IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓
Date: ***6th June 2017*** Signature:

CASE NO: A323/2016

COURT *A QUO* CASE NO: SS55/2013

DPP REF NO: JPV 2012/297

DATE: 6th June 2017

In the matter between:

LOUW, NIELTJIE RUNIEL First Appellant

VAN WYK, SHERWIN MARCUS Second Appellant

and

THE STATE Respondent

JUDGMENT

ADAMS J:

[1]. This is a Full Court appeal by the first and second appellants against their convictions and sentences. The two appellants were respectively accused 1 and 2 in the court *a quo*, being the Gauteng Local Division of the High Court (Naidoo AJ) where they were convicted of murder on the 21st August 2013. On the 22nd August 2013 both appellants were each sentenced to life imprisonment on the murder charge. With leave of the court *a quo* the appellants appeal to this court against their convictions and the sentences imposed.

[2]. This appeal principally turns on the reliability of the evidence, which in the main was of a circumstantial nature, identifying the first and second appellants as the persons who shot and killed the deceased in broad daylight on Monday, the 16th July 2012, at about midday. There is also an issue relating to the admissibility of an extracurial statement by the second appellant in the absence of a *'trial – within – a – trial'.*

[3]. In the trial the evidence of the state witnesses, none of whom actually witnessed the murder itself, was circumstantial in nature and related to events on the day of the incident. The evidence on behalf of the state, succinctly summarised, was as follows.

[4]. Shortly before midday on Monday, the 16th July 2012, the first state witness, Elfreda January *('Elfreda')*, the aunt of the deceased, was at home alone, when the second appellant arrived there and enquired from her about the whereabouts of the deceased. At that stage, the deceased and Elfreda were two of the people living at this house, which was described by Elfreda as the *'family home'.* Elfreda explained to the second appellant that she did not know where the deceased was, whereupon he

indicated that he would go looking for him and left. Elfreda thereafter took a bath. After she was done bathing, she was sitting watching TV and listening to music at the same time, when she heard two gunshots. Immediately thereafter she heard the sound of footsteps of persons running out of the yard. She thereupon went to their backyard to investigate and that was when she discovered the deceased lying on the ground with a gaping wound in his head. She thereupon returned to the front of the yard and shouted for assistance. The deceased succumbed to his injuries and was certified dead on the scene. Elfreda confirmed that she knew the second appellant at the time of the murder, and she was adamant that he was the one who came looking for the deceased earlier that morning. She also confirmed that the deceased and the second appellant were *'sort of friends'* who apparently used to do drugs and smoked pipe together. She also confirmed that the first appellant was known to her at the relevant time. She knew him from their school days.

[5]. The second state witness, Darrol Commody *('Darrol')*, the nephew of the deceased, was the second person to arrive on the scene after the shots had been fired. Prior to that he had been playing pool at the house next to the address where the deceased was shot. At about 11H10 on that morning he had noticed the two appellants, in each other's company, walking past this house where he, Darrol, was playing a game of pool at the neighbouring house. Thirty minutes later he again saw them pass the pool place, this time walking in the opposite direction. The second time that Darrol saw them was shortly after he had heard the gunshots being fired. The gunshots sounded like they were coming from the house where Elfreda was staying. When they were walking past him, the second appellant was busy putting on the cap of his *'hoody'*, and when they saw that Darrol had noticed them, they started walking faster. Darrol also confirmed that he knew both the appellants from before the date of the incident in question. He had known the first appellant for a longer period. As he put it: *'I grew up in front of the first appellant'*. The second appellant,

who, according to Darrol, was the cousin of the deceased, he had known for a period of approximately 2 years prior to the shooting. He also testified that there was seemingly no relationship between the deceased and the first appellant. He was adamant that the persons he saw passing him on these two occasions on Monday, the 16th July 2012, were the appellants, because, as he put it, he saw their faces. At some point whilst they were hurrying past him the second time, he heard Elfreda screaming whereupon the appellants started running. He then went to the back of the yard and found the deceased lying there.

[6]. The third state witness was a Captain Davids, who gave evidence concerning a statement made by the second appellant which implicated both the appellants in the murder of the deceased. The court *a quo* had ruled against a *'trial – within – a – trial'* despite the fact that the second appellant had disavowed and disowned the statement. In the end the statement was accepted by the court *a quo* and admitted into evidence. I will return to this statement later on in the judgment as it was submitted on behalf of the appellants that, in the absence of a *'trial – within – a – trial'*, the court *a quo* should not have admitted the statement.

