IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. No

..... **.....**

DATE **SIGNATURE**

Case No. A166/2017

In the matter between:

ROBERTO ROMARIO SHONGWE

APPELLANT

and

THE STATE **RESPONDENT**

JUDGMENT

MILLAR AJ

[1] On 22 November 2016, the appellant, a 21-year-old man was convicted in the Regional Court Ermelo of 1 Count of murder. He was sentenced to 12 years imprisonment. The appeal before this court is against conviction and sentence, such leave having been granted by the court *a quo*.

[2] The appellant was legally represented throughout the proceedings. He pleaded not guilty to charges of murder and assault with intent to cause grievous bodily harm. An explanation of plea was placed on record.

[3] On the evening of 17 December 2014 and at Dubs Tavern in Lothair, Mpumalanga, a chain of events was set in motion that resulted in the late Ayanda Nkosi ("the deceased") being stabbed 18 times and losing his life as a result. This was all that was common cause. Six persons were charged with murder, one of whom was the appellant. The appellant was "accused no. 2" in the court *a quo*. For the sake of convenience he will be referred to as the appellant and the other accused persons who are not before this court as accused 1, 3, 4, 5 & 6 respectively.

[4] The state called two witnesses to testify – Mr. Philane Slabbert and Mr. Themba Maseko. Each of the state witnesses testified as to the portion of the chain of events observed by them respectively. The evidence of Mr. Slabbert related mainly to what had transpired inside the tavern and that of Mr. Maseko to what had transpired outside.

[5] According to Mr. Slabbert he had heard a commotion outside the tavern and then the deceased had entered the tavern followed by all 6 accused. He had climbed onto the pool table in the tavern to see what the commotion was about and it was from this vantage point that he had observed events. The deceased had been cornered inside and while he had seen the appellant and accused 6 hitting him with clenched fists, he had seen the others, 1, 3, 4, and 5 stabbing the deceased. He did not testify that he had seen the deceased inflict injuries on anyone.

[6] He had at some stage tried to intervene to stop the attack on the deceased and had himself been stabbed although the injuries he suffered were relatively minor. The deceased had managed to break free and left the tavern with the accused in pursuit. He had a short while later exited the tavern and I will return later to his observations outside.

[7] Mr. Maseko had been seated outside the tavern drinking with friends. He had seen the deceased run into the tavern being chased. A short while later the deceased ran out pursued by the appellant and accused 4, 5 and 6. The appellant and accused 6 had caught up to the deceased and tripped him to the ground and had then proceeded to stab him.

[8] The deceased had managed to get up and ran further to a nearby bakkie and had jumped onto the back of it. Accused 4 and 5 had followed the deceased to the bakkie and had continued stabbing him there. He did not notice the appellant and accused 6 after that as neither the appellant nor accused 6 had followed the deceased to the bakkie or stabbed him there. He had then for the first time noticed accused 1 lying injured on the ground outside.

[9] The appellant accused 1 and accused 6 made common cause with their defence to the charges against them. Accused 1 had testified that the deceased had stabbed him 3 times and that he had stabbed him once in self defence. His evidence was then that he had fallen to the ground outside the tavern, unable to move as a result of his injuries and his state of inebriation. The appellant testified that he had been called to come to the tavern to assist accused 1 and that when he had got there and seen his state he realized he would need help to take him to the clinic, he had then telephoned accused 6 to come and help him. Accused 6 arrived in his sleepwear and together they had helped accused 1 to the clinic.

[10] All three denied entering the tavern, accused 1 on the basis that he was unable to do so because of his injuries, the appellant because he was only there to assist accused 1 and as a person who did not drink would in any event have had no reason to go inside and lastly accused 6 who stated that he would not go inside in his sleepwear.

[11] Returning to the last part of the evidence of Mr. Slabbert, he testified that when he had exited the tavern he had seen accused 1 near the bakkie and had observed that he was bleeding from his mouth. He did not see either the appellant or accused 6 at that stage.

[12] Counsel for the appellant argued that there were material discrepancies in the evidence of Mr. Slabbert and Mr. Maseko which rendered all their evidence questionable. She pointed pertinently to the fact that Mr. Slabbert had said that he did not see the appellant and accused 6 with weapons inside the tavern and that when he had come out he had seen accused 1 but not them.

[13] Mr. Maseko was criticized for the fact that the statement he had given to the police shortly after the incident did not accord precisely with the evidence given in court in that the statement did not record that the appellant and accused 6 had tripped the appellant and stabbed him before he had fled to the bakkie.

[14] While it is so that the evidence of Mr. Slabbert and Mr. Maseko did not correspond precisely, it seems to me that the discrepancies such as there may be, are indicative of the "moving scene" through which the events of the evening in question unfolded. Both witnesses place accused 1, the appellant and accused 6 following the deceased into the tavern. Both place all three outside the tavern after the deceased ran out. It is the evidence of Mr. Maseko alone that the appellant and accused 6 stabbed the deceased.

