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

CASE NO: A128/2020

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED. NO
DATE: 31 May 2021

In the matter between:

GERALD NDLOVU Appellant

And

THE STATE Respondent

JUDGMENT

SIWENDU J (NICHOLS AJ concurring)

Introduction

[1] The appellant is a 44-year-old naturalised Zimbabwean and a qualified bookkeeper. He is employed as a Portfolio Manager with S[....] P[....] Investments (the 'company') located in Bez Valley, Johannesburg. He manages certain properties as well as payments by tenants on behalf of property owners. At the time of his trial, he had been in the employ of the company for 11 years.

[2] On 13 November 2017, he was arraigned in the Johannesburg Regional Court on a single count of murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997. It was alleged that on 11 November 2017, he acted in common purpose with others and unlawfully and intentionally killed Ikechuku Edmond Manoke (the 'deceased').

[3] The appellant pleaded not guilty to the charge, but was convicted on 29 January 2020. On 30 June 2020, the trial court sentenced him to a 15-year term of imprisonment imposed in terms of s 51(2) of the Criminal Law Amendment Act.

[4] On 23 July 2020, the trial court refused the appellant's application for leave to appeal. The appeal against the conviction and the sentence follows a petition to this court in terms of s 309C(2) of the Criminal Procedure Act 51 of 1977 (the 'CPA').[1]

Background

[5] The deceased, together with Mr Calvin Chukwu, Mr Denis Ekwedi, and Ms Sibongile Mabasa were tenants at house [...] A[....], M[....] (the 'property'). Ms Mabasa occupied the backroom cottage while the deceased, Mr Chukwu, and Mr Ekwedi occupied rooms in the main house. They paid rent to John Paul who also occupied part of the main house.

[6] The evidence before the trial court was that the registered owner of the property and the company claimed that the occupants were in unlawful occupation of the property. They were not paying rent. In October 2017, the company dispatched the appellant to serve a notice to evict the occupants. On arrival, the appellant met two women inside the main house. The appellant's evidence is that there was a

[1] Section 309C(2) of the CPA provides:
(a) If any application—
(i) for condonation;
(ii) for further evidence; or
(iii) for leave to appeal,
is refused by a lower court, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question.
(b) …

verbal altercation, but that he managed to serve the notice because one of the ladies reluctantly accepted it.

[7] On 11 November 2017, at approximately 17h00, Ms Mabasa and Ms Nqai (a friend who came to visit) were in the backroom cottage. A child came to alert them that six armed men had forcefully broken and entered the main gate, heading towards the main house. Ms Mabasa's evidence is that she immediately left to investigate. En route, at the passage outside the main house, she encountered the six unknown men. They told her they were there for some work, pushed her aside, and proceeded to the main house. The appellant was amongst them.

[8] The men broke the doors to the main house and the rooms using crowbars. Some of the men had beer or other alcohol. The appellant had a crowbar and a Heineken beer. Ms Mabasa called 10111 and was informed that the Cleveland Police would arrive. When she realised the police would not come, she called Mr Chukwu and Mr Ekwedi, who arrived before the police officers. By this time, the group of men were taking furniture from the bedrooms of the main house, leaving it outside the house. Ms Mabasa was at the gate when Mr Chukwu arrived; soon thereafter, the deceased, whom she knew as 'Madiba', arrived.

[9] The incident escalated, because the post mortem report reveals that the deceased died of a fatal traumatic brain injury and blunt force trauma of the abdominal. Three classes of injuries were identified, namely: (1) head injuries which were potentially fatal; (2) blunt force abdominal trauma which was also potentially fatal; and (3) non-fatal superficial injuries to the head, body, and limbs were identified. The deceased was pronounced dead at approximately 18h30.

[10] The appellant was severely injured during the incident. Photographs show that he was stripped and left lying on the street naked. He was admitted at Charlotte Maxeke Johannesburg Academic Hospital for serious head injuries.

The court a quo

[11] At the trial, the appellant admitted the injuries sustained by the deceased, the cause of his death, and the photographic evidence of the scene prepared by Constable Shongwe in terms of s 220 the CPA.[2] He disputed that he had inflicted the injuries sustained and/or that he caused the death of the deceased.

