REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A298/2020
DPP REF. NO: SA94/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

February 2022 — DATE
PD. PHAHLANE — SIGNATURE

In the matter between:

SIBUSISO THAMOAZILE NKAYI — **APPELLANT**

and

THE STATE — **RESPONDENT**

JUDGMENT

PHAHLANE, J

[1] On 31 May 2016, the appellant who was legally represented during the trial proceedings was convicted of murder and sentenced to 15 years imprisonment. Although the charge sheet reflects that the appellant was charged in terms of the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the Act"), he pleaded in terms of section 51(1) in Part 1 of schedule 2, and section 51(2) in Part 2 of schedule 2 of the Act. He made admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 ("the CPA"), and gave a plea explanation which reads as follows:

> *"On the day in question, there were two altercations between the deceased and the accused. During the second altercation the accused hit him with a broken bottle in the face twice. He also kicked the deceased in the face twice. When the accused was doing this, he was acting in self-defense as the deceased had attacked him. It was not the accused intention to kill the deceased or caused his death".*

[2] On 28 July 2016, his application for leave to appeal in respect of conviction and sentence was refused by the trial court. The appellant subsequently lodged a petition to the High Court (North Gauteng, Pretoria) and was granted leave to appeal his conviction and sentence on 4 November 2020.

[3] Briefly summarized, the conviction of the appellant was based on the evidence of a single witness, Mr Thyilana who stated that on the day of the incident between 7:00 and 8:00 in the morning, he was at Barcelona, Etwatwa at the car wash. While busy washing a car, he noticed the appellant chasing the deceased, and the deceased fell. He heard the appellant saying to the deceased, *"I will stab you, I will kill you, let us talk"*. He noticed that the appellant had blood on his mouth.

[4] He stated that the appellant and the deceased sat on the grass chatting, and thereafter they stood up and went back to the direction where they were coming from. He continued washing the car and when he looked at them again, he noticed that the deceased was already lying on the ground and the appellant was on top of him, trampling on the head of the deceased. He also noticed the appellant kicking the deceased on the head while still lying on the ground and the deceased was not fighting back.

[5] He approached and reprimanded the appellant, saying that he must stop what he was doing because he will regret it later. The appellant stopped for a while, and he (the witness) continued to wash the car, but then the appellant started assaulting the deceased again. Mr Thyilana attempted to reprimand the appellant again but the appellant did not listen, and he became aggressive towards the him. He said the situation became worse and he witnessed the appellant trampling on the head of the deceased and was also throwing stones at his head. The appellant decided to run away when people started gathering around.

[6] Ms Van Wyk argued on behalf of the appellant that the trial court erred in not properly considering that the appellant acted in self-defence and not properly applying the requirements of the attack nor the requirements of the defence. Counsel further argued that the appellant acted in self-defence to protect his own life because when Mr Thyilana witnessed the altercation between the appellant and the deceased, the deceased had already attacked and injured the appellant earlier that day. She also argued that the appellant knew that the deceased may attack him again, and is capable of causing him further physical harm, and submitted that it cannot be excluded that the deceased also started the second altercation.

[7] It was further argued that no other injuries were sustained by the deceased except injuries to his head, and that the injuries sustained by the deceased as observed by the doctor does not support the evidence of Mr Thyilana who testified that the deceased was trampled on, kicked, and thrown with stones and bricks multiple times on the head.

[8] The respondent on the other hand argued that the fact that the appellant confirmed during cross examination that he is the only person who fought with the deceased on the day of the incident, means that he is the sole cause of the injuries sustained by the deceased and eventually caused his death. Mr Lalane submitted on behalf of the State that the post-mortem report corroborates the evidence of Mr Thyilana that he witnessed the appellant trampling on the deceased's head and pelting him with stones because the post-mortem report indicates that the deceased suffered among other injuries, a skull fracture.

[9] The following injuries are noted in the post mortem report:

9.1.1 *"**External appearance of the body and condition of the limbs**:*

1. *Jagged stab wound over left eye bank with left eye missing and fracture of the left jaggonatic process;*
2. *Stabbed wound lateral left eye 1 cm downwards;*
3. *Stabbed wound right eye;*
4. *Jagged stab wound over left temporal skull.*

9.1.2 ***Head and Neck***

***Scalp & Skull**: Jagged stab wound over left temporal scalp with sub-aponeurotic haemorrhage from left scalp to occipital scalp*

***Intracranial contents**: Brain bleeding left temporal with sub aragnoid haemorrhage and sub-dural haemorrhage".*

[10] As a court of appeal, this court must determine as regards conviction, what the evidence of the State witness was as understood within the totality of the evidence led, including the evidence led on the part of the appellant, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision.