[7]. The evidence of the fourth state witness, Mietha Commody *('Mietha'),* the aunt of the deceased, also placed the two appellants at the scene of the crime when it was committed. She testified that on the morning of the 16th July 2012, shortly before midday, she was standing at the gate to her yard, which is along the same street and about seven houses from the house where the deceased was shot. At some point she noticed the two appellants walking past her house whilst she was standing in front of the gate to her yard. At that stage, they were on their way in the direction away from what she described as their family home, which is the residence where the deceased was shot. Shortly thereafter they again came walking past her in the opposite direction, except that at that time

they were then in the company of the deceased. She called the deceased, but he gestured to her that he would speak to her on his return. The two appellants, whom she referred to as *'Neiltjie'* and *'Sherwin'*, then had a short discussion with her, whereafter they proceeded on their way to *'their family home'*, meaning the house where the shooting took place, with the deceased in tow. Thereafter she went back into her house. She also confirmed that prior to the incident in question both the appellants were well known to her. She puts it thus: *'These two children grew up in front of me'.* Shortly thereafter Elfreda called her to the family home. When she got there, she found the deceased in the back yard. It was a short period of time between when she saw the deceased in the company of the two appellants and when she saw him lying in the back yard. Towards the end of her cross – examination, in response to a proposition by Counsel for the appellants that it is possible that the deceased could have been killed by someone else, Mietha said that it could not have been any one other the appellants because there was no one else that went into the yard where the deceased was shot.

[8]. As I alluded to above, Captain Dino Davids of the Primrose Detectives Branch of the South African Police Services took down a statement by the second appellant, which implicated both him and the first appellant in the commission of the murder of the deceased. The appellants were arrested on the 8th October 2012, that is just under three months after the murder, and on the same day of their arrest the second appellant was interviewed by Captain Davids and allegedly made the statement incriminating them in the commission of the crime. It was alleged by the State that the second appellant's constitutional rights were explained to him and that the statement was freely and voluntarily made by him. The second appellant however denied that the statement was made at all. He in fact denied that it was his signature on the statement. The court a quo was of the view that whether the first appellant made the statement or not was a credibility issue, and therefore a *'trial – within – a – trial'* was not called for. This, we

believe, was a misdirection on the part of the trial Judge. The import of this statement was that the second appellant placed himself, as well as the first appellant, on the scene of the shooting. The statement was inculpatory relative to both the first and the second appellants.

SHOULD THE STATEMENT HAVE BEEN ADMITTED?

[9]. In the matter of *Mhlongo v S; Nkosi v S,* [2015] ZACC 19, the Constitutional Court held that the interpretation adopted in *S v Ndhlovu and Others*, [2002] ZASCA 70; 2002 (2) SACR 325 (SCA) *('Ndhlovu'),* that extra-curial admissions are admissible against co-accused in terms of section 3(1)(c) of the Evidence Amendment Act, creates a differentiation that unjustifiably limits the section 9(1) right of an accused implicated by such statements. The court also held that the pre-Ndhlovu common law position that extra curial confessions and admissions by an accused are inadmissible against co accused must be restored.

[10]. This means that, irrespective of whether the statement by the second appellants constituted a confession or an admission, the court *a quo* ought not to have admitted same against the first appellant and its contents were therefore inadmissible.

[11]. In any event, the mere fact that the second appellant disowned the statement required that a *'trial – within – a – trial'* be conducted. The Judge *a quo's* reasoning that the fact that the second appellant disputed that he made the statement means that it could be admitted as hearsay evidence subject to a credibility finding, is not sustainable. The second appellant had throughout the trial maintained that he did not make or sign the statement. There were also claims by the second appellant that at the

time he supposedly deposed to the statement, he had been assaulted and threatened. This in itself would have called for a *'trial – within – a – trial'*.

