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

APPEAL CASE NO: A264/2017
DPP REF: 10/2/5/1 – (2017/403)
DATE OF APPEAL: 28 APRIL 2022
Reportable: NO
Of interest to other judges: NO
10 May 2022

In the matter between:

BUTHELEZI, MOKOSATI BUSHLE LEVANI	First Appellant
NGWENYA, MONDI NJOLOSI WELCOME	Second Appellant
and	
THE STATE	Respondent

MOORCROFT AJ (MAZIBUKO AJ concurring)

Order

[1] In this appeal I grant the following order:

1. The appeal is dismissed.

[2] The reasons for the order follow below.

Introduction

[3] The two appellants stood trial on two counts, robbery with aggravating circumstances and murder arising out of the death of Mr. J[....] D[....] M[....]1in Vosloorus on 15 December 2012.[1]

[4] They were convicted of robbery with aggravating circumstances and murder committed on 26 June 2017, and sentenced effectively to life imprisonment. They now appeal against conviction and sentence.

[5] Both accused were represented at trial and pleaded not guilty to the charges. They chose not to provide a plea explanation.[2] The relevant provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997 were explained to them.

Appeal ad conviction

[6] The Learned Magistrate undertook a detailed analysis of the evidence in his judgment.[3] The evidence showed that on the night of 15 December 2012, but perhaps more accurately not long after midnight and in the early hours of the new day there was an altercation at the so-called Pepsi Tavern in Vosloorus when the first appellant touched Mr Mabasa's daughter, Ms H[....] M[....]2, in an inappropriate way and Mr M[....]1remonstrated with him. The first appellant produced a knife. The second appellant was in the company of the first appellant at the time.

[7] The parties went their separate ways but shortly afterwards Mr M[....]1and Ms M[....]2 were accosted in the street by the appellants. The first appellant again had a knife. The appellants 'requested' R50. Ms M[....]2 testified that the second appellant and her father started wrestling when her father refused to pay, and she tried to hold the first appellant away because she was concerned that the first appellant might stab her father with his knife. However the first appellant broke free of her and stabbed her father under his left arm. The appellants took the cold drink they had

[1] The first appellant was also charged with murder and assault in respect of a separate incident that took place on 24 May 2015 and was acquitted on both charges.
[222] In terms of section 115 of the Criminal Procedure Act, 51 of 1977.
[3] Commencing on p 246 of the record (Caselines 003-275).

bought at the tavern and ran away. She screamed and help came. Her father was taken to hospital where he passed away.

[8] She did not know the first appellant at the time but she was acquainted with the second appellant as he lived in the same area. The witness saw both appellants from up close at the tavern and in the street and did not doubt their identity.

[9] The next morning the first appellant was brought to the house where she lived by members of the community and she identified him as one of the attackers.

[10] Mr M[....] E[....] M[....]3testified that he saw both appellants in the street with the deceased and Ms M[....]2 shortly after the attack. Ms M[....]2 was screaming. He knew the second appellant very well and had met the first appellant when the first appellant was introduced to him a “brother” by the second appellant. He saw a knife in the hand of the first appellant. He added that visibility was good as there was a spotlight nearby.

[11] The two appellants left the scene and he saw Mr M[....]1stagger and then collapse. There was blood.

[12] Early the next morning members of the community approached him to ask who had killed Mr M[....]1and he mentioned the names of the appellants. They then went to find the appellants and apprehended the first appellant. The first appellant was assaulted. The second appellant ran away.

[13] The first appellant was not arrested when he was apprehended by members of the community. He was arrested in 2015 as a suspect on the murder and assault charge in respect of which he was tried and acquitted in this trial.

[14] The appellants testified in their own defence. The first appellant testified that he and the second appellant were at the tavern on 15 December 2012, but early; at about 18h30. He went home at about 20h00 and went to sleep. He never saw Mr M[....]1or Ms M[....]2 at the tavern. The next morning he was assaulted when people arrived at his home and enquired as to the whereabouts of the second appellant.

[15] The second appellant's evidence contradicted that of the first appellant. He testified that he and the first appellant were indeed at the tavern when Mr M[....]1and Ms M[....]2 arrived. Ms M[....]2 was known to him from school days. There was an altercation when the first appellant touched Ms M[....]2 inappropriately and he left to buy a cold drink. He returned later to look for the first appellant but could not find him at the tavern. On his way home he saw an altercation between the deceased and first appellant, and when he tried to separate them he was injured. He therefore placed both himself and the first appellant on the scene at the tavern and where the robbery and murder took place, and by doing so his evidence corroborated that of Ms M[....]2, but he exonerated himself by saying that he tried to separate the first appellant and the deceased at a time when the deceased was still alive.

