REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: A330/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

DATE : 22 November 2022

SIGNATURE:

In the matter of:

Justice Mpho Tlhabela — Appellant

And

The State — Respondent

This judgment has been handed down electronically and shall be circulated to the parties via email. Its date and time of hand down shall be deemed to be 22 November 2022.

JUDGMENT

Maumela J. (Munzhelele J *concurring)*

Introduction.

1. This matter came before court as an appeal subsequent to a successful petition to the North Gauteng Division of the High Court. It is opposed and is brought against both conviction and sentence.

2. Before the Regional Division of North West, held at Brits, (the court *a quo*), the Appellant, Justice Mpho Tlhabela appeared. He was 25 years of age at the time. He was legally represented throughout the trial. He was charged with Murder read with the provisions of Section 51(2) of the Criminal Law Amendment Act: (Act No 105 of 1997) – CLAA). The allegations were that upon or about the 15th of September 2014 and at or near Oukasie in the Regional Division of North West, the accused did unlawfully and intentionally kill Martha Letlogonolo Shai, a female person.

3. Before the court *a quo,* the Appellant, opted to be tried without the participation of assessors in terms of Section 93*ter* (1) of the Magistrates' Courts Act 32 of 1944, (Magistrate's Court Act). When the charge was put, he pleaded Not Guilty. He opted to exercise his right to remain silent and therefore did not disclose the basis of his defence.

4. One admission was made namely that on the day of the incident, the Appellant did get to be in the company of the deceased. The Appellant confirmed the admission.

5. The state led evidence to prove its case against the Appellant. At the close of the state's case, the defence applied for the court to find him Not Guilty and to discharge him in terms of section 174 of the Criminal Procedure Act 51 of 1977(CPA). He contended that the evidence advanced by the state does not constitute *prima facie* evidence against him, on the basis of which a reasonable court may find him guilty. His application was dismissed. The defence then closed its case without leading evidence.

6. The Appellant was convicted as charged. On the 24th of January 2017, he was sentenced to undergo 17 (seventeen) years of imprisonment.

Subsequent to petition to this court, (the North Gauteng High Court), the Appellant was granted leave to appeal against both conviction and sentence.

Reconstruction of the record.

7. The record of the proceedings as they panned out before the court *a quo* was incomplete. The court could not make an informed decision based on it. As per the order of court, it was reconstructed but two pages are still missing. In the case of *State v Chabedi*[1], where the court had to decide on the approach to instances where record's from courts *a quo* are incomplete, the court stated the following; *"the requirement is that the record must be adequate for proper consideration of appeal, not that it must be perfect recordal of everything that was said at the trial…."*
See *S v Schoombie*[2].

8. The parties agreed that the available record as reconstructed contains sufficient information for purposes of adjudicating this appeal. It was further agreed that looking at the nature of the offence and the probabilities of the conviction being set aside or altered to Culpable Homicide, it would not be in the best interest of justice to refer the matter for further reconstruction. This was among others in consideration of the fact that such may take up to 2 (two) years before the matter returns to this court

Merits.

9. The state contended that on the 15th of September 2015, the Appellant unlawfully and intentionally killed his girlfriend Martha Lehlogonolo Shai. Gopolang Tlhabela testified that on the date stated above, the Appellant came to his home in the early hours of the morning. He stated that the Appellant enquired to him about a type of poison that is used kill rats which

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1. 2005 (5) SARC 415 SCA.
2. 2017(2) SACR 1 CC

is called "halephirimi"[3]. He said the Appellant told him that he wishes to use that poison to end his, (the Appellant's) life.

10. Gopolang told court that in the morning, when they woke up the Appellant told him that *"he threw Lehlogonolo into a canal"*.[4] Dr. Monyatso Regionald Makete testified to the effect that she examined the body of the deceased and found that the cause of death is 'drowning' and not 'Head Injuries' as indicated on the Post-Mortem Report attached to the record. The State closed its case.

11. The state contended that because the Appellant closed his case without testifying, it therefore means that the evidence presented by the state remains uncontroverted. However, it is still fact that failure by the Appellant to challenge the evidence tendered by the state witnesses does not relieve the former, (the state), of its duty to prove its case beyond a reasonable doubt.

12. It was argued that *in casu*, the proven and accepted facts may establish that the Appellant threw the deceased into a canal and that thereafter, he retrieved her body therefrom and attempted in vain to resuscitate her. It was submitted that the evidence on record, which remains unrebutted proves beyond reasonable doubt that the Appellant threw the deceased into a canal. The court *a quo* did not know the circumstances under which the deceased was thrown into the canal.

