IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 185/18

In the matter between:

KHULEKANI SIZWE MKHWANAZI	1st Appellant
LUCKY BONGINKOSI MKWANA	2nd Appellant
BHEKISISA MEHLO Z MANQELE	3rd Appellant

and

THE STATE	Respondent

ORDER

In the result, the following order is made:

1. The appeal against conviction and sentence fails.
2. The convictions and sentences of the appellants by the court a quo are confirmed.

JUDGMENT

Date delivered: 10 May 2019

Masipa J (K Pillay J concurring):

[1] On 12 November 2012, the three appellants were convicted on one count of murder by the Regional Court Verulam relating to the killing of Zamokuthula Mgenge ('the deceased') on 4 June 2011 and acquitted on a kidnapping charge. They were each sentenced to life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997. The appellants exercised their automatic right of appeal in respect of conviction and sentence.

[2] The circumstances leading to the appellants' conviction and sentence are dealt with hereinafter. The State led the evidence of Mboniseni Thulasizwe Ndlovu ('Ndlovu') whose evidence was that on the date of the incident he, together with the first and second appellants rendered services to one Mr Ngcobo, cutting wood. After completing the work, they were paid R200. They used the money to purchase a case of liquor at Mologotlhe store. They sat at the tavern which is in the vicinity of the store and consumed the alcohol. When the alcohol was finished, he left the tavern to go home and found the third appellant, his cousin, parked outside the shop next to the main gate. He climbed into the front passenger seat of the vehicle and while there, the first appellant arrived and informed the third appellant that the deceased who was in the tavern was talking about him. The third appellant directed that the deceased be brought to him so that he could question him. The first appellant went to the tavern and returned with the deceased and the second appellant.

[3] According to Ndlovu, the third appellant questioned the deceased but before the deceased could reply, he was forced into the back seat of the vehicle

where he sat in between the first and second appellants. Ndlovu did not say anything despite witnessing this. The vehicle then left the store and the deceased was assaulted on several occasions by the first and second appellants. This was in the evening at approximately 20h00 with visibility provided by moonlight. They drove to a bridge leading to the sugar field plantation and parked there. The deceased was taken out of the vehicle by the first appellant and thrown to the ground. He was assaulted further and taken to a level which was lower than the bridge where the assault continued with the appellants using stones on his body and head. The deceased tried to run away but the appellants caught up with him and the assault continued. The deceased was on the ground but Ndlovu could see what was happening from the bridge where he had remained.

[4] Pursuant to the assault, Ndlovu and the appellants left the scene leaving the deceased for dead. The third appellant dropped him off at the bus stop and proceeded with the first and second appellants as he was going to leave them at the clinic. Although Ndlovu had consumed alcohol, his evidence was that he was not very drunk. He denied that he had left the tavern as he was very drunk. After Ndlovu was dropped off at the bus stop, he went home and slept.

[5] The appellants' version which was put to Ndlovu was that they arrived at the tavern at approximately 12h00. Ndlovu's evidence was that it was around 13h00. He disputed their version that they sat with him until they were all heavily intoxicated. He accepted as correct the version that they had spent the R200 on alcohol and then said that they bought the case of beer for R120 and then used the balance of the money to buy cigarettes, peanuts and to play the jukebox. It was further put to Ndlovu that when they finished consuming alcohol, the third appellant transported them home in his vehicle. This was disputed by Ndlovu who stuck to his initial version. Ndlovu denied that when they left the tavern, the deceased was not in their company. He also denied that he was sleeping in the vehicle while they were driving.

[6] The State also led the evidence of the deceased's brother Sandile Zamani Mgenge ('Mgenge') who was present at the tavern on the day of the incident. He arrived there at about 18h00 and observed the deceased crying with a male he identified as Mgalagathe, the first and second appellant near him. It was the first time that Mgenge saw the first and second appellant as he did not live in the area. Mgalagethe appeared to be separating a fight. He did not enquire as to what the fight was about. The first appellant grabbed the deceased and told Mgalagathe that he just wanted to talk to him. The two went out and Mgenge followed them and observed that they were talking at the back of the shop. The second appellant then joined the first appellant.