[12] In convicting the appellant, the trial court relied on the evidence of two eyewitnesses, Ms Mabasa and Ms Nqai, as well as the expert evidence of Dr Mantanga, all of whom testified for the state. The trial court held that the appellant was positively identified by Ms Mabasa and Ms Nqai as the person responsible for the fatal injuries. It found there was no room for error in their positive identification. In the view of the trial court, the witnesses had made good and reliable observations of the appellant and the incident.

[13] With regards to the injuries found on the deceased, the trial court held that the head injury was consistent with the blunt force caused by a brick. It was the cause of the deceased's death. While it noted that the deceased had sustained an abdominal injury, it recorded that there was no evidence of how the injury occurred. It concluded that the abdominal injury must have occurred while the deceased was lying on the street injured. However, during the application for leave to appeal, the trial court dismissed the importance of the abdominal injury, holding that it was irrelevant.

[14] Ultimately, in convicting the appellant, the court a quo found that the appellant acted in common purpose with the group of men who helped with the eviction. It held that the group of men were acting under the appellant's direct control. It rejected the appellant's version as false, improbable, and not being reasonably possibly true, finding that his version was in conflict with the totality of the evidence.

The grounds for appeal

[15] The appeal pivots on the trial court's assessment and approach to the evidence, in particular, whether the trial court was correct in:

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[2] Section 220 of the CPA provides: 'An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.'

a. accepting the evidence of Ms Mabasa and Nqai as a reliable account of what occurred; and

b. finding that they were credible witness who had corroborated each other.

[16] In addition, the appellant claims that the trial court misconstrued the basis of his defence. He argues that it convicted him on an incorrect premise of identification. Further, he states that the trial court also applied the wrong test in its assessment of the evidence, as it failed to consider the contradictions and the totality of the evidence.

Trial evidence

The evidence of Ms Mabasa

[17] In her evidence-in-chief, Ms Mabasa testified that when she went to investigate the break-in, she left Ms Nqai inside the backroom cottage with the children. Even though her child had reported that the men were carrying sticks, she saw them carrying crowbars and alcohol. She saw them breaking the door to the main house and the doors to the bedrooms. When the police did not arrive, she called Mr Chukwu and Mr Ekwedi. By this time, the men had removed the furniture from the main house and placed it outside.

[18] Mr Chukwu arrived first, and went to the main house. The men assaulted him with sticks. Soon thereafter the deceased arrived. The deceased immediately called the police. While she and deceased were at the gate, the appellant approached them and pulled the deceased aside to out to talk to him. The deceased refused, telling the appellant that he was only prepared to talk to the police.

[19] While the deceased was on the phone to the police, she saw the appellant pick a brick from the ground and assault the deceased on the forehead. The appellant and the deceased were at close range. The appellant did not throw the brick at the deceased. He assaulted the deceased once, while holding the brick in

his hand. She saw the deceased bleeding from the nose and mouth. The deceased ran for about eight meters, but collapsed on the ground near the neighbour's gate. This was the only assault she witnessed.

[20] Ms Mabasa left the deceased to buy airtime from the Spaza shop. On her return, the deceased was still lying on the ground. She called out to the deceased. He did not respond. The police had not yet arrived. There were two BMW motor vehicles in front of the house, one of them was white. Five of the men got inside the BMW, indicating to her they were going to the police station. She remained with the deceased but insisted that the appellant remain behind.

[21] Their neighbours witnessed the commotion. The appellant attempted to leave but he was prevented from doing so. Approximately 50 or more Nigerians, who were brothers of the deceased, came to the scene and assaulted the appellant. Ms Mabasa could not remember what happened thereafter. She confirmed, however, that the fight between Mr Chwuku, Mr Ekwedi, and the group of men inside the house migrated to the street. She also confirmed that even though she had left Ms Nqai behind looking after the children, she became aware of Ms Nqai's presence on the street later. The paramedics and the police arrived at about 19h00.

The evidence of Ms Nqai

[22] Ms Nqai, on the other hand, testified that she and Ms Mabasa went outside to investigate at the gate. She instructed Ms Mabasa to call the police as they left the backroom cottage. They met a man carrying a firearm and a can of Heineken. The man told them he was not there to harm them but to evict foreigners. The appellant was amongst the group of men. He had a crowbar in his possession. There was a 3-year-old child sleeping in the main house. Ms Nqai went to fetch the child in the company of the man with the firearm. She took the child to the backroom. She returned to the gate.