13. It was further submitted that as matters stand; to inquire into circumstances and/or reasons why the deceased was thrown into a canal would result in unwarranted speculative hypothesis which does not amount to conclusive proof that the Appellant committed the crime he is accused of. On that basis, the Appellant contended that the state failed to prove beyond a reasonable doubt that he committed the offence alleged.

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[3]. In Google, "halephirimi" is a Sotho or Tswana word for a type of poison that is often used to commit suicide. The literal translation of the word is "before the sun sets".

[4]. Lehlohonolo is the deceased in this case.

14. It was submitted that should the Court find that the evidence at hand does not sustain a finding that proof beyond a reasonable doubt was established, which shows that the Appellant intended to kill the deceased; then the court ought to find that the evidence at hand constitutes a reasonable possibility that he, (the Appellant), may have negligently caused the death of the deceased.

15. On behalf of the Appellant, it was submitted that it would be illogical and ludicrous that where he, (the Appellant), intended to kill the deceased, he consequently retrieved her from the canal and attempted to resuscitate her. It was submitted that the magistrate misdirected himself in finding that the statement made by the Appellant to Mr. Gopolang Tlhabela amounts to a confession. It was argued that the said statement is not an equivocal admission of guilt and therefore it does not meet the requirements of a confession.

16. It was pointed out that Gopolang conceded during cross examination that the Appellant did not say that he killed the deceased. It was further submitted that the statement made to Mr. Gopolang refers to an admission made to him by the Appellant on how the deceased died. It was pointed out that this evidence does not exclude the reasonable possibility that the Appellant was negligent in throwing the deceased into a canal and therefore does not establish beyond reasonable doubt that Appellant intended to kill the deceased. It was further stated that another reasonable possibility is that the death of the deceased was accidental.

17. This submission is premised on the fact that it can be inferred from the version put to the witness, that there was a struggle between the Appellant and the deceased over a cell phone. It is argued that the deceased could have slipped and fallen into the canal. However, it is conceded that a version does not amount to evidence. This submission is intended at illustrating that

there is more than one reasonable inference to be drawn on the facts *in casu*.[5]

18. It was submitted that the Court ought to find that the Magistrate misdirected himself in finding that the state succeeded in proving the offence of murder against the Appellant. It was submitted further that the Court should at worst, return a verdict of Guilty on Culpable Homicide.

19. The Respondent argues that the Appellant must have foreseen a possibility that throwing the deceased into the canal can lead to her death or injury. The fact that the Appellant went ahead and threw the deceased into the canal demonstrates that he reconciled himself that possibility. After throwing the deceased into the canal, the Appellant retrieved her and attempted to resuscitated her. After doing that, the Appellant left the deceased there, without alerting anyone. He only told the witness about it on the following day.

Onus and analysis of evidence.

20. It is trite that in criminal cases, it is the state which bears the onus to prove the case against the accused beyond a reasonable doubt. In the case of *Prinsloo v State*[6] the Supreme Court of Appeal enunciated the law as follows:

> *"It is trite that the State bears the onus to prove the guilt of the appellant beyond reasonable doubt and that there is no duty on the appellant to convince the court of the truthfulness of any explanation which he gives. If his explanation is found to be reasonably possible true, the court will have no reason to reject it.* See also *S v Mbuli*[7]. See also *S v V*[8]. *However, this does not require proof beyond any shadow of doubt by the State.* See *S v Phallo*[9].

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5. See R V Blom 1939 (AD) 188 at 202-203.
6. (534/13) [2014] ZASCA 96 (15 July 2014) para [18], not reported.
7. 2003 (1) SACR 97 (SAC), at 110 D – E.
8. 2000 (1) SACR 453 (SCA) at 455B.
9. 1999(2) SACR 558 (SCA) para 10."

The same view is expressed by Slomowitz AJ in *S v Kubeka*[10].

21. In our law, in due course, the concept of intention has gradually been extended to cover not just deliberate but also conduct the consequences of which can be foreseen. This is referred to as *Dolus eventualis* or legal intention. It exists where the accused does not mean for the unlawful outcome to happen, but foresees the possibility that it could happen and proceeds with his conduct nonetheless.

22. In the case of *S v Sigwahla*, Holmes JA said the following relevant to the present enquiry:

> *"The expression intention to kill does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as dolus eventualis, as distinct from dolus directus."*

23. The Appellant elected not to testify in his own defence. He therefore failed to give explanations to glaring improbabilities occurring in his version as it was put to the witness. He therefore exposed himself to what is obtained in the case of *S v Boesak*[11], paragraph 24 where the Constitutional Court held that:

> 'consequences may follow failure to testify'.