[11] It is trite law that a court of appeal will not interfere with the trial court's findings unless it finds that the trial court misdirected itself as regards its findings or the law. The principles which should guide the court in an appeal purely upon the facts were articulated by the Appellate Division in ***R v Dhlumayo & Another***[1] that where the appeal is directed against trial court's findings of facts, the court of appeal will interfere where the trial court's reasons on its findings were either unsatisfactory, or where the record shows them to be such. However, where there has been no misdirection of fact, a court of appeal must assume that the trial court's findings are correct and will accept these findings, unless it is convinced that they are wrong.

[12] In affirming that a court of appeal will only be entitled to interfere with the trial court's evaluation of oral evidence in exceptional cases, the Supreme Court of Appeal in ***S v Monyane and Others***[2] stated that:

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[1] 1948 (2) SA 677 (AD) at 705-6.
[2] 2008 (1) SACR 543 (SCA) at para 15.

"This court's power to interfere on appeal with the findings of fact of a trial court are limited...In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong....Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony". (See also: S v Hadebe and Others[3]).

[12] In convicting the appellant, the trial court rejected the version of the appellant that he acted in self-defence, and held that the appellant contradicted his plea as well as his evidence in chief and the version put to the witness. In this regard, it held that the appellant's evidence is not reasonably possibly true.

[13] It is on this basis that the respondent submitted that the appellant did not meet all the requirements of self-defence based on the following reasons:

1. *it is the evidence of both the witness and the appellant that the appellant chased after the deceased - this means there was never an attack against the appellant.*
2. *the attack on the deceased was unnecessary because the first altercation took place and finished earlier and the deceased left and the appellant remained behind - therefore the attack on the deceased by the appellant is a clear act of retaliation.*
3. *there was no reasonable relationship between the attack and defensive act - the appellant was not attacked at the time he attacked the deceased.*

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[3] 1997 (2) SACR 641 (SAC) at 645e-f.

4. *the appellant was not justified to have acted the way he did and he was not acting in self-defence at all.*

[14] In dealing with the requirement when assessing a claim of self-defence or private defence, there must be a reasonable connection between the attack and the defensive act in the light of the particular circumstances in which the events take place. Insofar as the requirements of attack are concerned, the attack must be unlawful; it must be directed at the interest which legally deserved to be protected, and it must have been imminent and not yet completed. A person who is the victim of an unlawful attack upon person or another recognised legal interest may resort to reasonable force to repel such attack. CR Snyman[4] defines private defence as follows:

> *"A person acts in private defence, and his/her act is therefore lawful, if he/she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon his/her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack".*

[15] In ***S v De Oliveira***[5] the court stated that:

> *"A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way".*

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[4] Criminal Law, CR Snyman, 6th Edition (2014) at 102.
[5] [1993] ZASCA 62 (18 May 1993).

[16] I am inclined to agree with the respondent's submission because in the appellant's own version, the altercation between himself and the deceased at the tavern had already ended and there was no attack on him when he approached the deceased near the car wash. The appellant's attack on the deceased does not pass the test of the requirement that the attack on him must have been imminent and not yet completed. It is on record that when the appellant approached the deceased, he was heard saying to the deceased: *"I will stab you, I will kill you, let us talk"* - an aspect which the appellant denied.

[17] Ms Van Wyk submitted that according to the post-mortem report, the deceased did not sustain other injuries, save for the injuries to the head. Further, that it cannot be excluded that the appellant hit/stabbed the deceased two or three times with the bottle. She however argued that while the trial court held during sentencing proceedings that the deceased was stabbed four times in the face, and that his skull was fractured, the injuries sustained and observed by doctor Sarang do not support the evidence of Mr Thyilana.

[18] I do not agree with the defence because the injuries sustained by the deceased are confirmed by the post mortem report and the evidence of Mr Thyilana. The injuries noted at paragraph **8.1.1** *supra* as regards the external appearance of the body and condition of the limbs, are indicative of the stab wounds inflicted on the face of the deceased, which the appellant's counsel submitted cannot be excluded to having been inflicted by the appellant with a bottle. These injuries were confirmed by the appellant during cross-examination that he stabbed the deceased four times on his face. At the same time, the injuries noted at paragraph **8.1.2** indicating a haemorrhage on the scalp and skull, corroborates the evidence of Mr Thyilana that the appellant was kicking the deceased and trampling on the

deceased's head while the deceased was lying on the ground and that the appellant threw stones or rocks at the deceased.