[23] She testified that she saw five men removing furniture from the main house, leaving it outside the yard. The community gathered to witness the incident. At this time the deceased returned from the shops. He did not get inside the house. He

called the police, advising that ‘thugs’ or ‘tsotsi’s’ were at his house. While some of the men were inside the house taking out furniture the appellant, who was standing outside, approached the deceased to talk. Ms Nqai testified that the appellant picked up a stone, which she later described as a brick, 20 centimetres in length, and hit the deceased once on the face. The deceased tried to run away but fell to the ground on his face. He had tripped on his shoes which had a sharp nose. The deceased later turned over to lie with his face up.

[24] Ms Nqai stated that five of the men left in a white BMW. The appellant attempted to run but members of the community prevented him from doing so. She returned to the backroom to look after the children. She did not see the attack on the appellant by the community. She went outside again after the police and paramedics arrived. She was informed that the deceased had passed away.

The evidence of Dr Mantanga

[25] The trial court also heard the evidence of Dr Mantanga. He testified that the deceased sustained a fatal cranial-cerebral blunt force trauma in the cranium (skull bone) leading to an intracranial haemorrhage, and an injury to the cerebrum (soft tissue of the brain), also referred to as a cortico cerebral contusion. This led to the cerebral oedema (swelling of the brain). Even though the deceased had a ventricular hypertrophy consistent with high blood pressure, the head injury was severe, leading to bruising under the sub-endocardial membrane and a sub-endocardial haemorrhage in the left ventricle.

[26] The fatal blunt force abdominal trauma revealed a nine by ten centimetre bruise to the right midline. It was complicated by a nine centimetre laceration to the liver. The position of the laceration was in a vulnerable part of the kidney under the skin. The deceased sustained massive intra-abdominal haemorrhage injuries. The bleeding was significant. However, the deceased lost less than 30% of the threshold of blood volume. The spleen contracted consistently with the shock. Other non-fatal injuries were abrasions to the nose and the chin, and a bruising and swelling of the frontal scalp of six by five centimetres. The deceased had a moderate amount of clotted blood within the nasal cavity.

[27] Dr Mantanga stated that the head injury was irreversible and non-survivable because of the tonsillar herniation at the end stage. The swelling of the brain, which forced the midbrain into the foramen, affected the deceased's respiratory and cardiac functioning. A substantial amount of force, consistent with that of a car accident, would have been required to result in the nature of the head injury sustained. The brick would have had to be flung or accelerated with a significant amount of force.

[28] Dr Mantanga testified that although the abdominal injury was potentially fatal, it was potentially survivable. A laceration to the liver can occur with a moderate amount of force applied. The deceased was clinically overweight at 110 kilograms, and had sufficient layer of fat as protection. A moderate to significant amount of force was necessary to cause the injury. He told the trial court that it would be difficult to reconcile how falling flat on the ground would have caused the liver to lacerate to the degree sustained. The most likely conclusion was that there had to be have been external factors applied, moderate and excessive, to cause the laceration to the extent suffered by the deceased.

The appellant's evidence

[29] The appellant testified in his own defence. He told the trial court that he went to the house to deliver a document to the occupants. His company required personal details from the occupants to proceed with the eviction. He was afraid and felt unsafe because of what had transpired on the previous occasion in October 2017. He had called Dan to assist him with the delivery of the document. Dan employed security personnel and had an agreement with the owner of the company to assist when tenants become difficult. They met a street away from the property. Dan arrived in his own vehicle with four men.

[30] The appellant stated that on arrival at the house, he remained outside the property while Dan and the group of men went inside. After a while, Dan came out to tell him the people inside wanted to talk to him. The appellant did not go inside. Dan went back to the house, but emerged a while later to advise him that he wanted to

remove his vehicle to a garage nearby for safety reasons. He told the appellant that he should remain as he would return.

[31] The appellant testified that while he was talking to Dan, a group of people arrived outside the house. He was not certain whether they were community members. They did not come from inside the property. When pressed, he stated that the group of people must have been attracted by noise from the main house. He could also hear the noise of people inside the house. They were 'fighting with words'. He does not know what went on inside the house as he had remained outside the property. A crowd gathered and commotion broke out.