[12]. In that regard, we have had regard to the principles enunciated by Streicher JA in *Director of Public Prosecutions, Transvaal v Viljoen*, 2005 (1) SACR 505 (SCA). At p518 the court has the following to say in answer to the question whether the Judge *a quo* was correct in holding that when the admissibility of a confession is challenged on the basis of an alleged violation of fundamental rights disputed by the State the matter cannot and should not be resolved by way of a *trial-within-a-trial* but should be dealt with before embarking on a *trial-within-a-trial* in order to determine whether the confession had been made freely and voluntarily:

> *'[35] In terms of s 35(1)(a), (b) and (c) of the Constitution a person arrested for allegedly having committed an offence has the right to remain silent, the right to be informed promptly of the right to remain silent and of the consequences of not remaining silent and the right not to be compelled to make any confession or admission that can be used in evidence against him. In terms of s 35(2)(b) and (c) a detained person has the right to choose and consult with a legal practitioner, the right to be informed of this right promptly and the right to have a legal practitioner assigned to him by the State and at State expense if substantial justice would otherwise result and the right to be informed of this right promptly.*
>
> *[36] Evidence obtained in a manner that violates any of those rights must, in terms of s 35(5), be excluded if the admission of that evidence would render the trial unfair or be detrimental to the administration of justice.*
>
> *[37] It follows that if the admissibility of a confession is contested on the basis of a violation of any of those rights two questions arise. The one is whether the alleged violation occurred and the other is whether the*

admission of the confession would, as a result of the violation, render the trial unfair or be detrimental to the administration of justice. Whether that would be the case is a factual issue which has to be decided upon the facts of each case. In this regard Kriegler J said in Key v Attorney-General, Cape Provincial Division, and Another, *1996 (2) SACR 113 (CC) (1996 (4) SA 187; 1996 (6) BCLR 788) in para [13] at 121a - b (SACR) and 196B (SA):*

> 'At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[38] In the present case the facts were not common cause and the dispute in this regard had to be resolved before a ruling could be given as to the admissibility of the confession. In order to resolve the dispute the parties had to be given an opportunity to adduce such evidence as they wished to adduce in respect of the factual issues. In these circumstances the Judge a quo's view that the factual dispute could not be resolved by way of a trial-within-a-trial but nevertheless had to be decided there and then makes no sense.

[39] The issue arose during the course of a criminal trial and had to be dealt with in terms of the provisions of the Criminal Procedure Act, which prescribes the manner in which evidence is to be adduced. There was, therefore, at that stage, only one way to resolve the factual dispute and that was by way of a trial-within-a-trial. A trial-within-a-trial is, as the phrase indicates, a trial held while the main trial is in progress in order to determine a factual issue separately from the main issues. Such a procedure is not unfair to an accused. On the contrary, it is a procedure that evolved in the interests of justice and in fairness to the accused.'

[13]. The Judiciary has been accorded the means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason, the second appellant should have been able by his own testimony or by other means to challenge the voluntary character of the tendered statement, and should have felt free to do so.

[14]. In *S v De Vries*, 1989 (1) SA 228 (A) at 233H – I, Nicholas AJA, said:

> *'It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. . . . In South Africa (the enquiry) is made at a so-called* "trial within the trial". *Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of guilt. (See* R v Dunga, *1934 AD 223 at 226.)'*

[15]. The considerations which require that a *trial-within-a-trial* be held to determine whether a confession had been made voluntarily apply with equal force when the admissibility of a confession is disputed on the ground that it had been obtained in violation of other fundamental rights of

the accused and when the relevant facts are not common cause between the parties.

[16]. In casu the Judge *a quo* did not consider it appropriate or necessary to determine the issue as to whether the second appellant acted freely and voluntarily or whether he in fact made the statement. She held that these issues related to aspects of credibility forming part and parcel of the assessment of the facts in the matter.

[17]. For the above reasons we are of the view that the Judge *a quo* erred in holding that when the admissibility of a confession is challenged on the basis of a denial that the confession was in fact made by the second appellant the matter cannot and should not be resolved by way of a *trial-within-a-trial*. She erred, in particular, in holding that the dispute should be dealt with without embarking on a *trial-within-a-trial* in order to determine whether the confession had in fact been made and if so whether it was made freely and voluntarily.

[18]. We are accordingly of the view that, without a *'trial–within–a–trial'* having been held, the second appellant's statement ought to have been disregarded by the court *a quo*.

THE REMAINING CASE AGAINST THE APPELLANTS

[19]. The extra-curial statement being inadmissible, the question is now: what remains of the case against the appellants?