[7] The first appellant held the deceased by his hand and took him to the vehicle belonging to the third appellant, who was Mgenge's relative. The third appellant and Ndlovu followed them. Mgenge then saw them all climbing into the vehicle and they seemed to be sitting there. He did not see the use of any force or violence on the deceased who seemed to climb into the vehicle willingly. As a result, Mgenge returned into the tavern.

[8] When Mgenge went out of the tavern, the vehicle was no longer there. He continued to watch soccer and left for his home at about 22h00. On arrival, he informed his younger brother of what he observed and then went to ask the deceased's mother to phone the deceased. The deceased could not be reached on his phone. Mgenge then went to sleep. The next morning he informed his mother about what he had witnessed at the tavern regarding the deceased. They again attempted phoning him with no success. Mgenge's brother woke up and they went to the first and second appellant's home to enquire about the deceased. The two appellants told them that they had last seen the deceased the day before at about 17h00 and he had said that he was going to Ongothini area. Mgenge and his brother then left.

[9] As they were leaving, Mgenge told his brother that the first and second appellants were not telling the truth since he had seen them with the deceased

around 18h00. They then went to Ndlovu's home but could not find him. He did not see the deceased alive again and had last seen him in the company of the appellants and Ndlovu. Mgenge did not know the first and second appellants and it was his brother that provided him with their details. He never had a problem with the third appellant.

[10] The appellants' version put to Mgenge was that they denied that they had exited the tavern and spoke to the deceased outside which version he refuted. According to them, when they left the tavern, the deceased remained behind and continued to consume alcohol with other people. This was also disputed by Mgenge. The appellants denied that they left the tavern together using a vehicle. Mgenge denied that the third appellant had not entered the tavern on the day. When it was put to him that the third appellant left the tavern alone Mgenge insisted that the deceased had climbed into the vehicle belonging to the third appellant.

[11] The appellants testified in their defence. The evidence of the first appellant was that on the day of the incident at about 14h00, he went to the shop alone to consume alcohol. On arrival, he joined some male persons and they drank alcohol. He thereafter left the tavern at about 18h00. While at the tavern, he saw the second appellant who was sitting with another group and was also consuming alcohol. According to the first appellant, he arrived at the tavern before the second appellant who is his brother. He knew the deceased and also saw him at the tavern on the day drinking with Mgalagathe.

[12] According to him, he did not speak to anyone in the tavern on that day. He then said he only spoke to the people he was seated with. He denied that there was an argument between him and the deceased to which Mgalagathe intervened. He also denied going out of the tavern with the deceased to talk. He did not see the deceased crying and did not have any conflict with him. Also, he did not see Ndlovu at the tavern on that day. His evidence was that he did not know Ndlovu but under cross-examination said that he knew Ndlovu by sight. He

also said that he did not know the name of the third appellant until their court appearance. He then contradicted himself and said that he knew him but did not know that he owned a motor vehicle.

[13] He walked home alone and since he was highly intoxicated, upon his arrival at his home, he slept until the next day. He denied that he had climbed into a vehicle which was parked outside of the tavern with the deceased. While at home on 5 June 2011, he was approached by some unknown people who were looking for the deceased and he informed them that he had last seen him at the tavern. He was arrested the same day.

[14] The first appellant confirmed under cross-examination that he had been hired by Mr Ngcobo to do some work on the day of the incident. He worked with the second appellant and Sicelo Vilakazi. He said that Ndlovu was not in their company on that day. When they finished working, Mr Ngcobo paid each of them R50. He could not remember whether he had told this version to his attorney. He had no explanation why his attorney had not challenged Ndlovu's evidence on this issue and had in fact appeared to be confirming it. He denied that he had told his attorney that he went to the tavern with Ndlovu and the second appellant after they finished cutting wood for Mr Ngcobo. Having said in his evidence in chief that he had not seen Ndlovu on that day, during cross-examination, he said that he had seen him at the tavern but did not concentrate on him or talk to him. He denied that he acted in common purpose with the second and third appellants by assaulting the deceased and that they had killed him.

