REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 27/5/16

CASE NO: A452/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

27 May 2016 EJMbushi

In the matter between:

DERRICK ZWELETHU ZULU **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

Date of Hearing:24/04/2016

Date of Judgment:27/05/2016

KUBUSHI, J

INTRODUCTION

[1] The appellant was tried as accused 1 in the regional division of Nigel on the following charges: count 1 – murder read with the provisions of s 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("the Act"); count 2 – robbery with aggravating circumstances read with the provisions of s 51 (2) of the Act; and count 3 – possession of an unlicensed firearm. The respondent informed the trial court that it will rely on the doctrine of common purpose in order to prove its case against the appellant.

[2] The appellant pleaded not guilty in respect of the three counts. He was acquitted on count 3 and found guilty in respect of count 1 and count 2. The trial court imposed the following sentences: count 1 – life imprisonment; and count 2 – fifteen (15) years imprisonment. The trial court ordered the sentence in count 2 to run concurrently with the sentence in count 1. The appellant was further declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000.

[3] The appellant has an automatic right of appeal in terms of s 10 of the Judicial Amendment Act 42 of 2013. He is before us appealing the conviction and sentence imposed by the trial court.

[4] At the hearing of the appeal the appellant applied for the condonation for late filing of the heads of argument. There was no objection to the application and we granted the condonation.

FACTUAL MATRIX

[5] The factual matrix is that on the day in question the deceased was sitting with his girlfriend, Ms Mvulani in the deceased's motor vehicle, a maroon VW Polo, parked in the street. They were waiting for the deceased's friend. It was late at night around 22h10. The two were accosted by three men. One of the men, who Ms Mvulani identified as the appellant, knocked on the window and ordered the deceased and Ms Mvulani to get out of the motor vehicle. The appellant pulled out a firearm. One of the assailants, who was the appellant's co-accused, slapped the deceased with an open hand. Ms Mvulani opened the motor vehicle's door and ran away. As she was running she heard a gunshot and after sometime she saw the motor vehicle drive away. Ms Mvulani returned to where the motor vehicle was to look for the deceased. When she got there, the deceased was lying on the ground in a pool of blood injured and he died on the scene.

[6] Ms Mvulani's evidence is that she was able to see their assailants very clearly because, although it was dark outside, the street lights were on. The lights were about 25 meters from where the motor vehicle was parked. It took her about ten (10) minutes within which to observe their assailants. She was able to identify the appellant in an identity parade.

[7] The following documents were entered into evidence during the trial: the identity parade form handed in as exhibit "E" with the consent of the appellant, the contents of which were admitted in terms of s 220 of the Criminal Procedure Act 51

of 1977 ("the Criminal Procedure Act"); and the photographs taken at the identity parade depicting Ms Mvulani identifying the appellant were admitted into the record as exhibit "F". A further admission placed on record was that the deceased was the owner of the motor vehicle.

[8] The appellant was further implicated in the commission of the offences when a police officer found the deceased motor vehicle parked on the premises where the appellant resides together with the key and registration papers of the motor vehicle which were found in his possession. The print of the appellant's ring finger was uplifted on the outside the right front door window of the deceased motor vehicle.

[9] The appellant denied that he took part in the murder and robbery of the deceased. He also denied that he was found in possession of the deceased's motor vehicle, keys and registration papers. His testimony was that he has never been in Rathanda where the incident took place.

AD CONVICTIONS

Grounds of Appeal

[10] The submission by the appellant is that the trial court erred in finding that the respondent proved its case against him beyond reasonable doubt, in that insufficient weight was attached to the following factors:

1. The complainant was a single witness and her evidence should have been clear and satisfactory in all material aspects. The submission in this regard is that the trial court did not treat the evidence of Ms Mvulani with the necessary caution;

2. The identity of the appellant was not proven beyond reasonable doubt;

   The explanation given by the appellant for the finger print lifted on the outside of the motor vehicle; and

3. The version of the appellant as reasonably possibly true.

The Issue

[11] The crux of the issue before us is whether the trial court erred in concluding that the respondent has proved its case beyond reasonable doubt. Ancillary to the main issue, are the following issues: whether the evidence of Ms Mvulani, as a single witness, was not clear and satisfactory in all material aspects; whether Ms Mvulani's testimony was not treated with the necessary caution required in law; whether the identity of the appellant was proved beyond reasonable doubt; whether the explanation given by the appellant in respect of his finger print lifted from the motor vehicle was reasonable; and whether the appellant's version is reasonably possibly true.