24. In the case of *Osman & another v Attorney-General, Transvaal*[12], *the court said:*

> "our legal system being adversarial in nature: *Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the*

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10. 1982(1) SA 534 (W) at 537D.
11. 2001 (1) SACR 1 (CC).
12. 1998 (1) SACR 28 (T).

right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."'

25. The Respondent submits that a negative inference can be drawn for the Appellant's failure to testify. In his version, the Appellant put to the witness that the deceased fell into the canal by mistake that the deceased fell, now why then keep silent when it's your chance to narrate unless if there is something to hide. The Respondent submitted that had the Appellant negligently caused the death of the deceased, he should have given an explanation as to how the negligence occurred.

26. It was also submitted that the Appellant attempted to resuscitated the deceased because he had an afterthought. As a result of the afterthought, he got gripped by fear but by then it was too late. The appellant made admissions to a private person. He was not compelled to make an admission. He did it voluntarily the witness would not have had a reason to lie about what the appellant told him. He and the witness were in good terms and the state witness is the Appellants cousin.

27. It is trite that a court of appeal should be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court (see *R v Dhlumayo and Another*[13]), and will only interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned.

28. In the case of *S v Fancis*[14], the approach of an appeal court to findings of fact by a trial court was crisply summarized as follows:

"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in

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13. 1948 (2) SA 677 (A)
14. 1991 (1) SACR 198 (A).

accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in ***exceptional cases*** *that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony".*

29. In *S v Hadebe and Others*[15], at 645*e-f*, the Court held the following:

"... 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".

30. Based on the above, the court finds that the State succeeded in proving the guilt of the Appellant beyond a reasonable doubt. It finds that the state proved the charge of murder against the Appellant beyond a reasonable doubt. The appeal against conviction therefore stands to be dismissed.

Re: Sentence.

31. Regarding sentence, the available record only reflects the last page on which it stands recorded that a sentence of 17 (seventeen) years was imposed. The Appellant was convicted in terms of section 51(2) of the Criminal Law Amendment Act[16]. In terms of this section, a minimum sentence of 15 years' imprisonment becomes applicable in the event of conviction. However, in exercising his discretion, the Magistrate exceeded the Prescribed Minimum Sentence by 2 years. It is a requirement that this discretion be excised judicially.

32. It is trite that if the Magistrate is of the view that a sentence in excess of the minimum is necessary, he or she must give reason on record for such, and such will be evidence that he or she exercised his discretion judicially. In this matter, the Magistrate did not give his reason why a sentence of 17 years was appropriate. In that way, the Appeal Court had leeway provided it

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[15]. 1997 (2) SACR 641 (SCA).
[16]. Act No 105 of 1997.

advanced reasons motivating deviation from the prescribed sentence to deviate. See: *S v Mathebula and another*[17] and *S v Maake*[18]

33. It was further submitted that the Magistrate misdirected himself in finding that there are no substantial and compelling circumstances justifying the imposition of a lesser sentence. It was submitted that the merits of this matter and the age of the Appellant at 25, constituted substantial and compelling circumstances, which justified a deviation from imposition of the Minimum Sentence of 15 years. It was pointed out that the Appellant is not a hardened criminal with a list of previous convictions. It was argued that there is no evidence suggesting that the Appellant is a violent person in nature. It was submitted that evidence shows that he had no intention directly or indirectly to cause the death of the deceased. It is contended that the Appellant's conduct amounted to negligence on his part or that the incident was accidental. It was also submitted that he is not a hard-core offender with minimal chances of rehabilitation.

34. In the case of *S v Vilakazi*[19] the Court remarked that:

> *"a material consideration is whether the accused can be expected to offend again. While that cannot be confidently predicted, his or her circumstances might assist in making at least some assessment."*

It was argued that each matter ought to be dealt with on its own merits, because some of the offences are more serious than others.

35. The following was held in the case of *S v Mahomotsa*[20] at paragraph 18 where the court dealt with differences in the seriousness of offences:

> *"Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more*

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17. 2012(1) SACR 374 (SCA).
18. 2011(1) SACR 263 (SCA).
19. 2012 (6) SA 353 (SCA).
20. 2002 (2) SACR 435 (SCA).

serious than others and subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment."

36. It was submitted that in the case of B[21] it was found that there is hardly a person of whom it can be said that there is no prospect of rehabilitation. It was submitted that the Supreme Court of Appeal in the case of *S v Malgas*[22] laid down a determinative test as follows:

"if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal, and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

37. It was submitted that the Magistrate does not appear to have considered whether reformation and rehabilitation are achievable through the imposition of a lesser sentence. In the case of *S v Khumalo*[23], the Court remarked:

"it is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of the offender".