[15] The second appellant testified that he only knew the deceased by sight. He did not have much recollection of his whereabouts at 19h00 on 4 June 2011 as he arrived at the tavern highly intoxicated. He then said that he was home. He confirmed under cross-examination that he and Vilakazi had worked with the first appellant earlier that day rendering services to Mr Ngcobo. He vaguely recalled that he had gone to the tavern where he consumed alcohol with some soccer mates of his until he was highly intoxicated. He recalled seeing the deceased

when he was about to leave the tavern but did not talk to him. While at the tavern, he saw the first appellant who was on his way home. He did not see Mgalagathe at the tavern on the day.

[16] He left the tavern on foot and went home alone. He was arrested the next day while at his home. He did not know the third appellant prior to his arrest and did not see him in the vicinity of the tavern on the day of the incident. He denied any knowledge of the charges against him. He said under cross-examination that he had told his attorney that he did not know the third appellant until after his arrest and then said that his attorney never asked him about this. He then suggested that they had not been informed that the matter was set down for trial and therefore they had not adequately consulted with the attorney. When questioned further, he conceded that he had consulted with the attorney but said that all he told him was that he knew nothing about the case.

[17] He saw Ndlovu at the tavern but did not know him. He then said that it was the first time that he saw Ndlovu at court. He did not tell his attorney about this and said that the attorney had not asked him. He then said that he had seen him at the tavern but that he did not know that Ndlovu was a witness. He had seen him for the first time at the tavern and then in court. He told his attorney that he knew nothing about Ndlovu. He did not tell his attorney that he went to the tavern with Ndlovu and the first appellant and had no idea where the attorney obtained that version. He never told his attorney that he left the tavern with the first and third appellants and Ndlovu. He told the attorney that he went to the tavern alone and returned home alone. He denied that he together with the first and third appellants killed the deceased.

[18] The evidence of the third appellant was that he resided in the Ndwedwe area where he worked. He did not know the second appellant and only got to know him after his arrest. He knew the first appellant by sight. On 4 June 2011, he went past the tavern and bought airtime through the window as it was packed. He parked his vehicle outside the premises and after purchasing what he

required, he left. It was around 18h00 and he was rushing home as his mother was sick. He saw the first and second appellants outside of the tavern going down the stairs together with his cousin, Ndlovu who spoke to him. The deceased was also present. They walked together and Ndlovu asked the third appellant for a lift which the third appellant acceded to. Ndlovu was seated in the front passenger's seat and the other three sat in the back. The deceased was sitting on the left side of the vehicle. Since the four passengers were all under the influence of alcohol, the third appellant listened to his radio. He dropped them all at their bus stop and proceeded with his journey.

[19] The third appellant knew the deceased whom he said was his brother in law. He had known him from when they were in school which was a period in excess of ten years. According to him, there had been some conflict between him and Ndlovu in 2010 as they were in a relationship with the same woman. He then changed to say that he was in a relationship with Ndlovu's brother's wife and the family was upset. This he provided as the reason why Ndlovu would implicate him in the murder. They had discussed the issue and he continued to be Ndlovu's friend. He suggested under cross-examination that Ndlovu had been pretending that the matter was resolved. He denied that he assaulted and murdered the deceased.

[20] The third appellant's evidence was that the first and second appellant had lied and that their evidence should not be believed. He stated that it was not true that he had left the tavern alone and said that he was compelled to say that by the first and second appellant. He accepted that his evidence contradicted what his attorney had put to the state witnesses. And said it was because he was afraid of the first and second appellants. He accepted that during the trial, he had given instructions to his attorney. He said that he was changing his version since he was under oath and had to tell the court the truth. He denied that he was being opportunistic and that he was using this to shift the blame to the first and second appellants. The third appellant's evidence was that he was not present when the murder was committed.

[21] It is trite that in criminal cases, the State bears the onus to prove the accused's guilt beyond a reasonable doubt and there is no onus on the accused to prove his innocence. See *S v V* 2000 (1) SACR 453 (SCA) at 455B.

