IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE **SIGNATURE**

Case Number: A796/2015

In the matter between:

PRINCE THABISO MATLHONG Appellant 1

BONGINKOSI REMIS MLAMBO Appellant 2

and

THE STATE Respondent

JUDGMENT

MADIBA AJ

[1] The appellants were convicted and sentenced at Sebokeng Renional Court on the 17th of September 2014 on charges of murder read with the provisions of section 51(1) of Act 105 of 1997 as amended and housebreaking with intent to rob and robbery with aggravating circumstances in contravention of section 51(2) of Act 105 of 1997 as amended.

Both appellants were sentenced to life imprisonment each on a charge of murder and 10 years for housebreaking with intent to rob and robbery.

The appellants were declared unfit to possess a firearm in terms of section 103(1) of Act 60 of 2000.

Leave to appeal was granted as follows:

The first appellant's leave to appeal was limited to sentence only on a charge of murder. For the second appellant he was allowed to appeal both the conviction and sentence on a count of murder.

It should be mentioned that the appellants were denied leave to appeal on their conviction and sentence relating to a charge of housebreaking with intent to rob and robbery.

The appellants approached this court to appeal both convictions and sentences meted out by the court *a quo*.

Factual background

[2] On the 3rd of March 2012 and at Evaton the deceased was brutally shot at and died as a result of the gunshot would sustained.

Several items, cell phones, digital camera, wallet, Absa card and several pairs of tekkies including Lime Puma tekkies were taken by the assailants.

Judith Sidinyane, the deceased, an old pensioner aged 65 years was peacefully sleeping in her home together with her grandchildren. The grandchildren and the deceased slept in different rooms. All the doors and windows were locked before the inhabitants of the deceased's house went to sleep.

Their sleep was abruptly interrupted by three unknown and uninvited people who managed to break in and gain entry into the deceased's home.

One of the grandchildren, N[....] R[....] , was awoken by the commotion in the house and suddenly saw an unknown person in his bedroom who covered his head.

He was assaulted and ordered to cover his head with blankets which he did.

[3] While he was in his bedroom with his head covered with blankets, he heard a sound of a gun going off in the house. The person who was in his bedroom left and reprimanded others that they were not there to shoot people.

N[....] R[....] went to investigate and heard the deceased asking for water. Along the passage way, he met with the three assailants and he ran back to his bedroom.

These unknown people followed him and ordered him to show them the safe and demanded R20 000.

When he told them that there is no money and a safe in the house, they tied his feet to the bed, assaulted him and poured him with some liquid threatening to burn him.

After the assailants left, N[....] R[....] untied himself and went to the deceased's bedroom to check on her.

He was met with a lifeless body of his grandmother lying on the floor in a pool of blood. The neighbours and N[....] 's mother were alerted and the police attended the scene.

It was then discovered that the grandmother has indeed passed on.

[4] Further investigation revealed that the intruders gained entry by cutting the burglar proof on the window and forcefully removed the door attached to the house's wall.

During the police investigations, lime Puma green tekkies were found in a room where the second appellant was sleeping and the tekkies were confiscated and registered in SAPS 13 as exhibit. Fingerprint and palm print were uplifted form a shoe box written Truworths. The fingerprint matched the first appellant's fingerprint in all material respects. Both appellant together with a third person were arrested and detained.

The first appellant denied that he was at the scene of incident and alleged that he was with the third person arrested at a tavern enjoying themselves with their girlfriends. When confronted to explain the presence of his fingerprint uplifted on a shoe box Truworths, he was unable to do so.

The second appellant's defence was that the lime Puma tekkies found in the room he was sleeping in during his arrest, belonged to his brother, Joel Makhoba. He testified that he was not staying in the house and only spent that night in his brother's bedroom in his absence. He denied any involvement in the offences. He denied all charges levelled against him.

[5] Several witnesses including the police officer who found the lime Puma tekkies and the fingerprint experts testified.

The appellants testified during their trial. Joel Makhoba, the second appellant's brother testified that the lime Puma tekkies belonged to him. After identifying them at the police station, he was handed the lime Puma tekkies. The alleged tekkies were not brought to court as an exhibit.

The first appellant did not call any witness and insisted that his fingerprint was planted on the shoe box – Truworths.

