or patently wrong to justify interference therewith by this court. The trial court correctly found that the State has proven the guilt of the appellant beyond reasonable doubt. The appeal on the convictions therefore stands to be upheld.

Ad sentence:

[13] The appellant contended that the sentence imposed by the trial court was disturbingly inappropriate and induced a sense of shock taking into account his personal circumstances. The mitigating factors recorded are that the appellant was 23 years old when he committed the robbery and 29 years old when he was sentenced. He has one minor child. He completed grade 12. He was employed by his brother earning R2 500 00 per month before his arrest. He was in detention for approximately 6 years.

[14] It is trite that punishment is pre-eminently a matter for the trial court's discretion. *S v Rabie* 1975] 4 All SA 723 (A); 1975

(4) SA 855 (A) at 857D-E. The power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Bogaards*

[2012] ZACC 23; 2012 BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41, the Constitutional Court stated as follows:

‘It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.’

[15] The murder the appellant has been convicted of falls within the ambit of section 51(1) read with Part 1(a) of Schedule 2 of the CLAA, that is where the death of victim was caused while committing robbery with aggravating circumstances (as defined in Schedule 1 of CPA) or by person/group/syndicate acting in execution/furtherance of common purpose/ conspiracy. The prescribed minimum sentence is life imprisonment. However, in terms of section 51(3) (a) of the CLAA, the court may deviate from the imposition of the prescribed minimum sentence if it finds that there are substantial and compelling circumstances justifying imposition of a lesser sentence.

[16]. The magistrate correctly found that the murder was pre-meditated. In *S v Mahlangu and Others* 2012 (2) SACR 373 GSJ), Satchwell J held that

“murder, where it is committed in the course of a robbery, which is robbery with aggravating circumstance, or where it is planned or premeditated murder, or where the murder is committed by a group of persons acting together in the course of a common purpose or conspiracy, is a crime which the Criminal Law Amendment Act 105 of 1997 (the Act) has identified as a crime attracting a prescribed minimum sentence of life imprisonment”.

[17] In this case the trial court found that on the totality of the evidence before it, there are no substantial and compelling circumstances justifying deviation from the imposition of the minimum sentence. The court further referred to *S v Malgas* 2001 (1) SACR 469 SCA where the court stated that the sentences specified in the CLAA are not to be departed from lightly or for flimsy reasons. It is clear that stern sentences have been prescribed for this type of murder.

[18] In *S v Mthembu* 2012

- (1) SACR 517 (SCA) paras 5-13 and 18 paying particular attention to the provisions of s 51 of the CLAA, the Supreme Court of Appeal stated the following:

‘Thus far our courts have simply accepted that if, upon an evaluation of the cumulative effect of all the circumstances of a case, a higher sentence was called for, there were no constraints on its discretion to impose a sentence far in excess of the ordained minimum (Director of Public Prosecutions, Transvaal v Venter [2008] ZASCA 76; 2009

- (1) SACR 165 (SCA) ([2008] 4 All SA 132) para 19)...

And at para 18 it was there pronounced:

...After all, any sentence imposed, like any other conclusion, should be properly motivated (S v Maake 2011 (1) SACR 263 (SCA)). And we should not lose from sight that our appellate courts have, in terms of long standing practice, reserved for themselves the right to interfere where a sentence has been vitiated by a material misdirection or where it is shocking or startlingly inappropriate...a

‘vigilant examination of the relevant circumstances’ is required...’

- [19] It is clear in this case that the court a quo considered all the relevant factors placed before it for sentencing including the appellant’s personal circumstances. I am therefore satisfied that the trial court correctly concluded that there were no substantial and compelling circumstances. In my view the appellant’s personal circumstances do not constitute such circumstances, even if taken cumulatively. Given the circumstances of this case the contention that the imposed sentence is disproportionate cannot be sustained. Having found no substantial and compelling circumstances the provisions of section 51 (1) comes into play.
- [20] I am of the considered view that the sentence of life imprisonment imposed in this matter on the count of murder is competent and appropriate as it is based on sound premise. Having regard to all the serious aggravating features of this case as well as the finding by the court that there are no substantial and compelling circumstances, the trial court was correct in imposing the sentence that it did. The prescribed minimum sentence of life imprisonment would best serve all the objectives of punishment. There is therefore no justification for deviation from the prescribed sentence.
- [21] However, regarding count 2 of house breaking and robbery with aggravated circumstances the sentence of life imprisonment imposed by the Magistrate appears to be incompetent even though there were no submissions in this regard. The appellant was charged with housebreaking with intent to rob and robbery with aggravating circumstances clearly read with the provisions of Section 51(2) of CLAA. The magistrate correctly explained the minimum sentence of 15 years imprisonment applicable thereto unless substantial and compelling circumstances are present. In respect of the conviction the Magistrate correctly found that the appellant acted in common purpose with his co-perpetrators in the commission of the robbery. The appellant stood guard at the door whilst

the others broke in and took items inside. There is therefore no reason to criticize the Magistrate conclusion that the appellant is guilty on count 2 as well. It is, however, the sentence which is problematic. There appears to be no legal justification for the imposition of the sentence of life imprisonment which is clearly an incompetent sentence in the circumstances. I am therefore, of the view that the sentence on this count is inappropriate and warrants interference therewith.

[22] As already stated in the preceding paragraphs, no substantial and compelling circumstances could be found in this case justifying

deviation by the trial court from the imposition of the minimum sentences. The appellant was not a first offender as he has two

previous convictions relevant specifically to count 2. In 2005 he was convicted of housebreaking with intent to steal and theft and sentenced to 18 months imprisonment suspended for 5 years. He was also convicted of robbery in 2007 and sentenced to six months

imprisonment.

Conclusion

[23] In conclusion I find that there are no grounds for this court to interfere with the decision of the court a quo in respect of both the conviction and sentence with regard to count 1 of murder. The appeal therefore stands to fail in respect of both. However, the sentence on count 2, housebreaking with intent to rob and robbery is incompetent and should therefore be set aside and substituted with an appropriate sentence. Having considered all the relevant circumstances, in my view a sentence of 20 years imprisonment would be appropriate in respect of count 2.

Order

[24] In the result the following order is made:

1. The appeal in respect of the conviction and sentence on the count of murder is Dismissed and the conviction and sentence are confirmed;
2. The appeal in respect of the sentence on count 2 of housebreaking with intent to rob and robbery is upheld and the sentence is set aside and substituted with a sentence of 20 years imprisonment. The sentence is ante-dated to 21 August 2017.
3. The order by the trial court for the sentences in count 2 and 3 to run concurrently with the sentence in count 1 in terms of Section 280(2) of the Criminal Procedure Act 51 of 1977 is confirmed.

MTIMUNYE J

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

LANGA J

JUDGE OF THE HIGH COURT

Date of hearing: 10 March 2023 Date of judgement: 17 April 2023 For the Appellant: Ms. N.G Marimo, Legal Aid South Africa, Nelspruit. Email: NomsaM1@legal-aid.co.za For the Respondent: Advocate D. Rowles, Director of Public Prosecutions, Middelburg. Email: DRowles@npa.gov.za

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