[20]. The evidence on behalf of the State I have summarised above. Is this evidence sufficient to prove the guilt of the appellants beyond a reasonable doubt? Put another way, the question is whether, at the end of the trial, the evidence as a whole was sufficient to ground the conviction of the appellants?

[21]. All of the remaining evidence on behalf of the State is circumstantial in nature and based on inferences. Therefore the principles in *R v Blom*, 1939 AD 188, find application. Those have been enunciated thus:

21.1 The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

21.2 In a criminal case the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.

[22]. The first and second appellants were intricately linked in time and space to the commission of the crime by the evidence of Darrol and Mietha. Additionally, the second appellant was inextricably connected to the deceased in the moments before his death. The appellants denied being anywhere near the scene of the crime on the day of the commission of the offence. The appellants distanced themselves in space from the murder of the deceased, claiming that the deceased and all the state witnesses were completely unknown to them. The second appellant's defence was one of an alibi, which was supported by the evidence of his cousin, who testified that, at the time of the murder the second appellant was at work. In that regard, the evidence of the cousin was that the first appellant was

employed by her in her liquor store. This alibi was rejected by the court *a quo* on the basis that it was highly improbable mainly because despite the fact that the appellants were arrested approximately three months after the murder, the witness was able to say exactly what happened on the day notwithstanding the fact that she did not keep a diary. The second appellant's defence was also to the effect that he was not anywhere near the scene of the crime at the time of the commission.

[23]. To determine whether the state had proved the guilt of the appellants beyond reasonable doubt, the whole mosaic of evidence must be considered. It is clear from the evidence of the state witnesses that the appellants, who were well known to them, can and should be linked in time and space to the commission of the crime.

[24]. The version of the appellants is one of denial. At the time when the murder was committed both of them were not anywhere near the scene of the crime. They also deny that they, the two of them, are friends or hang out together. So, according to them, there is no way in which they could have committed the murder. They did not proffer any explanation for them being implicated and falsely accused by the state witnesses.

[25]. The court *a quo* approached the evidence of the state witnesses concerning identity with the necessary caution. She held, correctly in our view, that their evidence was clear, satisfactory, sincere, honest and reliable. Mr Milubi, who appeared on behalf of the appellants, submitted to us that the evidence of the state witnesses should have been rejected because of contradictions in their respective versions. These contradictions, if they are contradictions, were not of a material nature. If anything, they are of such an insignificant nature that we believe that they can safely be disregarded for purposes of assessing the credibility of the

witnesses. For example, much is made of the fact that there was a discrepancy between the witnesses in their description of the clothes the appellants were wearing at the relevant time. Then there was also a difference in the estimated time the incident occurred. The aforegoing is the sum total of the discrepancies in the evidence of the state witnesses.

[26]. We are of the view that the discrepancies in the versions of the state witnesses on behalf of the State are not of such a material nature as to warrant the *critique* which should result in a rejection of the versions of the state witnesses.

[27]. The state witnesses had sufficient opportunity to make proper and reliable observation of the appellants.

[28]. It is trite that the State bears the onus of establishing the guilt of the appellants beyond reasonable doubt, and the converse is that they are entitled to be acquitted if there is a reasonable possibility that they might be innocent (*R v Difford,* 1937 AD 370 at 373, 383). In *S v Van der Meyden*, 1999 (2) SA 79 (W), which was adopted and affirmed by the SCA in *S v Van Aswegen,* 2001 (2) SACR 97 (SCA), it was reiterated that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R*, LAC (1980 - 1984) 57 at 59F - H, which was cited with approval in *S v Hadebe and Others,* 1998 (1) SACR 422 (SCA) at 426f - h:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.

[29]. What is important is the overall picture. If the bare denial of the appellants is to be accepted, it would mean that the state witnesses fabricated and concocted their entire story from beginning to end. The suggestion is made that for no rhyme or reason the state witnesses in a manner of speaking, *'drew the names of the appellants from a hat'* and resolved to have them charged with the murder. This is not tenable.

[30]. Applying the principles in *R v Blom* (supra), and having regard to all of the proven facts in this matter, we are of the view that the only reasonable inference to be drawn is that the appellants shot and killed the deceased. The facts and circumstances surrounding the incident exclude any and / or all other reasonable inferences.