During the second appellant's brother's testimony, the presiding officer ordered Joel Makhoba to fit N[....] R[....] , the victim of robbery's tekkies he wore, to establish if indeed the lime Puma green tekkies would be the exact size of second appellant's brother Joel Makhoba.

N[....] R[....] 's tekkies did not fit Joel Makhoba as he wore size 8 while the victim N[....] R[....] 's shoe size was size 7.

The third person arrested with the appellants was acquitted at the close of the state's case as there was no evidence linking him to the charges as proffered in this matter.

Issues on appeal

[6] (i) The appellants contended that the state failed to prove its case beyond reasonable doubt.

(ii) Whether the court *a quo* misdirected itself by finding that there are no substantial and compelling circumstances.

(iii) Whether the sentences imposed by the court *a quo* is inappropriate in the circumstances.

(iv) That the evidence of the complainant, N[....] R[....] , was not satisfying and was not approached with the necessary caution.

(v) Whether the court *a quo* erred in failing to take into account the period the appellants spent awaiting trial.

(vi) That the court erred in finding that the appellants were not suitable candidates for rehabilitation.

Legal principles finding application

Ad conviction

[7] It is trite law that the guilt of the accused must be proved beyond reasonable doubt. The accused does not have to prove his innocence. What is expected of him is to provide the court with a version which is reasonably possibly true. The court does not have to believe that his version is truthful. It does not have to be convinced that every detail of the version is true. See ***S v Chabalala* 2003 (1) SACR 134 (SCA); *S v Shackell* 2001 (4) SA 1 (SCA).**

The first appellant raised the defence of alibi contending that at the alleged time of the offences he was at the tavern with his friend together with their girlfriends and thereafter went home in the company of his girlfriend to sleep.

He disputed the fingerprint uplifted on a shoe box written Truworths found in the deceased's bedroom as his and alleged it was planted. The second appellant denied that he committed all charges proffered against him.

Appellant's alibi evidence

It is indeed so that the appellant does not bear the onus of proving his alibi. The duty rests on the prosecution to prove beyond reasonable doubt that the first appellant is the one who murdered the deceased.

All what the first appellant had to do is to show that he could not have committed the offence because he was not present at the time when the offence was committed.

The first appellant alleged that he was not at the crime scene as alleged. For reasons not explained the first appellant failed to call any of the people to

corroborate his version. More surprisingly one of the said people was accused three who was ultimately acquitted at the close of their case.

The state called a fingerprint expert. His findings are that the fingerprint uplifted on a shoe box – Truworths found in the deceased's bedroom, matched that of the first appellant. There is no plausible explanation from the first appellant about his fingerprint's presence in the deceased's bedroom.

Fingerprints and other traces left behind at the scene of an incident are commonly used to provide circumstantial evidence of identification. They are often of a strong probable value in linking the accused with the commission of a crime.

Considering the totality of evidence against the first appellant, his version that he was not at a crime scene is not possibly true and I find that it was correctly rejected by the court *a quo*. The only inference to be drawn is that the first appellant did kill the deceased. I hold that the conviction against the first appellant should stand.

Evidence against the second appellant

The state alleged that the second appellant is linked to offences committed as a result of the following:

That the Lime Puma tekkies green in colour were found by the police in the bedroom the second appellant was sleeping in when he was arrested. The tekkies referred to are part of the items stolen from the deceased's house on the day she was murdered.

N[....] R[....] identified the lime Puma green tekkies as his through their colour, size (7) and that one of the tekkies resembled his deformed shape of his foot as he was suffering from bunions. The tekkies were given back to N[....] R[....] by the police after he identified them as belonging to him.

The lime Puma tekkies were not brought to court as an exhibit during the trial.

During the trial, the second appellant testified that the lime Puma tekkies belonged to his brother and denied any involvement in the commission of the offences for which he was charged.

[8] It is settled law that the accused does not have to prove his innocence. The onus vests with the state to prove its case beyond reasonable doubt. The state is expected to provide credible and reliable evidence to prove its case against the accused.

N[....] R[....] could not identify the assailants including the second appellant. He was ordered to cover his head with blankets by the perpetrators of these heinous crimes committed at his grandmother's house. As there is no direct evidence linking the second appellant to the offences, the state relied on the circumstantial evidence.