[22] The court a quo in analysing the evidence acquitted the appellants on the kidnapping charge having found that the State failed to prove that the deceased was taken from the tavern against his will. This finding was based on the evidence of Mgenge who had returned into the tavern when he observed that the deceased had willingly climbed into the third appellant's vehicle. The court a quo was however satisfied that the State had proved beyond a reasonable doubt that the appellants murdered the deceased. This was because it found that the material aspects of Ndlovu were corroborated by Mgenge.

[23] The court a quo was mindful that Ndlovu was a single witness and that his evidence should be approached with caution. In this regard, the court a quo considered the provisions of s 208 of the Criminal Procedure Act 51 of 1977 and *S v Sauls & others* 1981 (3) SA 172 (A). The court a quo considered the credibility of Ndlovu, the merits, demerits of his evidence, shortcomings, defects and contradictions. It also relied on *S v Banana* 2000 (2) SACR 1 (ZS) where it was stated that where the evidence of a single witness is corroborated in a way which tends to indicate that it was not fictitious, the caution enjoyed may be overcome and corroboration is not essential. The court a quo found that Ndlovu's evidence was clear, consistent and free flowing. Further that he did not contradict himself in his evidence. It found that he was an impressive and reliable witness whose testimony stood unshaken. It was never put to him that there was any animosity between him and the appellants.

[24] The court a quo accepted as a fact that Ndlovu, the deceased and the appellants left the tavern in the third appellants' vehicle as this was corroborated by the two State witnesses and the third appellant. The evidence of the first and

second appellants was contradictory stating that they had not seen Ndlovu on the day and then changing under cross-examination to say that they saw him. The court a quo noted that the first appellant in his evidence denied the version which was put to the State witnesses by his counsel.

[25] As regards the second appellant, the court a quo found that he was a poor witness who suggested under cross-examination that he had not consulted with his counsel and therefore did not know where the versions put emanated from. He contradicted himself as to whether he had seen Ndlovu or not on the day of the incident. The court a quo found that the first and second appellants fabricated their versions of walking home separately from the tavern to disassociate themselves from Ndlovu as he was the main witness in respect of the death of the deceased.

[26] In respect of the third appellant, the court found that he had failed to ensure that his attorney placed a version that there was animosity between him and Ndlovu. Despite accepting that Ndlovu had consumed alcohol, the court a quo was satisfied that he could still observe the assaults on the deceased. On the whole, the court a quo rejected the evidence of the three appellants as being false beyond reasonable doubt. The court a quo was satisfied that the appellants murdered the deceased.

[27] Mr *Chiliza* for the appellants submitted that since Ndlovu was a single witness, his evidence should have been treated with caution. He highlighted the supporting factors as being that Ndlovu had consumed alcohol; despite witnessing the assault on the deceased, he returned home and did not alert the police or seek medical assistance; he suggested that there was material misdirection between Ndlovu's evidence and that of Mgenge on whether the deceased entered the vehicle voluntarily or was forced. He argued that the court a quo erred in finding that the appellants' version was not reasonably true. He argued that even if the court a quo rejected the appellants' evidence, there was

doubt in the State's case and therefore the appellants should have been given the benefit of doubt. Consequently, the court a quo erred in convicting the appellants.

[28] Mr *Sibanyoni* for the State argued that it was apparent from a reading of the record that the court a quo took into account the fact that Ndlovu was a single witness and having considered relevant law applied the cautionary rule. He submitted that the court a quo correctly found that Ndlovu gave his evidence in a clear, consistent and free flowing manner. Further that there was no criticism in his evidence. He submitted that the photo album corroborated Ndlovu's evidence on how the deceased died.