[31]. We are of the view that the court *a quo*, after considering all the probabilities and improbabilities and particularly the fact that there is no

onus on the appellants to convince the court of the truth of their explanation, correctly held the evidence of the appellants was inherently improbable and false beyond a reasonable doubt. The Judge's finding that sufficient corroboration existed in linking the appellants to the murder cannot be faulted. The improbability or implausibility of their version, particularly the fact that on their version the state witnesses concocted the whole story against them, is apparent.

[32]. We are accordingly of the view that, even after the statement by the second appellant is excluded from the evidence before the court *a quo*, there is no reason for disturbing any of the factual findings made by the court *a quo*. The case against the appellants was overwhelming, even if the second appellant's statement is excluded from the evidence, and they were accordingly correctly convicted.

[33]. It follows that the appeal against the convictions must fail.

SENTENCE

[34]. I now turn to deal with sentence. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.

[35]. The provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 *('the Act')* would ordinarily apply to the sentencing regime. The murder charge, where the perpetrators acted with a common purpose, would attract a prescribed minimum sentence of life imprisonment, unless substantial and compelling circumstances exist to justify the imposition of

a lesser sentence. The indictment specifically referred to the provisions of s 51 of the Act.

[36]. I take into consideration, as held in S v Vilakazi, that in respect of —

> *'serious crime the personal circumstances of the offender . . . recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be . . . .'*

[37]. At the time of the imposition of the sentence the first appellant was 23-years old and unmarried. He had passed grade 12 at school, and before his arrest during 2012 he was employed at a Liquor Store seemingly as a general assistant, earning R300.00 per week. He is the father of a young toddler, who is taken care of by his family since his incarceration. During January 2013 he was sentence to 3 years after being convicted on a charge of armed robbery.

[38]. The second appellant was 21 years old at the time when he was sentenced by the trial court. He attended school up to grade 10, and was unemployed at the time of his arrest. He is the father of two minor children. He had a previous conviction for theft.

[39]. It was submitted on behalf of the State that the appellants showed no remorse for their actions.

[40]. The court *a quo* also heard evidence regarding the effect that the murder has had on the family of the deceased, who supported them from his earnings from odd jobs. The family has also been left emotionally scarred and badly hurt by the untimely death of their family member.

[41]. I can only repeat what was said in *S v Matyityi*, 2011 (1) SACR 40 (SCA)

> *'I hazard that the value of the sum of his life must have been far greater than the crime statistic that he has come to represent in death. It surely would therefore be safe to infer that in some way or the other his death must have had devastating consequences for others.'*

[42]. The community demands that consistent and, if necessary, severe sentences be handed down for serious crimes. In this instance the motive was not altogether clear, but there seems to be a suggestion that the murder may have been gang – related. It was brazenly committed in broad daylight and seemingly was a senseless loss of human life.

[43]. The personal circumstances, notably the relative young ages of the appellants, should be taken into account when imposing a sentence.

[44]. We are of the view that, having regard to the aforegoing, the sentences of life imprisonment imposed on the appellants may be unduly harsh and inappropriate. I say this especially if regard is had to the ages of the appellants. Accordingly, we are of the view that this court should interfere with the sentences imposed by the trial court.

[45]. Taking into consideration all the known factors we are of the view that a sentence of 22 years' imprisonment on the charge of murder is appropriate.

[46]. It follows that the appeal against sentence must succeed.

ORDER

Accordingly the following order is made:

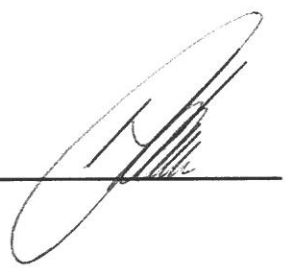
1. The appeal against the convictions of the appellants is dismissed.

2. The appeal against the sentences imposed on the appellants by the court below succeeds and is upheld.

3. The sentences in respect of the murder are set aside and in its stead is substituted the following in respect of each of the appellants:

   'The first and second appellants are each sentenced in respect of the murder to a period of 22 years' imprisonment.'

4. The sentences are antedated to the 22nd August 2013.



ADAMS J

I agree, and it is so ordered

MNGQIBISA – THUSI J

I agree,

DOSIO AJ

HEARD ON:	21st April 2017
DATE OF JUDGMENT:	06th June 2017
FOR THE APPELLANTS:	Adv Mpho Hlubi
INSTRUCTED BY:	Legal Aid Board
FOR THE RESPONDENT:	Adv F Mohamed
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division