[15] While Mr. Slabbert did not see the appellant and accused 6 outside when he exited the tavern, he did see accused 1 and testified about the injury he had seen. The fact that all three accused confirmed in evidence that accused 1 was bleeding from his mouth means that Mr. Slabbert could not have known this unless he had indeed come out of the tavern when he said he did.

[16] The evidence paints a picture of a series of events which culminated in the death of the deceased. None of the state witnesses saw the entire series of events, each seeing only part.

The consideration of the evidence in this matter must be as a whole[1] and the individual pieces of the "jig-saw puzzle" pieced together.

[17] In S v Chabalala 2003 (1) SACR 134 (SCA) it was held by Heher AJA at 40a–b that:

> "*The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. 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 on 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 in evidence."*

[18] The appellants counsel made much of the fact that Mr. Slabbert had testified that he had not seen the appellant and accused 6 when he had exited the tavern and tried to suggest that this fact should cause the evidence of Mr. Maseko to be called into question. I disagree – the fact that Mr. Maseko kept his attention on the attack on the deceased and that Mr. Slabbert saw accused 1 on his own near the bakkie while the attack continued, is destructive of the version given in evidence by accused 1, the appellant and accused 6[2].

[19] The most serious challenge to the evidence of Mr. Maseko was in regard to the discrepancy between his evidence in court and the written statement. The approach to be followed in this regard is set out in S v Mafaladiso and Others 2003 SACR 589 (SCA) at 584d-h:

> "*Material differences between witness's evidence and prior statement – Juridical approach*

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[1] S v Trainor 2003 (1) SA 35 (SCA) - "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety."

[2] Shackell v S [2001] 4 All SA 279 (SCA)

to contradictions between two witnesses and contradictions between versions of the same witness is, in principle identical – In neither case is aim to prove which version is correct, but to satisfy oneself that witness could err, either because of defective recollection or because of dishonesty – Court must carefully determine what witnesses actually meant to say on each occasion – In this regard adjudicator of fact must keep in mind that previous statement not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement and that person giving statement is seldom, if ever, asked to explain statement in detail – It must be kept in mind that not every error by a witness and not every contradiction or deviation affects credibility of witness – Non material deviations not necessarily relevant – Contradictory versions must be considered and evaluated on a holistic basis."

[20] The failure to record in the prior statement to the police that he specifically saw the appellant and accused 6 tripping and stabbing the deceased was traversed during cross examination. Mr. Maseko testified that he had told this to the Police Officer who took down his statement. The statement was read into the record and it is apparent that it was a narrative of the events as witnessed by him on the evening. None of the 6 accused were named in the statement - being referred to as "a group of males". It was open to the defence to have pursued this further, but it failed to do so.

[21] It bears mentioning that the evidence of Mr. Maseko was not seriously disturbed during cross-examination and that the court *a quo* had found him to have made a favourable impression upon the court.

AD CONVICTION

[22] In my view, and on consideration of the evidence as a whole, there can be no doubt that the appellant, committed the offence with which he was charged and convicted.

[23] There is in the circumstances, no reason to interfere with the factual findings of the court *a quo* in respect of the conviction on count 1

AD SENTENCE

[24] The appellant was convicted, on Count 1 of a crime referred to in *Part 1 of Schedule 2 of The Criminal Law Amendment Act 105 of 1997* and the court a quo was obliged to impose the prescribed minimum sentence of life imprisonment in terms of Section 51(1)(a) of that Act, absent substantial and compelling circumstances[3]. See *S v Malgas*[4].

1. The court *a quo* found substantial and compelling circumstances and imposed a sentence of 12 years imprisonment, a sentence significantly lower than the prescribed minimum.
2. There are in the circumstances no grounds for to interfere with the sentence imposed by the trial court.

[25] In the circumstances, I make the following order:

25.1 The appeal against the conviction on count 1 is dismissed.

25.2 The appeal against sentence on count 1 is dismissed.

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A MILLAR

ACTING JUDGE OF THE HIGH COURT

I agree, and is so ordered.

[3] Section 52(3) of Act 105 of 1997

[4] 2001 (1) SACR 469 (SCA) at paragraph 8

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B NEUKIRCHER

JUDGE OF THE HIGH COURT

HEARD ON:	**20 FEBRUARY 2019**
JUDGMENT DELIVERED ON:	**25 FEBRUARY 2019**
COUNSEL FOR THE APPELLANT:	**ADV L AUGUSTYN**
INSTRUCTED BY:	**LEGAL AID SOUTH AFRICA**
	PRETORIA JUSTICE CENTRE
COUNSEL FOR THE RESPONDENT:	**ADV M MOHAMED**
INSTRUCTED BY:	**THE STATE ATTORNEY**