[19] The appellant contends that he kicked the deceased twice on his chest because he wanted to break free from the deceased who was holding his leg, but the post-mortem report indicates that the chest area was normal. Ms Van Wyk submitted that the State failed to prove the guilt of the appellant beyond a reasonable doubt and prove that the appellant had the intention to kill the deceased. She further submitted that the State failed to prove that the appellant did not act in self-defence during the second altercation.

[20] The question is therefore whether on the conspectus of all the evidence, it can be concluded that the appellant had the intent to kill the deceased or whether he acted in self-defence to justify his actions. To succeed on appeal, the appellant needed to convince this court on adequate grounds that the trial court was wrong in accepting the evidence of the State and rejecting his version as not being reasonably possibly true.

[21] The correct approach in evaluating evidence is to weight up all the evidence which point 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, and having done so, decide whether the balance weighs so heavily in favour of the state so as to exclude any reasonable doubt about the accused guilt. Of course, this cannot be done in isolation, but the court must consider the totality of the evidence before it to come to a just decision. It is therefore imperative to evaluate all the evidence and not be selective in determining what evidence to consider.

[22] The Supreme Court of Appeal in ***S v Chabalala***[6] amplified as follows, the '*holistic*' approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accused:

> *"A court when evaluating the evidence in totality does not have to be convinced that every detail of an accused's version is true, if the accused version is reasonable possible true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities, but the accused's version cannot be rejected merely because it is improbable, it may only be rejected on the basis of inherent probabilities if it is said it is so improbable that it cannot reasonably possibly be true".*

[23] With regards to the appellant being convicted on the evidence of a single witness, the trial court correctly pointed out that the evidence of Mr Thyilana was that of a single witness and must treated with caution. It may very well be that Mr Thyilana was a single witness, but section 208 of the CPA states very clearly that "an accused person may be convicted of any offence on the single evidence of any competent witness". In ***S v Sauls and Others***[7] Diemont JA held that:

> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or*

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[6] 2003 (1) SACR 134 (SCA)

[7] 1981 (3) SA 172 (A).

contradictions in the testimony, he is satisfied that the truth has told".

[24] It is trite law that in criminal proceedings, the prosecution must prove its case against an accused person beyond a reasonable doubt and that the accused has no duty to prove his innocence. With regards to the question whether trial court was correct in finding that the State proved the guilt of the appellant beyond a reasonable doubt, the evidence of the State has to be measured against the evidence of the appellant as to whether his version could be said to have been reasonably possibly true.

[25] In determining whether an accused person's version is reasonably possibly true, the Supreme Court of Appeal in ***S v Trainor***[8] stated that:

> *"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 be of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety".*

[26] Having given proper and due consideration to all the circumstances of this case, I am satisfied that on a careful analysis of all the evidence, including the appellant's version of what transpired on the day of the incident, the trial court correctly concluded that the appellant did not act in self-defence. On an

[8] 2003 (1) SACR 35 (SCA) at para 9

assessment of the objective facts or evidence as it appears on record, the appellant could not have reasonably believed that his life was in imminent danger. The post mortem report clearly shows the veracity of the injuries sustained by the deceased, and the attack on the deceased was therefore not necessary.

[27] The trial court held that Mr Thyilana did not exaggerate his evidence because he made concessions during cross-examination where one would have expected him to do so, and stated that Mr Thyilana did not have any motive to fabricate evidence against the appellant. The trial court further held that there were no contradictions and improbabilities in Mr Thyilana's evidence. Having said that, the appellant's evidence was riddled with contradictions as he kept changing his version that was put to the witness, including the reasons why he went to the deceased. In this regard, he stated that he was on his way home and the deceased called him while on the other hand he testifies that 'he went to the deceased because he wanted to talk to the deceased in order to sort out their issues'.

[28] In the circumstances, I agree with the trial court's finding that the State proved its case against the appellant beyond any reasonable doubt. Accordingly, I am of the view that the trial court did not misdirect itself in convicting the appellant. It is also my view that the trial court in stating that it considered the whole evidence as to how the incident unfolded, was mindful of the basic principle as enunciated in ***S v Van der Meyden***[9] where Nugent J stated that:

> *"A court does not base its conclusion, whether it be to convict or acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence...The proper test is that an accused is bound to be convicted if the evidence establishes his*

[9] 1999 (1) SACR 447 (W).

guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored"[10].