38. In the case of *S v Zinn*[24], the court stated that in imposing sentence, courts have to take into consideration, the crime committed, the interests of the accused, and the interest of the community. However, our courts have always emphasized that in the determination of a fitting sentence, satisfaction of the interests of the public ought not to override all other considerations. In other words, courts have to avoid meting undue harshness only because they aspire in doing so, to satisfy the interest of the

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21. 2007 (2) SACR 198 (SCA).
22. 2001 (1) SACR (SCA).
23. 1984 (3) SA 327 (A).
24. 1969 (2) SA 537 (A).

general public. See *S v Mhlakaza and Another*[25].

39. It was submitted that a sentence of 15 years' imprisonment is disproportionate to the crime, the offender and the interest of society and that the appeal against sentence should be upheld. Based on that, the Appellant submits that he has made out a proper case and that this appeal should succeed in the sense that the Court has to interfere with both conviction and sentence.

40. The Appellant submitted that in deciding on the success or otherwise of this appeal, the court has to consider that conditions at correctional centres no longer serve the purpose for which they are intended. This is because of overcrowding, the existence of gangs in prisons and lack of suitable facilities at prisons. It was therefore submitted that prison authorities can no longer pursue their intended objective, namely that of infusing reform onto the prisoners. In the case of *S v Khumalo*[26], the Court remarked as follows:

> *"it is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of the offender".*

41. At the same time, courts have expressed that the objective behind sentence should not merely satisfy the general public. In the case of S v Mhlakaza[27], the court held as follows:

> *"the object of sentencing is not to satisfy the public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public. This does not mean that the views of the society are of no consequence to the sentencing of the offender."*

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[25]. 1997 (1) SACR 515 (SCA).
[26]. 1984 (3) SA 327 (A).
[27]. 1997 (1) SACR 515 (SCA), at paragraph 13.

42. The Appellant submitted that based on the above, the sentence of 15 years' imprisonment ought to be found to be disproportionate to the crime, the offender and the interest of society and that the appeal against sentence should be upheld. The Appellant submits that he has made out a proper case for this Court to interfere on conviction and sentence.

43. It is trite law that sentencing falls within the discretion of a trial court, and that the Court of Appeal's right to interfere with a sentence is limited to instances where the court *a quo* materially misdirects itself or commits a serious irregularity in evaluating all the relevant factors with regard to sentence. In the case of *S v Rabie*[28], at 857D-E Holmes JA in regard to appeals against sentence held:

43.1. "In every appeal against sentence, whether imposed by a magistrate or a 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".

43.2. The test under (*b*) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

44. In the case of *S v Pillay*[29] Trollip JA remarked:

> "*Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere*

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[28]. 1975 (4) SA 855 (A).
[29]. 1977 (4) SA 531 (A) at 535E-F.

with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".

45. The Respondent made the point that no substantial and compelling circumstances were found to be attendant to the person of the Appellant which would have justified the imposition of a lesser sentence. The Respondent also submitted that while it is mitigating that the appellant is 25 years old, he is not a first offender. He was convicted before on a charge of robbery. He was sentenced to pay a fine of R4000 or 12 months' imprisonment, wholly suspended on conditions.

46. The Respondent also pointed out that the Appellant's previous conviction and sentencing notwithstanding, he remained undeterred by the law from committing further offences. It is fact that the objective behind the passing of sentences is to rehabilitate, reattribute and deter the accused from committing such offences again.

47. The Respondent argued that the Appellant resisted rehabilitation. It points out that Appellant did not even show remorse or take the court into his confidence. The nature of the offence that the Appellant committed is femicide[30]. This kind of a crime is serious and prevalent within the jurisdictional area of this court.

48. The court finds that the magistrate took all the relevant aspects into consideration and his finding was correct. It therefore finds that the court *a quo* did not misdirect itself in sentencing the Appellant. The sentence is therefore confirmed.

49. Consequently, the appeal against conviction and sentence stands to be dismissed and the following order is made:

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[30]. The killing of a woman or girl, in particular by a man and on account of her gender.

Order.

49.1. The appeal against conviction and sentence is dismissed.

T.A. Maumela.
Judge of the High Court of South Africa.

Heard on the: 4 August 2022

Electronically Delivered: 22 November 2022

APPEARANCE:

For the Appellant: Adv Masete

Instructed by: Legal Aid South Africa

For the Respondent: Adv Nyakama

Instructed by: The Director for Public Prosecutions