[16] The identification of the appellants was an issue in the criminal trial. I am satisfied that both were identified by the witnesses. Both appellants were known to Mr M[....]3and he recognised them both on the scene of the murder. The first appellant had been introduced to him by the second appellant. The second appellant was well known to Ms M[....]2 and she recognised him at the tavern and again in the street during the assault. She observed the first appellant at the tavern and again on the scene of the murder, and saw him up close on both occasions. The second appellant corroborated her evidence by testifying that both of them saw Ms M[....]2 and the deceased at the tavern and at the scene of the murder.

[17] During the trial both appellants made formal admissions regarding the chain of medical evidence relating to the death of the deceased, and of his identity.

[18] The Learned Magistrate analysed the evidence and convicted both appellants of robbery under aggravating circumstances and murder. He acquitted the first appellant on the other murder charge and the charge of assault relating to events in 2015.

[19] In *S v Van der Meyden*[4], Nugent J said:

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[4] 1999 JDR 0092 (W), 1999 (1) SACR 447 (W); 1999 (2) SA 79 (W) 80-81

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In R v Hlongwane 1959 (3) SA 337 (A), after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H—341B, which applies equally to any other defence which might present itself:

'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation. . . . The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'"

[20] The reasoning of the Learned Magistrate can not be faulted. The identity of the appellants were established beyond reasonable doubt and the Learned Magistrate accepted the evidence of the State witness as to what occurred and who the attackers were.

[21] In *S v Mthetwa*[5] 1972 (3) SA 766 (A) 768A, Holmes JA said in respect of the identification of an accused by a witness:

> *"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 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; see cases such as R. v Masemang, 1950 (2) SA 488 (AD); R. v Dladla and Others, 1962 (1) SA 307 (AD) at p. 310C; S. v Mehlape, 1963 (2) SA 29 (AD)."*

[22] To sum up, MsM[....]2 saw both attackers up close and the second appellant was known to her. Both were known to Mr M[....]3and he recognised them. The evidence shows beyond reasonable doubt that the two appellants accosted the deceased and his daughter in the street with the intention of robbing them. When the deceased resisted the second appellant wrestled with him and the first appellant stabbed him with a knife. The two appellants absconded with the cold drink that the deceased and his daughter carried when they were accosted. It was common cause that he died shortly after of his injuries.

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[5] 1972 (3) SA 766 (A) 768A.

Ad Sentence

[23] A Court of appeal may interfere on sentence when there is a disparity between the sentence imposed and that which the Court considers appropriate. See *S v Anderson*[6] and *S v Pillay*[7]. In *Kgosimore v S*[8], Marais JA said:

> *[10] It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry (cf S v Pieters 1987 (3) SA 717 (A) at 727G–I). Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so….*

[24] Minimum sentences are prescribed for certain offences[9] including, inter alia, murder when committed in an attempt to commit robbery with aggravating circumstances,[10] or robbery with aggravating circumstances.[11] However, judicial discretion is preserved: A court may impose a lesser sentence when substantial and compelling circumstances exist.[12]

[25] Both appellants had previous convictions. The first appellant was convicted of housebreaking and rape, and sentenced to thirteen and five years' imprisonment in

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[6] 1964 (3) SA 494 (A).
[7] 1977 (4) SA 531 (A).
[8] [1999] JOL 5360 (A)
[9] See sections 51 and 53 of the Criminal Law Amendment Act, 105 of 1997 and *S v Malgas* 2001 (2) SA 1222 (SCA). The proper approach to minimum sentences is summarised in paragraph 25.
[10] In Part I of Schedule 2.
[11] In Part II of Schedule 2.
[12] Section 51(3).

2017 on these two counts. The second appellant was convicted of assault in 2012 and of murder in 2016.

[26] The Court a quo correctly considered the appellants' personal circumstances when imposing sentence and had regard to a victim impact statement. The Learned Magistrate did not find any substantial and compelling circumstances to deviate from the prescribed sentences. After evaluating all factors and referring to case law the Learned Magistrate sentenced both accused to fifteen years imprisonment on count 1 (robbery with aggravating circumstances) and life imprisonment on count 2 (murder). These sentences are to run concurrently.

[27] The Court also declared the appellants unfit to possess a firearm in terms of section 103(1)(g) of the Firearms Control Act, 60 of 2000, and made an order in terms of section 103(4) for the search and seizure of any firearms, licences, authorisations or permits they may possess.

[28] There are no grounds for interfering with the sentence. For these reasons I made the order in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

N MAZIBUKO
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG
Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties /

their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **10 May 2022**.

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