[32] Three Nigerian men approached the appellant looking for the whereabouts of the men who had accompanied Dan. They assaulted the appellant, and as a result, he was taken to hospital. He lost consciousness and regained it at the ICU a few days later. He had had brain surgery. He recalled interacting with the third state witness, Mr Chukwu, to explain why they were there. He did not recall seeing furniture moved out of the house. He did not see that the men in Dan's company were armed with knives, beer bottles, or firearms. He denied seeing or interacting with the deceased. He denied hitting the deceased with a brick.

Analysis of the evidence

[33] The first point of departure is the trial court's evaluation of the evidence. Mr van Rensburg (for the appellant) seeks to impeach the evidence of the two eyewitnesses. He argued that on a proper evaluation, and an assessment of the totality of the evidence, the trial court did not arrive at a sound conviction. He contended that there were the contradictions in the evidence of Ms Mabasa and Ms Nqai which, contrary to the court's finding, rendered their evidence less credible and unreliable. He argued that this Court should infer that the two witnesses rehearsed their version, and that the evidence should have been rejected.

[34] I pause to mention that the two women were eyewitnesses. They were the only ones who saw the appellant hit the deceased with the brick. Their testimony about the assault was the primary area of convergence in their evidence. I first deal

with the complaint about the contradictions, before considering the trial court's evaluation of the totality of the evidence.

[35] An appeal court will generally be slow to interfere with the trial court's evaluation of the evidence assessment. In *Essential Evidence*, Zeffertt *et al* point out that:

'…while deference is paid to the trial court's findings on credibility, it is not precluded from dealing with findings of fact which do not in essence depend on personal impressions made by a witness in giving evidence. They "generally have greater power to do so where a finding of fact does not essentially depend on the witness' demeanour, but predominantly upon inferences from other facts and upon probabilities". The trial court's reasoning may, for instance, be logically flawed, or the record may reveal a false premise based on a mistake of fact, or the court may have failed to take a relevant fact into account. An error of this kind is known as misdirection. Where there has been no misdirection, the appeal court will reverse a finding on fact only when it is convinced that it is wrong; but, where there has been a misdirection, the appeal court is at large to disregard the court a quo's findings in whole or in part and substitute its own.'[3]

[36] It is trite that contradictions *per se* are not sufficient grounds to reject the evidence of a witness. The court is required to consider the precise nature of the contradictions, the materiality thereof, and their effect on the totality of the evidence before it.[4] This principle was confirmed in *S v Mkohle*,[5] and that court, dealing with contradictions in the evidence, held that:

'Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an

[3] DT Zeffertt et al *Essential Evidence* 2 ed (2020) at 326 (footnotes omitted).
[4] *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA).
[5] *S v Mkohle* 1990 (1) SACR 95 (A) at 98F-G. See also *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE) at 435A-B.

evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'

[37] In *Nzimande v S*,[6] the court's guidance makes clear that where contradictions and inconsistencies arise, the aim is not to establish which of the versions is correct. Rather, the court must satisfy itself that the witness could err, either because of a defective recollection or because of dishonesty. Confirming the principle laid out in *S v Mafaladiso*, it held that the approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as *inter alia*, between their *viva voce* evidence and a previous statement) is identical.

[38] I have considered the contradictions complained of. Their essence pivots on two areas: (1) whether the two witnesses left the backroom cottage together; and (2) whether they witnessed the same things. Ms Mabasa stated she had left Ms Nqai behind, while Ms Nqai testified she went out to investigate with Ms Mabasa. Further, Ms Nqai testified about a man carrying a firearm. He told her they were there to evict foreigners. The man had escorted her into the main house to collect a three-year-old child who was sleeping in the main house. In contrast, Ms Mabasa testified that she encountered six men carrying crowbars and beers along the passage to the main house. Her evidence was that she had called 10111. Ms Nqai, on the other hand, stated that she asked Ms Mabasa to call the police.

[39] In her statement to the police, Ms Mabasa stated that the men carried 'knives'. She testified that this was the first time she had ever seen the appellant. Yet in the statement to the police, she had told them the appellant was the driver of the BMW and was in red trousers, and that she had seen him at the property on a previous occasion. When confronted with the contradictions, Ms Mabasa's explanation was that she became aware that Ms Nqai was outside later that evening when they were all on the street. She had conceded she was traumatised by the incident.

