REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

22-03-2017 .....
DATE SIGNATURE

CASE NO: A332/2016

In the matter between:

PIETERSE, PHEHELLO JACOB **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

SUTHERLAND J

INTRODUCTION:

[1] The appellant, Phehello Pieterse was convicted of murder. He was found to have stabbled the deceased once in the neck. He was sentenced to 19 years' imprisonment. On petition, he was granted leave to appeal against the sentence.

THE CONVICTION

[2] Two preliminary points were, nevertheless, raised in the appeal concerning the conviction *per se*.

[3] First, in counsel's heads of argument, it was contended that it was unclear whether the appellant had been properly warned of the implications of section 51 of the General Law Amendment Act 105 of 1997, read with part II of schedule 2, that he was at risk of imprisonment upon conviction of a minimum prescribed sentence of 15 years. This contention was based on the absence of that part of the transcription during which such a warning would have been given. However, the judgment of the magistrate mentions in the narrative of the trial that such warning was given and understood. Moreover, annexure 'D' in the record is a document dated 21 February 2012 in which the presiding magistrate records that the warning was given. In addition, the appellant was represented throughout the proceedings. In the absence of sworn evidence by the appellant or his legal representative that a warning was not administered, that the judgment falsely states that

it was, and that annexure 'D' evidences a falsehood, it seems to me that an argument that no warning was given could not be sustained. The argument advanced on appeal is less than that; the proposition is that it is merely unclear. In the context of what evidence that there is of such a warning having been given, the probabilities of it having not been given are nil. We are satisfied that despite the absence of a transcript recording the actual exchange, which is indeed regrettable, there is no genuine likelihood of it having not been given and therefore no real risk of the interests of justice being undermined. The point was not persisted with in argument.

[4] The second argument related to whether the conviction was safe. In this regard, the appeal court was invited to exercise its inherent jurisdiction to determine whether justice had failed. The court has indeed an inherent power to prevent injustice and to regulate its own process. This scope of this power must however not be exaggerated. There is much to be said for an appeal court seized of an appeal on sentence only to satisfy itself that the conviction is safe, but that approach, which might be more properly located within the realm of judicial ethics, rather than be understood as an example of a procedural duty, strictly construed, cannot be elided into a power to intervene without more. No court can pronounce on an issue not before it. The invitation extended to the court in this matter is not novel, and as in the past, is unsubstantiated by any authorities to support the proposition. The very issue was raised in *State v Van der Merwe 2009 (1) SACR 673 (C).* Tt was there held by a full bench that it was not open to an appeal court to interfere with a suspect conviction when that question was not before it. The only way in which the question of either conviction or sentence imposed by a magistrates' court

can come before an appeal court is upon leave being granted, or if leave is refused, on petition to the high court exercising appeal jurisdiction, and if leave is refused by that court, on petition to the Supreme Court of appeal. Logically, the constitutional Court must have the last word. This finding in Van der Merwe is premised on the paramountcy in these matters of procedures prescribed in sections 309(1), 309 B, and 309C of the Criminal Procedure Act 51 of 1977, which regulate access to an appeal court. As the whole of the procedure to access an appeal court on the question of conviction and of sentence is regulated by the statute, there is no room for nor any need to invoke the courts inherent power in such matters. (see too: *State v Sefatsa 1989 (1) SA 821 (AD) at 834E*) The proper approach is to defer the hearing on the appeal against sentence to afford the appellant an opportunity to obtain leave from the appropriate court in the hierarchy.

[5] The case advanced on behalf of the appellant is based on two points. First, a major conflict in the evidence about where and how the stabbing of the deceased occurred, and second, whether the appellant's version that it was not he, but his companion, Olifant that stabbed the deceased was properly disbelieved.

[6] The killing occurred on 18 February 2012. Initially the appellant was charged as accused no 2 with Moithene Olifant. Olifant was in hospital during the early remands; it emerged in evidence that he had been attacked by a mob in retaliation for the attack on the deceased. The two accused were in custody. It appears that the trial may have started on 26 February 2013, a year after the incident, or if not so, it began on 4 April 2013.

[7] The charges against Olifant were withdrawn at some stage prior to evidence being led. The J15 form states '5 February 2014' but that date must be wrong as the trial was completed on that date, and Olifant was not on trial. The appellant was in custody for the whole duration of the trial having been arrested the day after the incident.

[8] Only two people testified. The evidence marshalled by the state relied on the testimony of Joseph Tsweni. He was at a tavern, drinking and playing pool. The appellant had recently become known to him as they worked at the same place. He saw the appellant and Olifant, who he had known a long time, seated at a table. At about 18h00 to 19h00, the deceased entered the tavern and was at the juke box. He saw Olifant give the appellant a knife (an allegation mentioned first in cross examination and omitted from his police statement) and then get up from the table and walk to the doorway where the deceased was standing. He then stabbed him once in the neck, after which the appellant returned to where he and Olifant were seated. The deceased, mortally wounded ran outside. Shortly thereafter a mob entered the tavern and hauled Olifant outside where he was laid beside the prone deceased and assaulted.

[9] Why did this happen? Tsweni infers that this incident was set in motion by Olifant, earlier on, suggesting to the deceased's girlfriend that they have sex. The deceased was angered by this. Tsweni claims to have witnessed Olifant speak to the girlfriend in the deceased's presence. Later in his evidence he said Olifant and one 'Zigs' who was with

Olifant and the appellant at some stages, was outside when the deceased entered the tavern.