[29] This court will reiterate on what was said by Boshielo JA in ***S v Engelbrecht***[11] when he pointed out that:

"Having read the transcript, I am unable to find any fault with the assessment of these witnesses by the trial court, which had the advantage of seeing them testify and observing their reactions to questions during cross-examination. This gave the trial court an advantage which this court does not have as a court of appeal. In the absence of any misdirection by the trial court, I decline to interfere with such a finding".

[30] With regards to sentence, this court must determine whether the sentence imposed on the appellant was justified. In order to deal with the grounds of appeal relating to the alleged misdirection by the trial court, it is important to

[10] See also: S v Van Aswegen 2001 (2) SACR 97 (CSA) at para 8; S v Shilakwe [2011] ZASCA 104;2012 (1) SACR 16 (SCA) para 11

[11] 2011 (2) SACR 540 (SCA) at para 18

restate the legal principles on sentencing. It is trite law that the imposition of sentence falls within the discretion of the court burdened with the task of imposing the sentence and the appeal court will only interfere with the sentence if the reasoning of the trial court was vitiated by misdirection, or the sentence imposed induces a sense of shock, or can be said to be startling inappropriate. Nonetheless, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The sentence must be of such a nature, degree, or seriousness that it shows that the trial court did not exercise its sentencing discretion at all, or exercised it improperly, or unreasonably.

[31] It is clear from the record of the trial proceedings that the appellant was warned of the provisions of Minimum Sentences Act when the charge was put to him. To avoid the prescribed minimum sentence of fifteen (15) imprisonment, the appellant had to satisfy the trial court that substantial and compelling circumstances existed which justify a deviation from the imposition of the prescribed minimum sentence. The trial court did not find such circumstances.

[32] It was submitted on behalf of the appellant that although the personal circumstances of the appellant may not qualify as substantial and compelling circumstances, the trial court ought to have considered the following factors as justifying a deviation from imposing a sentence of 15 years imprisonment: (a) the State failed to rebut that the first altercation was caused by the deceased; (b) that the deceased injured the appellant with a bottle during the first altercation; (c) that the appellant got angry when he was again assaulted by the deceased.

[33] The respondent opposed the appeal and submitted that the sentence imposed is fair and appropriate under the circumstances, and that the trial court did not

misdirect itself as it took into consideration all the relevant factors when sentencing the appellant. Mr Lalane further submitted that the trial court was obliged to impose the prescribed minimum sentence because the offence which the appellant was convicted for, fell under the provisions of Part 2 Schedule 2 of the Act.

[34] The general principles governing the imposition of a sentence in terms of the Minimum Sentences Act as articulated by the Supreme Court of Appeal in ***S v Malga***[12] cannot be ignored. Referring to the case of ***Malgas,*** the court in ***S v Matyityi***[13] reaffirmed that:

> *"The starting point for a court that is required to impose a sentence in terms of Act 105 of 1997 is not a clean slate on which the court is free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation".*

[35] I am of the view that the submissions made on behalf of the appellant cannot stand. There was no evidence placed before the trial court to justify the imposition of a lesser sentence than the prescribed sentence. In considering the appropriate sentence to impose, the trial court took into consideration the appellant's personal circumstances, and was also mindful of the 'triad' factors pertaining to sentences as enunciated in ***S v Zinn***[14] namely: 'the crime, the offender and the interests of society. With that in mind, it is important to heed to the purpose for which legislature was enacted when it prescribed sentences for

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[12] 2001 (1) SACR 469 (SCA)
[13] (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 ALL SA 424 (SCA)
[14] 1969 (2) SA 537 (A)

specific offences which falls under section 51(2) for which the appellant has been convicted and sentenced for.

[36] Having given proper and due consideration to all the circumstances, this court cannot fault the decision of the sentencing court nor can it be said that the sentence imposed was shocking or unjust. We are of the view that the trial court did not misdirect itself in imposing the prescribed sentence of fifteen (15) years imprisonment. We also cannot find any misdirection in the trial court's finding that there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. Accordingly, we are of the view that the sentence imposed must stand.

[37] In the circumstances, the following order is made:

1. The appeal against conviction and sentence is dismissed.

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

DE VOS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Applicant	: ADVOCATE LA VAN WYK
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For the Respondent	: ADVOCATE S. LALANE
Instructed by	: DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA
Date of Hearing	: 19 January 2022
Date of Judgment	: 21 February 2022