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[6] *Nzimande v S* [2017] ZAKZPHC 33 para 10.

[40] I find that when viewed in context and what transpired, the contradictions are not material. Ms Mabasa, in particular, accounted for the inconsistencies. I find she was a reliable, credible witness who made concessions when required. On the appellant's own account, after he and the group of men came to the property, there was commotion and noise coming from inside the house. People were 'fighting with words'. The two witnesses could hardly have been expected to give exactly the same account of the same incident.

[41] In view of what transpired, it is not material whether the group of men used sticks or crowbars to force their entry onto the property. The indisputable fact is they forcefully entered the property and as will be evident later in the judgment, vandalised the house. It is clear from the record that the situation was fluid, became volatile, and soon escalated after the occupants arrived. I am unable to agree that the witnesses were dishonest, or to find that their evidence was contrived**.**

[42] A material part of the complaint, which Mr van Rensburg argued justifies the jettisoning of the evidence and the conviction by this Court, is that the state did not account for the abdominal and other injuries found on the deceased. On this score, the approach enunciated in *S v Chabalala*[7] is instructive as to a trial court's approach to evidence. The SCA noted that in weighing all the elements, which either prove the guilt of an accused, against all those that are indicative of his innocence:

'…. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence….'

[43] The evidence by the two witnesses was that the appellant inflicted a single assault with a brick on the deceased's head from a close proximity. It was not disputed that after the brick assault on the deceased, Ms Mabasa left the scene to

[7] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

buy airtime at the spaza shop. It is not clear from the record what transpired. I disagree with the trial court's finding that the abdominal injury and laceration of the liver was, in all probability, inflicted while the deceased was lying along the street where he had fallen down. There was no basis for the trial court's conclusion. Nevertheless, I find that conclusion does not take the matter further. On the evidence, the abdominal injury was survivable and the head injury was the cause of death. Ms Kalikhan (for the state) relies on the head injury to support the conviction.

[44] I have also considered Dr Mantanga's opinion evidence that the deceased's head was accelerated and decelerated at a rapid rate out of synchrony with the skull. The skull moved so violently. The brick would have had to be flung or accelerated to a significant amount of force usually generated by a car accident in the light of the direct evidence by the eye witnesses. This is based on the accepted approach in *Motor Vehicle Accident Assurance Fund v Kenny* that:[8]

'An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eye witness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view.'

[45] I conclude that the testimony of the eyewitnesses must prevail. It is clear from Dr Mantanga's further evidence that the brick assault was unexpected. The deceased was on the phone to the police. This may account for the sharp acceleration and deceleration of his head.

[46] I have, in addition, considered the trial court's verdict based on the above facts and the appellant's version and, in particular, Mr van Rensburg's criticism that despite referring to *S v Aswegen*,[9] the trial court applied an incorrect test to evaluate

[8] *Motor Vehicle Accident Assurance Fund v Kenny* 1984 (4) SA 432 (ECD) at 436H-437B.
[9] *S v Aswegen* 2001 (2) SACR 1997 (SCA).

the evidence. Ultimately, as held in *S v Janse van Rensburg and Another*,[10] and endorsed by the SCA in *S v Doorewaard and Another*[11]—

'…. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold — in this case proof beyond reasonable doubt.'

[47] The appellant's account is instructive. He was at the property to serve a document and to obtain personal details of the occupants. He denied that the personal belongings and furniture of the occupants were taken out and vandalised. He denied that Dan's security men were armed. It was only when questioned to explain why people who were not from the property had gathered outside that he agreed, there was commotion and noise coming from the house. He stated that people were 'fighting with words'. Even though he denied implementing or being part of the group that implemented the illegal eviction, it had been peaceful until their arrival. The house was ransacked and commotion broke out after their arrival.

[48] Even though the appellant testified that he had remained outside the property, and the only person he spoke to was Mr Chukwu, the two women connected him with the group inside. It is clear that the occupants knew and identified him as the leader and part of the group of men inside the house. The occupants wanted to talk to him. He referred to Dan and the security men as his 'colleagues'. The three people he cannot identify, who came from the property towards him to assault him, connected him with the commotion and the events inside.

