REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A549/10
DATE: 2011/07/28

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

28/7/2011
DATE

R Mahalelo
SIGNATURE

In the matter between:

ALI BONGINKOSI CHAUKE Appellant

and

THE STATE Respondent

JUDGMENT

MAHALELO, AJ:

[1] The appellant was arraigned before the Regional Magistrate sitting with two assessors on one count of murder read with the provisions of Section 51(2) of Act 105 of 1997. The appellant was legally represented

throughout the trial. He pleaded not guilty. However, at the conclusion of the trial, he was convicted and sentenced to 20 years imprisonment.

[2] The charge of murder arose from a shooting incident which occurred on the evening of 3 December 2008 at a tavern in Soweto which resulted in the death of Thirani Shibambo (the deceased).

[3] With the leave of the Court *a quo*, the appellant appeals against conviction and sentence.

[4] The appeal against conviction is based on the following grounds:

4.1 the proceedings were irregular in that the record does not reflect that the two assessors were sworn-in, therefore, no proper forum was constituted wherein the appellant was tried;

4.2 the evidence of the state witnesses is unreliable and is riddled with contradictions to the extent that it does not prove the appellant's guilt beyond reasonable doubt.

Ad Conviction:

[5] Section 93*ter* of the Magistrate's Court Act 32 of 1944 prescribes a procedure to be followed where a trial court makes use of assessors. Section 5 thereof provides that:

> "(5) Every assessor shall, upon registration on the roll of assessors referred to in subsection (1), in writing take an oath or make affirmation subscribed by him or her before the magistrate of the district concerned in the form set out below, ..."

Section 145 (3) of the Criminal Procedure Act No 51 of 1977 provides:

> "No assessor shall hear any evidence unless he first takes an oath or affirmation administered by the presiding judge that he will on the evidence placed before him give a true verdict upon the issues tried."

[6] When this appeal first came before this court, the magistrate's response was sought pertaining to the issue raised by the appellant in paragraph 4.1 above. The magistrate responded that the two assessors who sat with him in this matter were part of his regular roll of assessors and that they were duly sworn in. The magistrate's response forms part of the record. The fact that the assessors were sworn in was not controverted by the appellant. The explanation furnished by the magistrate is reasonable and acceptable.

[7] It is trite that the State bears the onus to prove the accused guilt beyond a reasonable doubt. It is also trite that when evaluating the evidence the court must consider the totality of the evidence in order to determine if the guilt of the accused has been shown beyond a reasonable doubt. The record of proceedings in the court *a quo* reflects that the trial court meticulously analysed all the evidence led, and was alive to the need for reliability of the State's evidence, especially in relation to identification. The State relied on the evidence of two eye witnesses. In the well-known case of *S v Mthwetwa* 1972 (3) SA 766 (A) the principles regarding identification were set out on page 768 as follows:

> *"Because of the 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 the 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 the probabilities ..."*

[8] In this regard the Court *a quo* made a finding that the two state witnesses had sufficient opportunity to observe the appellant. It cannot be disputed, as the trial court found, that the two state witnesses, Mashimbe and Mati, were well acquainted with the appellant. The evidence presented indicated that they have known each other for a

considerable period of time and therefore not strangers to each other. Mati testified that he knew the appellant very well because they both stayed in the same area and he knew his place of residence. Furthermore, Mati had no problems with the appellant and had no reason to falsely implicate him as the person who fired the shot that killed the deceased. Scrutiny of Mati's evidence and the manner in which he performed under cross-examination, justified the learned magistrate in accepting his evidence as reliable. Mashimbe also testified that he knew the appellant for more than 10 years and that he saw him quite often at the same tavern. He corroborated the evidence of Mati regarding who the shooter was. The circumstances under which the appellant was identified are, in my view, satisfactory.

[9] As regards the contradictions in the evidence of the two state witnesses, the appellant argued that there was a difference between the two regarding whether the appellant was in the company of his girlfriend at the tavern or not, and the time they arrived and left the tavern. The argument raised by the appellant in this regard in my view has no merit. I find that the contradictions are not material. In *S v Mkohle* 1990 (1) SACR 95 (A) and *Venter v S* 1972 (1) 51 (TPD) the court held that: "contradictions *per se* do not lead to a rejection of a witness' testimony. They may simply be indicative of an error. Not every error made by a witness affects his credibility, the trier of facts has to make an evaluation, taking into account such matters as to their nature, number and whether there is any explanation offered for the contradictions." The trial court

found that these contradictions were immaterial. No fault can be found with the conclusion reached by the trial court.

[10] A court may only reject the version of the accused if it is satisfied that in the light of all the evidence the version is so untrue that it cannot be reasonably possibly true. In my view, the trial court was justified in rejecting the appellant's alibi defence as false beyond reasonable doubt.

[11] I have read the judgment of the learned magistrate and I have carefully analysed his approach to the totality of the evidence and his application of the legal principles. I am satisfied that he has not misdirected himself. In the circumstances, I have no hesitation in concluding that the conviction of the appellant for murder is justified and in accordance with justice.

Ad Sentence:

[12] The appeal against sentence is based on the following grounds:

12.1 the Court *a quo* erred in not taking into account the fact that at the age of 34, the appellant was still a first offender;

12.2 the trial court imposed a sentence of 20 years' direct imprisonment without elucidating reasons that justified the

imposition of sentence above the prescribed minimum sentence of 15 years.

[13] It is trite that sentencing is pre-eminently a matter falling within the discretion of the trial court. The recognised grounds for interference by the court of appeal were listed in *S v Romer* 2011 (2) SACR 153 (SCA) at [22] as being where the sentence is:

> "*(a) disturbingly inappropriate;*
>
> *(b) so totally out of proportion to the magnitude of the offence;*
>
> *(c) sufficiently disparate;*
>
> *(d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and*
>
> *(e) is otherwise such that no reasonable court would have imposed it.*"

The issue to be determined is whether the trial court exercised its sentencing discretion judiciously. The trial court took into consideration the serious nature of the offence of Murder, the interest of the society and carefully balanced them against the appellant's personal circumstances. The appellant was 34 years at the time of sentencing and a first offender. In my view, there is nothing extra ordinary in his personal circumstances. The appellant did not take responsibility of his actions. The trial court found that there are no compelling and substantial circumstances. I find no fault with that finding.

[14] Murder is a serious offence. It takes away one's life guaranteed by the Constitution of South Africa. It is very prevalent in the jurisdiction of the court. It is an offence which involves violence as displayed in the present case. A weapon in the form of a fire arm was used by the appellant to kill the deceased. There is no evidence to suggest that the sentence is vitiated by irregularity and the sentence is not shockingly disproportionate in the circumstances of the case. Having regard to all the conspectus of the matter I do not find any misdirection in the manner in which the trial court considered sentence. There is no misdirection entitling this Court to interfere with the sentence imposed.

[15] The appeal against conviction and sentence must fail.

[16] Accordingly I propose that the following order be made:

16.1 The appeal against conviction and sentence is dismissed.

B MAHALELO
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 28 JULY 2011

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