[10] The appellant's version was that the affair began when Zigs, not Olifant, spoke to the girlfriend of the deceased. This was about 19h00. An argument ensued. The appellant and Olifant intervened to stop it escalating. Later, the deceased came into the tavern and called Olifant. They went outside. The next thing to occur was a commotion from outside. The appellant saw Olifant re-enter the tavern, knife in hand. Olifant said he stabled the deceased. Tsweni, who was inside the tavern during these events, then went outside and never returned. The appellant's further evidence is incoherent. He says he went off to the market to buy cigarettes (when in the sequence of events is unclear) could not find any and when he returned to the tavern, a mob was pelting it with stones. He also relates being seen at the market by the deceased's friends and chased. To add to the confusion, he relates how the tavern owner expelled Olifant and him because of the stone throwing. He refers to a fight at about 20h00, but what component of the events he means is obscure; the fight was between Zigs and the deceased (does this mean the initial altercation?) and it happened before he went for cigarettes. On his return to the tavern he related the pursuit by the deceased's friends to Olifant. Upon hearing this account, Olifant said he would stab the deceased (who, ostensibly, was not with the 'friends' in the pursuit of the appellant).

[11] The taking of the appellant's evidence commenced on 18 September and was resumed on 3 February 2014, three and a half months later. Upon resumption, he now said he saw the stabbing occur just outside of the doorway of the tavern. He was behind Olifant when he did so, and he then ran away. The cross examination took place on 3 February 2014. His account did not improve. It was now said the stone throwing happened before the stabbing and was somehow a precipitating cause of the stabbing. He was tackled on his evidence about being told by Olifant that he had stabbed the deceased which did not accord with his more recent account of seeing it. Bizzarely, he said that he did not know who was stabbed and Olilfant had to inform him, because of the absence of light at the doorway. He now conceded that Olifant handed him a knife, but that was afterwards and Olifant asked him to hide it. It was when they both tried to run off, the mob caught Olifant. He now also denied returning to the tavern, but also says be changed his clothing and then returned, in the expectation he would not be recognised.

[12] The upshot is that the appellant was terrible witness, and his account was rightly rejected. The sole rationale offered for Tsweni falsely implicating him was that Tsweni is an old friend of Olifant and was protecting him. That is a danger that needed to be assessed. However, on a holistic conspectus of the evidence was correctly not taken as displacing the account given.

[13] An exceptional additional event occurred in the trial. The statement of Nomwe Gama, who had died before being able to render her evidence was handed in by consent

at the instance of the defence. The statement was attested on 18 February 2012 at 23h23, ie hours after the killing. She said she was a vendor in the vicinity of the tavern. She saw a group of men arguing next to the tavern. She saw one man take out a knife and stab the deceased, her cousin. The assailant ran into the tavern. She sounded the alarm, and a mob went into and attacked 'the suspect'. She concerned herself with rendering aid to the deceased, and relates no more about the critical events.

[14] Can this untested testimony influence the outcome of the case? The incident is said to have happened next to the tavern. This does not mean that the evidence that it happened at the doorway is contradicted. She does not identify the 'suspect' and it is not an inference that can be made from her statement that she could have identified anyone. Noone from the crowd of men, apparently in proximity to the argument, testified. The targeting of Olifant who must have been the 'suspect' she cryptically alludes to is explained, on the probabilities, by the encounter with the girlfriend. In this respect, the appellant's evidence is contradicted that it was zigs who affronted her or the deceased.

[15] In our view, the conclusions reached by the court *a quo* on the conviction are not seriously in doubt. No failure of justice is apparent. Accordingly, no need arises to defer the hearing on the sentence or to facilitate a further attempt to obtain leave against the conviction.

THE SENTENCE

[16] The judgment on sentence says very little.

[17] The magistrate considered the question of premeditation. This was premised on the notion that he was handed a knife and went over to the deceased to stab. That is an aspect correctly addressed. However, there was no plan to kill the deceased, rather the episode is yet one more wholly stupid, irresponsible act by a young man over a triviality. The act was not a reflex action, but it seems to me to be plainly an impulsive act carried out in the heat of the moment.

[18] The remarks of the magistrate that seek to draw inferences from the wound that was inflicted are unpersuasive. The knife penetrated the lung. The notion that this means it was a 'hard' stabbing or that anything is to be inferred from a 'hard' stabbing' is obscure. No evidence was led to suggest that a stab in the neck which penetrates the lung implies any particular force. The neck is, self-evidently, a vulnerable spot.

[19] In such circumstances, the murder was not 'planned or premediated'. Indeed, whether there was *dolus directus* by the appellant was not explored at all. The evidence such as it is, in our view, establishes no more than a reckless assault and the intention thus proven is *dolus evenualis*. Accordingly, the finding is a misdirection.

[20] As regards factors which might serve as substantial or compelling reasons not to apply the prescribed sentence regime, the appellant's age, ie 20 years, at the time of the commission of the offence is mentioned. He spent two years in custody awaiting trial. He had been working as a painter.

[21] Absent entirely is an assessment of the role of intoxication in the whole affair. That liquor or drugs may have been an influence is not improbable, but for sound policy reasons that cannot be allowed to diminish culpability. The question of intoxication was raised in the appeal. In my view, the role that liquor played, if at all, having not been explored in the trial, cannot be now relied on for sentencing purposes, even if policy reasons did not temper the weight to be attached thereto.

[22] The appropriate point of departure, is the 15 year minimum sentence, making allowance for the two years in custody awaiting trial. That experience is notoriously harsh. Moreover, the immaturity of a 20 year-old must be seriously weighed. This 20 year-old had held down a job. He supported a mother and three siblings. This factor points way from a feral character. Weighed together, I am of the view that substantial circumstances exist to impose a sentence less than the prescribed minimum.

[23] In my view a term of 10 years is appropriate.