[49] When Dan left to move his vehicle for safety reasons, the situation had escalated. The fight inside the property had migrated outside the property. The commotion escalated further when the three men arrived. The appellant did not call

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[10] *S v Janse van Rensburg and Another* 2009 (2) SACR 216 (C); [2008] ZAWCHC 40 para 8. Also see *S v Saban 'n Ander* 1992 (1) SACR 199 (A) regarding contradictory versions.
[11] *S v Doorewaard and Another* 2021 (1) SACR 235 (SCA); [2020] ZASCA 155 para 22.

the police. He did not call his employer. He did not leave because he took comfort from Dan's security he assumed were still inside the property. It is clear that the relationship with Dan soured after the incident. The appellant did not discuss how he got severely attacked. Dan no longer provides services to the company.

[50] The appellant did not take the trial court into confidence about what had transpired between him and the two women in October 2017 to warrant the security protection. He could not identify the nature of the second document he was there to serve. His evidence is inconsistent with the photographs admitted in terms of s 220 of the CPA. They show that the doors inside the main house were broken. Personal belongings including furniture of the occupants were thrown outside. The house was vandalised inside. There was blood on the floor. I accept Ms Mabasa's evidence that the appellant came inside the property at a certain point. He was connected to the group inside. I find that the appellant knew that they were at the property to implement an unlawful eviction. He could not explain why he required a group of security men to merely serve a document. I find that he was evasive and sought to minimise their unlawful conduct. The version he advanced was improbable and could not be believed.

[51] Having regards to the above, I am minded to articulate the threshold of a proof beyond a reasonable doubt as held by the court in *S v Phallo and Others*,[12] where the court endorsed the classic formulation by Malan JA in *R v Mlambo* that:[13]

'…there is no obligation on the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.'

[52] I disagree with Mr van Rensburg's assertion that the trial court's premise about identification was flawed. It did no more than confirm that the appellant was

[12] *S v Phallo and Others* 1999 (2) SACR 558 (SCA) para 10.
[13] *R v Mlambo* 1957 (4) SA 727 (A) at 738A-C.

identified outside property as the one who threw a brick at the deceased. Photographs also show that windows of one of the BMW motor vehicles were broken. The appellant was seen outside the property. I find that this is consistent with the migration of the violent commotion outside property and the fateful attack on the deceased. I accept that the head injury was the final cause of the deceased's death and that the appellant inflicted the fatal injury.

[53] The state discharged the burden of proof of the appellant's guilt beyond a reasonable doubt, and the appellant was correctly convicted.

[54] With regard to the imposition of the sentence, it has been repeatedly emphasised that it is a matter that pre-eminently lies in the discretion of the trial court, and a court of appeal can only interfere if: there was a material misdirection by the court; the court failed to exercise its discretion judicially and/or the court acted unreasonably or improperly; if the sentence is startlingly inappropriate; or the interests of justice require an interference.[14]

[55] As held in *S v Zinn*,[15] a court must consider a triad of factors, consisting of the crime, the offender, and the interests of society. I have scrutinised the trial court's reasoning and approach to the sentence. It took account of the pre-sentencing report, the totality of the appellant's circumstances, and the seriousness of the offence. It found there were no substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence.

[56] The appellant was charged in terms of s 51(1) Criminal Law Amendment Act 105 of 1997. The prescribed minimum sentence is mandatory life imprisonment. Despite the evidence that the group of men acted on the instructions of the appellant, and that he considered them his 'colleagues', the trial court did not place sufficient weight on this in sentencing the appellant. Curiously, even though the trial court found that there were no substantial and compelling circumstances justifying a deviation from the minimum sentence, it departed from the prescribed minimum

[14] *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.
[15] *S v Zinn* 1969 (2) SA 537 (A) at 535G.

sentence and imposed a lighter sentence in terms of s 51(2) of the Criminal Law Amendment Act. The state did not cross-appeal this finding.

[57] The 15-year term of imprisonment imposed is therefore not shockingly inappropriate, nor does it deviate from the sentence that this Court would impose.

Therefore, the following order is made:

1. The appeal against the conviction and the sentence is dismissed.

T SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 31 May 2021.

Date of hearing:	15 April 2021
Date of judgment:	31 May 2021

Appearances:

Counsel for the appellant:	R C Krause
Attorney for the appellant:	David H Botha, Du Plessis & Kruger Inc
Counsel for the respondent:	A Kalikhan

Attorney for the respondent:	National Prosecuting Authority