[29] He submitted that the trial court made credibility findings and that the appeal court should be slow to interfere unless convinced on a conspectus of all the evidence that the trial court was clearly wrong. This is because the trial court would have had the advantage of observing witnesses. See *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706 and *Kebana v S* [2010] 1 All SA 310 (SCA) para 12. He submitted that the evidence before the court a quo presented two contradictory versions

[30] It was argued for the State that after considering all the evidence including inherent probabilities, the court a quo delivered a clear and well-reasoned judgment. Further, that the existence of contradictions did not lead to the rejection of a witness' evidence. There must be proper weighing of the nature and importance of evidence. See *S v Mkohle* 1990 (1) SACR 95 (A) at 98E-H. Mr *Sibanyoni* submitted that there was no reason to interfere with the conviction.

[31] It is apparent from the record that the court a quo was mindful of the fact that Ndlovu was a single witness and that his evidence should be approached with caution. Indeed the court a quo applied the necessary caution to the evidence of Ndlovu. It is noteworthy that Ndlovu was present during the commission of the offence and the manner in which he conducted himself in not reporting the offence is questionable. One wonders why he was not considered a

s 204 witness. This was however not dealt with during the trial and it is not for this court to consider the issue.

[32] The courts have held that the evidence of a single witness should be approached with caution and that the correct approach in dealing with such evidence is to assess the bias, if any, and determine the importance thereof in the light of the evidence as a whole. See *R v Abdoorham* 1954 (3) SA 163 (N) and *S v Webber* 1971 (3) SA 754 (A). It is trite that the exercise of caution must not displace the exercise of common sense.

[33] In *S v Letsedi* 1963 (2) SA 471 (A) at 473 and *S v Snyman* 1968 (2) SA 582 (A) at 586-587 it was held that when, there is a measure of corroboration, even if it is small, one is no longer dealing with a single witness. The evidence of Ndlovu was corroborated on three instances. First by the evidence of Mgenge that he had witnessed the appellants, Ndlovu and the deceased climb into the third appellant's vehicle; the second corroboration was the evidence of the third appellant confirming this and then the post-mortem report which was consistent with Ndlovu's evidence on how the deceased had died. This issue was adequately dealt with by the court a quo when it referred to *S v Banana*. In view of this, I am satisfied that the measure of corroboration was sufficient enough to warrant a conclusion that the court was no longer dealing with a single witness.

[34] Of course there was a contradiction between the evidence of Ndlovu and Mgenge on whether the deceased had climbed into the vehicle voluntarily or was forced. This however is not material to the facts. What is material is that the five men had climbed into the vehicle belonging to the third appellant and this was the last time Mgenge had seen his brother alive. On the evidence before the court a quo, which correctly found the evidence of Ndlovu to be credible, what followed from this were brutal assaults on the deceased which led to his demise.

[35] In respect of credibility, in *S v Mkohle* the court held that not all errors affect a witness' credibility. The trier of fact has to make an evaluation taking into account contradictions, their number and importance and bearing in mind other parts of the evidence. Similar sentiments were shared by the court in *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) where the court added that contradictory evidence must be evaluated holistically. The court also held that it is the duty of the trial judge to weigh all previous statements with oral evidence and decide whether it is reliable or not and decide whether the truth has been told despite any shortcomings.

[36] The court a quo correctly found that the evidence of the appellants was contradictory. Their oral evidence was in contrast with the version put by their attorney to the State witnesses. Having put versions that they had gone to the tavern with Ndlovu, they sought to suggest during their oral evidence that they had not worked with him on that day and that they had not seen him. They gave several conflicting versions in this regard. They failed to challenge relevant evidence led by Ndlovu, for example, that they had been paid R200 by Mr Ngcobo and how that money was spent. They suggested without having raised this with Ndlovu that they were paid R50. Having put a version that they had left the tavern with the third appellant, the first and second appellants in order to disassociate themselves from Ndlovu suggested that they had gone to the tavern separately and had left separately.