The Law

[12] It is established law that a court of appeal rarely interferes with the credibility findings of a trial court. The powers of a court of appeal to interfere with the credibility findings of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including the acceptance of a witness' evidence, is presumed to be correct on the basis that the trial court had the advantage of seeing, hearing and appraising a witness.[1]

Analysis of Evidence

[13] The appellant's contention is that the trial court did not approach the evidence of Ms Mvulani, as single witness, with the caution required in law.

[14] It is trite that a court may convict on the evidence of a single witness as is provided for in s 208 of the Criminal Procedure Act. It is also established judicial practice for trial courts to apply cautionary rules when evaluating the testimony of such single witnesses. The purpose of the cautionary rules is said to be to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt.[2]

[1] See S v Francis 1991 (1) SACR 198 (A).
[2] See S v Snyman 1968 (2) SA 582 (A) at585C-G.

[15] The cautionary rule does not require that triers of fact should be told, or should warn themselves about the application of the rules. What is required is for a court to look for a safeguard which would reduce the risk of wrongful conviction.[3]

[16] The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial court. The trial court must demonstrate that it has in fact heeded the warning and that it was well aware of the dangers of wrong conviction by its treatment of the evidence.[4]

[17] In this instance, the trial court convicted the appellant mainly because it found the evidence of Ms Mvulani in respect of the identity of the appellant as one of the perpetrators to be truthful and as such rejected that of the appellant as being not reasonably possibly true.

[18] It is common cause that in accepting the respondent's version, the trial court relied on the evidence of Ms Mvulani in identifying the appellant as one of the perpetrators in this instance. In this regard Ms Mvulani was a single witness. The trial court was therefore enjoined to approach her evidence with the necessary caution required in law.

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[3] See R v Mpompotshe & another 1958 (4) SA 471 (A) at 476E-F.
[4] See also R v Manda 1951 (3) SA 158 (AD).

[19] From the trial court's reasons for judgment, it is apparent that it was aware that Ms Mvulani was a single witness and that it ought to approach her evidence with caution. As an indication that it approached Ms Mvulani's evidence with caution, the following is stated in the trial court's judgment:

> 'So nou moet die hof kyk na, en soek na, betroubaarheidswaarborge vir die getuie, Me Cindie Mvelani, sy uitwysing: 1) dit was donker, 2) die voorval het vining gebeur, 3) sy het weliswaar waargeneem dat daar in die mate van straatlig en nabye huise se ligte was. Maar, is die beligting nie van so ' helder aard gewees nie, maar kon sy sien, en is die hof tevrede dat daar in haar uitkenning met betrekking beskuldigde 1 [appellant] vele betroubaarheidswaarborge bestaan'

[20] The trial court, as such, sought and found a safeguard against wrong conviction in the evidence of Ms Mvulani, herself. It found such safeguard in the truthfulness of Ms Mvulani's testimony. When assessing the evidence in its totality, it satisfied itself, correctly so in my view, that Ms Mvulani was a credible and reliable witness and accepted her version as truthful. This is so because it found the evidence of Ms Mvulani to be straight forward, clear and satisfactory in all material respects.

[21] The appellant, however, contends that Ms Mvulani's evidence was not clear and satisfactory in all material respects because of the material contradiction between her evidence and that of Constable Motatenyane, who attended to the scene of crime, as to the illumination on the scene of crime. It is Ms Mvulani's testimony that she could clearly see their assailants because the street lights were on. To the contrary, Constable Motatenyane's evidence is that they could not see clearly and had to illuminate the scene by means of the lights of their motor vehicle.

[22] The trial court was alive to the contradictions in the version of the respondent but despite such discrepancies it concluded that the truth has been told. It stated the following in respect of some of the contradictions in the evidence of Ms Mvulani:

> 'Nou met betrekking tot die getuienis van Cindie Mvulane het sy die hof oortuig as 'n eerlike en geloofwaardige getuie. Sy slag daarin om die gebeure op 'n logiese en konsekwente wyse aan die hof oor te dra. Die enigste skadu wat op haar getuienis gewerp word is waar sy in die hoof getuienis meld dat sy het nie gesien wie die vuurwapen het nie, en later in kruisverhoor meld beskuldigde 1 [appellant] het die vuurwapen gehad.'

[23] The contradiction the appellant is complaining about, might of course, be a material contradiction that would go to the root of the identification of the appellant by Ms Mvulani, but, this discrepancy is cured by the objective truthfulness of Ms Mvulani in the positive identification of the appellant at the identity parade as one of the perpetrators on that fateful night.