Regarding circumstantial evidence the court in ***R v Blom*** **1939 AD 188** at paragraphs 202-3 stated that there are two cardinal rules of logic to be considered in dealing with circumstantial evidence namely:

(i) the inference sought to be drawn must be consistent with all the proven facts; and
(ii) the proven facts should be such that they exclude every reasonable inference save the one to be sought.

There are serious challenges and difficulties in my view in the evidence the state seeks to rely on in proving its case against the second appellant.

The respondent relied on the testimony of N[....] R[....] relating to his identification of his tekkies without such identification being thoroughly tested in court as the identified tekkies were not brought to court as an exhibit.

Except Joel Makhoba's say-so, about the lime Puma tekkies belonging to him, no extrinsic evidence was tendered to link the second appellant's involvement with the offences. In such instances the police could have for example obtained DNA samples from the tekkies linking the second appellant by his sweat and/or dead cells found in the said tekkies. More concerning is the fact

that the second appellant did explain that the lime Puma tekkies found in his brother's bedroom does not belong to him but to Joel Makhoba (his brother). Joel Makhoba indeed corroborates his version. It is to be noted that the second appellant does not even stay at the house he was found sleeping in as he only spent that night therein. He stays with his grandmother, the deceased in her house.

As to why the second appellant's brother was not arrested as he clearly stated that the alleged stolen Lime Puma tekkies belonged to him is telling.

[9] The presiding officer in the court *a quo* descended into the arena and played a role of an investigator and an expert in my view. After instructing the second appellant to fit the tekkies N[....] R[....] was wearing in court (not the stolen lime Puma tekkies) and did not fit him, the presiding officer made a finding that the second appellant was indeed involved in the commission of the offences. With respect the presiding officer's finding should be rejected as it was not his duty to embark on an investigation in court as the police are tasked to do so. The issue of whether the sizes involved are either size 7, 8 or 9 does not take this matter any further. It cannot be said that N[....] R[....] is the only person in Evaton who owns lime Puma green tekkies as there is no evidence to this effect.

Evidence of a single witness is to be treated with caution and its merits and demerits should be considered.

I find that the evidence of N[....] R[....] is not clear and satisfactory in all material aspects to link the second appellant to the commission of the offences.

The state has failed to prove its case beyond reasonable doubt against the second appellant in both charges proffered against him. The inference sought to be drawn in this matter is not consistent with the proven facts and does not exclude every reasonable inference save the one sought to be drawn.

[10] The personal circumstances of the first appellant were recorded as follows:

(i) The first appellant was 28 years old and he is unmarried. He dropped out of school doing Grade 11. The first appellant is a hawker earning ± R 2 800,00 per month.

(ii) He has fathered a child who is 7 years doing Grade 1 at school. He spent two and a half years in jail, since his arrest and until the date of his sentence.

(iii) The first appellant has a previous conviction of assault with intent to do grievous bodily harm.

It is to be considered whether the aforementioned factors are indeed substantial and compelling to justify a deviation from the prescribed minimum sentence.

[11] The first appellant has been convicted of serious offences of murder and robbery. The conviction of murder falls within the provision of section 51(1) of Act 105 of 1977 which prescribed minimum sentence unless substantial and compelling circumstances were found to exist justifying the imposition of a lesser sentence or whether the court *a quo* misdirected itself or did not exercise its discretion judicially and properly.

The court *a quo* found no substantial and compelling circumstances in favour of the first appellant.

It was contended on behalf of the first appellant that the court *a quo* failed to attach any weight and insufficiently considered the personal circumstances of the first appellant.

Pertaining to the personal circumstances of the offender in matters as serious as the offence before the court, it was stated in ***S v Vilakazi* 2009 (1) SACR 552 (SCA)** at page 574 paragraph 58 that:

> "In cases of serious crimes the personal circumstances of the offender, by themselves will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that ***Malgas*** said should be avoided."

The personal circumstances of the first appellant were indeed considered by the court *a quo* and found that they did not constitute substantial and compelling circumstances. I find no reason to hold otherwise.

[12] Ad sentence

Sentencing is a prerogative of a trial court and that sentence imposed by a trial court can only be interfered with where the trial court did not exercise its discretion reasonably and judicially. The test is therefore whether the sentence is vitiated by an irregularity, misdirection or is disturbingly inappropriate. My reading of the record reveals that the court *a quo* considered all the facts required to be considered i.e. first appellant's personal circumstances, the interest of society and the gravity of the offence. Mitigating and aggravating circumstances were taken into account.