[37] The second appellant sought to place the blame of not challenging the evidence of Ndlovu and placing a different version to his evidence on his attorney suggesting that they had insufficient time to consult but conceded under cross-examination that this was not correct. As regards the third appellant, his complete turn-around when he took the stand before the court a quo proved that he was not a credible witness. He confirmed most of Ndlovu's evidence except on the actual murder which he sought to remove himself from. While he suggested that he had been scared of the first and second appellants, he conceded that during the trial, he had given instructions to their attorney on several occasions. He had sufficient

opportunity to raise this in the instructions he was giving to the attorney but failed to do so. He is susceptible to lying to the court and continuing with that lie. He lies in order to get himself out of a situation. His evidence can therefore not be relied upon. The sentence herein falls within the purview of s51(1) read with schedule 1 part 1 of the Criminal Law Amendment Act 105 of 1997on the basis that the appellants acted in common purpose in committing the murder.

[38] It is trite that sentencing falls within the discretion of the trial court and should not be interfered with unless the appeal court is satisfied that the discretion has not been judicially and properly exercised and the sentence is vitiated by irregularity, misdirection or is strikingly inappropriate.

[39] Mr *Chiliza* argued that the court a quo misdirected itself by attaching insufficient weight to traditional mitigating factors. It failed to take into account that the first appellant was 22 years of age, had temporary employment, was a father of two minor children and went up to standard six (grade eight) at school. He was admittedly not a first offender. The second appellant was 28 years old with casual employment and no children. He was also not a first offender. The third appellant was 35 years of age with seven minor children and a common law wife. He was self-employed running two tuck shops.

[40] What was aggravating in respect of the first appellant was the fact that his previous conviction was on a murder charge in 2005 and he was sentenced to six years' imprisonment two of which was suspended. The previous conviction had no salutary effect and instead of being rehabilitated, he has now become a seasoned murderer who attaches no value to human life. The second appellant's previous conviction was for assault with intent to do grievous bodily harm. He was sentenced to 12 months' imprisonment which also had no rehabilitatory effect on him. Instead, he has graduated to now becoming a murderer. In my view, the third appellant's previous conviction of theft is not relevant in considering an appropriate sentence for a murder charge.

[41] He submitted that while the appellants deserved to be punished for the offence, life imprisonment imposed upon them was harsh and inappropriate taking into account that alcohol played a major role in the commission of the offence. He accepted however that the appellants had not suggested that they had diminished capacity. Further, that there was no apparent reason why they murdered the deceased. He conceded that the deceased was brutally murdered as he was stoned to death. He however argued that the murder was not premeditated and that the sentence was shockingly inappropriate and induced a sense of shock. This warrants this court to interfere with the discretion of the court a quo.

[42] Mr *Sibanyoni* argued that the sentence imposed by the court a quo was correct and that there was no reason to interfere.

[43] In *S v N* 2008 (2) SACR 135 (SCA) para 29 the court stated that when considering an appropriate sentence in serious crimes emphasis should be on retribution and deterrence and that the rehabilitation of the offender will play a smaller role. In serious crimes, however, the personal circumstances of the offender retreated into the background. Once it was clear that a substantial jail term was appropriate questions of whether or not the accused was married, or employed, or of how many children he had were largely immaterial. Their relevance is in assessing whether the accused was likely to offend again. See *S v Vilakazi* 2009 (1) SACR 552 (SCA). The traditional mitigating factors of the appellants played a minor role in this regard in view of the seriousness of their offence.

[44] In order not to be seen to be abdicating its duty and discretion, the court a quo court found that the sentence of life imprisonment as prescribed was fitting. See *S v PB* 2013 (2) SACR 533 (SCA). On the evidence, there is nothing to suggest that the court a quo imposed sentences that were strikingly inappropriate even when it is considered that the first and second appellants had consumed alcohol. There is nothing to suggest that alcohol played any role in their conduct.

[45] In the result, the following order is made:

1. The appeal against conviction and sentence fails.
2. The conviction and sentence of the appellants by the court a quo are confirmed.

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Masipa, J

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K Pillay, J

I agree.

DETAILS OF THE HEARING

Appearances:

For The Appellant:	Mr EM Chiliza
Instructed by:	Durban Justice Centre
For the Defendants:	Mr J Sibanyoni
Instructed by:	Director for Public Prosecutions, Durban
Matter heard on:	3 May2019
Judgment delivered:	10 May 2019