[24] The identity of the appellant as a perpetrator of the offences in this instance was, in my opinion, proven beyond reasonable doubt. The trial court's finding in this respect which in my opinion is correct is stated as follows in the judgment:

> 'Maar, het sy volhard met haar getuienis en openbaar haar getuienis geen inherente onwaarskynikhede nie, en is dit duidelik wanneer haar getuienis opweeg word, het sy 'n tydjie gehad om 'n waarneming te doen en sy het daarna weggehardloop. 'n Tydjie is 'n paar sekondes.'

[25] Ms Mvulani saw the appellant for the first time on 11 June 2010 and was able to identify him again on 19 July 2010 at the identification parade. This is not an unreasonably long time. This to me is an indication that within the limited time Ms Mvulani saw the appellant she was able to observe him clearly. The truthfulness of Ms Mvulani's evidence that she clearly saw the appellant by the help of streets lights is corroborated by her ability to have identified the appellant at the identity parade. It is further corroborated by the evidence of Constable Whitman who found the deceased motor vehicle parked on the premises where the appellant stayed together with the keys and registration documents of the deceased's motor vehicle which were found in the possession of the appellant.

[26] I, must also in passing, mention that Constable Whitman is also a single witness in respect of the recovery of the deceased motor vehicle, the key and registration documents. Similarly, the trial court, having declared him an independent witness, found his evidence to be satisfactory in all material respects.

As an independent witness, he had no reason and none was proffered, to falsely implicate the appellant.

[27] The trial court having accepted the version of the respondent it had to, correctly so, reject that of the appellant as not reasonably possibly true.

[28] It is my view that the version of the appellant that he was not involved in the murder and robbery of the deceased cannot be reasonably possibly true. There are just too many coincidences.

[29] Firstly, Ms Mvulani, whose testimony has been accepted as truthful, testifies that she saw the appellant at the scene of crime. According to Ms Mvulani, the appellant is the one who knocked at the window of the motor vehicle and ordered them to get out. She saw him pull out the firearm and point it at the deceased. She testified that she could clearly see the appellant because the street lights were on at that time. Although the incident happened very quickly, she could still positively identify the appellant at the identity parade.

[30] Secondly, the deceased' motor vehicle was found by the police parked on the premises where the appellant is residing. The keys of the motor vehicle and its registration papers are found by the police in his possession.

[31] Lastly, a finger print is found on the outside right front door window of the deceased motor vehicle whilst parked in the premises where he resides and the finger print is positively identified as his. Even though the explanation as to how the appellant's finger print got to be found on the motor vehicle is accepted as reasonably possibly true, it does not take his case any far, because, the other evidence against him is just too overwhelming.

[32] It does not appear from the record that the trial court convicted the appellant on the basis of the doctrine of common purpose. The appellant did not raise it as an issue, I, therefore do not intend dealing with it in this judgment.

[33] However, in argument before us, the appellant wanted to raise an issue of recent possession in respect of the offence of robbery with aggravating circumstances. I do not think that that doctrine finds application in the circumstances of this matter and requires no further attention by us.

[34] It is my view therefore that the appellant's version that he was not involved in the commission of these offences is not reasonably possibly true and the trial court was correct to have rejected it. The respondent has proved its case beyond reasonable doubt and the appeal on the convictions must fail.

AD SENTENCE

[35] The appellant has been convicted of two offences where the prescribed minimum sentence is applicable. In respect of count 1 of murder the applicable section is s 51 (1) of the Act; and in respect of count 2 robbery with aggravating circumstances s 51 (2) of the Act is applicable. The minimum sentence applicable in count 1 is imprisonment for life since the death of the deceased was caused by the appellant in committing an offence of robbery with aggravating circumstances; and the sentence applicable in count 2 is fifteen (15) years imprisonment because the appellant was a first offender for purposes of this offence.

[36] The said sentences can only be imposed if there are no substantial and compelling circumstances warranting deviation from the sentence prescribed to a lesser sentence. In determining whether there are substantial and compelling circumstances to justify deviation from the imposition of the prescribed minimum sentence the trial court must consider all the factors traditionally considered when a sentence is imposed. The trial court, in this instance, considered all the factors, namely, the seriousness of the crime, the interest of society and the personal circumstances of the appellant, and found that there are no substantial and compelling factors and thus imposed the prescribed minimum sentences in respect of both counts.

[37] Before us the submission by the appellant is that the trial court misdirected itself in not finding that the cumulative effect of the following factors as well as the

personal circumstances of the appellant amounts to substantial and compelling circumstances:

1. The motor vehicle was recovered;

2. The appellant spent time in custody awaiting trial; and

3. The appellant was the sole breadwinner.

[38] Although in its heads of argument the respondent argued for the dismissal of the appeal on sentence, however, before us, the respondent's counsel conceded that the trial court should have considered the four (4) years the appellant spent in custody awaiting trial as substantial and compelling circumstances.