The court found that the aggravating circumstances far outweighed the mitigating factors of the first appellant. It should be noted that the first appellant has a previous conviction of assault with the intention to cause grievous bodily harm.

The first appellant was given an opportunity when sentenced in his assault case as he was not directly imprisoned. Instead of seizing the opportunity to reflect on his past conduct, murder and robbery charges were proffered against him thus impacting on the issue whether the sentence imposed in his previous conviction of assault charge did really have any impact on his rehabilitation.

The court *a quo* held that the first appellant was not a candidate for rehabilitation and I could not agree more.

What is left is for this court to apply its mind to the question whether the sentence imposed by the court *a quo* was proportionate to the offence.

The aggravating factors in this matter are, that a helpless old pensioner was brutally murdered in a place she thought was her safe haven. A dangerous weapon, a firearm, was used against a defenceless woman to take away her soul for the selfishness and greed of the heartless assailants. No amount of words can describe the unprovoked and senseless attack on the deceased by the first appellant and his partners in crime. Statistics reveal the shocking skyrocketing percentage in murder and robbery offences. Sooner or later South Africa will be regarded as the number one country in the world when coming to murder and robbery offences.

[13] It is contended on behalf of the first appellant that the court *a quo* could have considered the period the first appellant spent in jail since his arrest and until he was sentenced.

As to why the first appellant was detained for such a period and who contributed to such detention was not canvassed by the first appellant.

In view of the seriousness of the offence committed and the circumstances that led to the death of the deceased, it cannot be said in my view, that failure to take into account the period spent in awaiting trial can be a determining factor for the appeal court in this matter to interfere with the sentence imposed by the court *a quo.* As stated above, the aggravating circumstances far

outweighs the mitigation factors herein. The yard stick remains, is the sentence meted out by the court *a quo* vitiated by irregularity to an extent that there is a shocking disparity between the sentence so imposed to which the appeal court could have imposed? I do not think so.

Careful reading of the record reveals that the court *a quo* did consider the issue of the period the first appellant spent awaiting trial and the issue of rehabilitation. I am of the view that the period was not so great that it can be inferred that the court *a quo* acted improperly and unreasonably under the circumstances.

[14] In ***S v Malgas*** **2001 (1) SACR 469 (SCA)** the court held that speculative hypotheses favourable to the offender, undue sympathy and marginal differences in personal circumstances relevant to sentencing must cumulatively justify the departure from the prescribed sentence.

The prescribed sentences are not to be departed from lightly and for flimsy reasons.

I can find no reasons to interfere with the sentences imposed on the first appellant. The sentences imposed by the court *a quo* on the first appellant do not appear to be shockingly inappropriate and disproportionate to an extent of inducing a sense of shock.

I therefore find that the court *a quo* exercised its discretion properly and judicially when sentencing the first appellant. In the same breath, the appeal against the conviction of the first appellant is devoid of any merit and it falls to be dismissed.

A finding that the state failed to prove its case against the second appellant on both charges has been made aforementioned.

[15] It is trite law that the conclusion of a trial court on factual findings is deemed to be correct unless the appeal court is convinced that the assessment of the evidence is wrong. See ***R v Dhlumayo* 1948 (2) 677 (D)**.

[16] Consequently the following order is proposed:

Regarding the first appellant

1. The appeal against the conviction and sentence against the first appellant on both counts is dismissed.
2. The conviction and sentence of the court *a quo* is confirmed.
3. The sentence imposed on count 2 (housebreaking with intent to rob and robbery) should run concurrently with the sentence imposed on count 1 (murder.

Appeal by the second appellant:

The conviction and sentence imposed on both count 1 (murder) and on count 2 (housebreaking with intent to rob and robbery) is upheld.

1. The appeal against the conviction and sentence in both counts 1 and 2 succeeds.
2. The conviction and sentence by the court *a quo* on count 1 and 2 are set aside.

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S.S. MADIBA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

_____

V.V. TLHAPI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A796/2015

HEARD ON: 8 February 2022

FOR THE APPELLANTS: ADV. R.S. MATLAPENG

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. M.J. MAKGWATHA

INSTRUCTED BY: Director of Public Prosecutions, Pretoria

DATE OF JUDGMENT: 24 March 2022