[39] The issue before us is whether the trial court erred in not finding substantial and compelling circumstances warranting deviation from the prescribed minimum sentence.

[40] The Supreme Court of Appeal in *Radebe and Another v S,*[5] stated the following in respect of time spent in custody awaiting trial:

[5] (726/12) [2013] ZASCA 31 (27 March 2013) at para [14]

"[14] . . . a better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."

[41] It is thus evident from the aforesaid that the time spent in custody awaiting trial is only but one of the factors that a trial court should take into account in determining whether an effective period of imprisonment to be imposed is justified. In my opinion it does not mean that once a person has spent time in custody awaiting trial such a period should be considered a substantial and compelling circumstance warranting a lesser sentence. The question is whether the sentence the trial court intends meting out is proportionate to the crime committed and whether the sentence in all the circumstances, including the period spent in detention awaiting trial is a just one.

[42] My view is that, in the matter before us, the sentence imposed is not proportionate to the crimes the appellant has been convicted of. This is mainly because the appellant spent a period of four (4) years in prison prior to his conviction

and sentence. Four (4) years in my view, is a long time to be spent in custody awaiting trial. I am, therefore of the opinion that the trial court should have taken the period the appellant spent in custody awaiting trial cumulatively with his other personal circumstances and found that there were substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence and imposed a lesser sentence.

[43] The appellant's personal circumstances are: he was thirty five (35) years at the time of sentencing; he was unmarried but had a girlfriend; he had three (3) children aged fourteen (14) years, eleven (11) years and seven (7) years old; the children resided in Kwazulu Natal; he attended school until standard 7; he was employed as a taxi driver prior to his arrest; he has four (4) sisters that he was supporting; his father and brother are deceased; and he was the sole breadwinner.

[44] In addition to the appellant's personal circumstances the following further factors should have been considered: the motor vehicle was recovered and there was no evidence led to the effect that it was not in good condition when it was returned; the appellant was arrested on 24 June 2010 and the matter was finalised on 2 June 2014. The record indicates that he was in custody throughout the trial proceedings – and the time of four (4) years spent in custody should have been considered; the appellant was not a first offender.

[45] The trial court was correct in finding that the crimes of which the appellant has been convicted are serious because of their nature and their prevalence. The trial

court, also, correctly so, considered the aggravating factors which will continue playing a role even though a lesser sentence will be imposed, in that: the deceased was a young man in the prime of his years and with potential; the appellant is not a first offender and has been involved in crimes where violence was a factor; the appellant showed no remorse; Ms Mvulani is traumatised and might be so traumatised for a long time to come.

[46] It is trite that any appeal against sentence whether imposed by the magistrate or Judge, the court hearing the appeal – a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court; and b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised.' The test under b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.[6]

[47] I am therefore of the opinion that from the aforesaid, the trial court did not exercise its discretion properly and that we have to interfere with the sentences it imposed.

[48] An appropriate sentence should, as it is normally said, fit the offence, the offender and be in the interest of the society. It is my view that appropriate sentences in the circumstances of this matter should be the following: count 1 the appellant should be sentenced to eighteen (18) years imprisonment; count 2 the

[6] See S v Rabie 1975 (4) SA 855 (A).

appellant should be sentenced to ten (10) years imprisonment; and the sentence in count 2 should be ordered to run concurrently with that in count 1, the effect thereof to be eighteen years (18) imprisonment. In terms of s 282 of the Criminal Procedure Act, the sentence should be ante dated to 2 June 2014 being the date on which the trial court's sentences were imposed.

[49] In the circumstances I would grant the following order:

1. The appeal on conviction is dismissed.
2. The appeal on sentence is upheld. The sentences imposed by the trial court are set aside and substituted by the following:

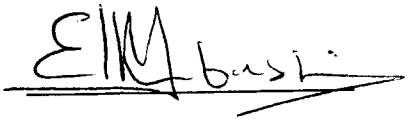
'1. Count 1 the accused is sentenced to eighteen (18) years imprisonment;

2. Count 2 the accused is sentenced to ten (10) years imprisonment.

3. The sentence in count 2 is ordered to run concurrently with count 1.

4. The sentences are ante-dated to 2 June 2014.

5. The accused is declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000".



E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

I concur

T.A.N MAKHUBELE
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Adv. M.B. MOLOI
	Instructed by:
	PRETORIA JUSTICE CENTRE
	2nd Floor FNB Building
	206 Church Street
	PRETORIA 0001
On behalf of the respondent:	Adv. C. PRUIS
	Instructed by:
	DIRECTOR OF PUBLIC PROSECUTIONS
	Presidential Building
	28 Church Square
	PRETORIA 0001