IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR416/2019

In the matter between:

CYPRIAN SIPHO KWEYAMA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Jasat AJ (Olsen J concurring)

Heard: 05 November 2021

Delivered: 01 December 2021

ORDER

On appeal from: Esikhawini Regional Court (sitting as court of first instance):

1. The appeal against the conviction is dismissed, and the conviction is confirmed.

2. The appeal against the sentence succeeds. The sentence of the court *a quo* is set aside and is substituted with the following:

'The appellant is sentenced to 15 years' imprisonment, such sentence antedated to 11 October 2018.'

JUDGMENT

Jasat AJ (Olsen J concurring)

[1] The appellant was arraigned in the Regional Court sitting at Esikhawini on one count of murder, read with section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the Amendment Act') together with Mr Dumisani Mthembu ('accused 2'). The appellant was legally represented at his trial and pleaded not guilty to the charge. In support of his plea of not guilty, the appellant submitted a statement in terms of section 115 of the Criminal Procedure Act 51 of 1977 ('the Act'), incorporating admissions in terms of section 220 of the Act. The appellant and accused 2 were both convicted of murder and sentenced to life imprisonment on 11 October 2018. This appeal is before us only in respect of the appellant.

[2] Exercising his automatic right of appeal,[1] the matter is now before us on appeal against both conviction and sentence.

[3] The appellant admitted that the deceased was an adult male person known as Mr Thulani Cyril Mkhwanazi ('the deceased'), and that at the time of his death, he was approximately 37 years of age.

[4] It was common cause that:

(a) the deceased was assaulted on 7 December 2014 at or near Port Dunford and subsequently died whilst at Ngwelezane Hospital on 18 December 2014.

(b) the appellant, as well as accused 2, were present at the scene where the deceased was assaulted.

(c) the State sought to amend its charge sheet to allege that the offence for which the appellant was charged with, was committed by a group of people acting in furtherance of a common purpose. The amendment was subsequently granted by the court *a quo*.

[1] In terms of section 309(1) of the Act.

(d) the amendment to the charge sheet was not objected to at the trial by the legal representatives for the appellant, and was further not raised as a ground of appeal herein.

[5] The crisp issue therefore before the court *a quo* and before us on appeal is whether the appellant:

(a) was part of a group who had assaulted the deceased, and

(b) formed common purpose by actively associating himself and acting in concert to participate in a criminal endeavour with the actions of the group.

[6] In order to prove the case against the appellant, the State relied amongst others on the evidence of Mr Siboniso Mkhwanazi (Siboniso), who was the deceased's cousin, Mr Sipho Mthiyane (Mthiyane) and Mr Emmanuel Mkhwanazi (Emmanuel), the deceased's elder brother.

[7] The facts of the matter are succinctly captured in the judgment of the court *a quo*. In as much as this appeal lies against both conviction and sentence, it is necessary to briefly have regard to those facts. I now turn to deal with the conviction of the appellant.

[8] By way of brief background, the evidence led was that the accused 2's home was burgled and his firearm, cellular phone and cash was stolen. On 7 December 2014, the appellant, who was an independent councillor for Ward 13 in the Mpembeni area, had convened a community meeting in the Madaka area. Accused 2 was also present at the meeting. Accused 2 had approached the appellant and requested to be excused from the meeting. Accused 2 later returned to the community meeting in the company of the deceased, who allegedly confessed to members of the community and offered to return accused 2's firearm. It is alleged that after the deceased confessed to the community meeting members, they started assaulting him. Accused 2 had placed the assaulted deceased into the appellant's motor vehicle, as the deceased had requested that he, the appellant, and accused 2 go to his (the deceased's) homestead to fetch the firearm.

[9] It is significant that it was only when they arrived at the deceased's homestead in Port Dunford that the serious assaults, which ultimately led to the death of the deceased, occurred.

[10] Siboniso testified that, on 7 December 2014, he was in a house which is used as a church. After church services had been completed, Siboniso together with other church members, were sitting in a circle holding a meeting. Siboniso noticed four vehicles approaching, which stopped near the homestead. He described the motor vehicles as a bakkie, a white Golf, a silver brown Cressida and a white truck with approximately 50 people on, who then proceeded to surround the house. Siboniso further testified that five to six people had entered the premises. Amongst them was the deceased, who appeared to have been assaulted as he was bleeding from the mouth and his head, the appellant and another person claiming to have lost his firearm. Siboniso noticed that the appellant was carrying a stick and accused 2 was carrying a sjambok.

[11] Upon enquiring from Siboniso and the church members on the whereabouts of one Nde, they exited the premises with the deceased. Whilst being approximately six metres away from them, Siboniso witnessed the appellant hitting the deceased with a stick several times, whereafter the deceased fell down. The deceased was then assaulted by accused 2, and other members of the community who had accompanied the appellant to the deceased's homestead.

[12] Under cross-examination, Siboniso testified that although there were people with and in front of him, it did not obstruct his view, as he could clearly see the appellant assaulting the deceased. At first Siboniso did not know the people who had entered the house, but later learnt that it was the appellant. Siboniso remained steadfast in his version that the appellant had assaulted the deceased, and that the deceased had fallen down. Siboniso testified that he did not see any injuries, as he and the church members who were present, were chased away by the appellant.

[13] Mthiyane testified that he was a ward councillor for Ward 18 in Port Dunford. He arrived at the scene after receiving a report that the deceased was being assaulted. He found the deceased lying on the ground wrapped in a blanket, assaulted and

bleeding from his head. At the scene, Mthiyane saw the appellant, accused 2 and a group of people. Mthiyane approached the appellant and accused 2, both of whom were well-known to him. After speaking to accused 2, who was not far from the appellant who was leaning against a motor vehicle, Mthiyane approached the deceased and enquired from him as to who had assaulted him. Prior to Mthiyane approaching the deceased, Mthiyane had approached the appellant to enquire what had happened to the deceased, and the appellant merely told Mthiyane to speak to the deceased. Based on the appellant's response, Mthiyane approached the deceased, who reported to Mthiyane that the appellant and accused 2 had assaulted him as they had suspected him of having stolen accused 2's money and firearm. The deceased had denied that he was involved in the theft. At the time when the deceased reported this to Mthiyane, the appellant was standing approximately three metres away.

[14] Emmanuel testified that he was the deceased's elder brother. He is employed as a warrant officer with the South African Police Service, and is stationed at the KwaDukuza Crime Intelligence Unit. He is also a bishop of the church at his homestead. On 7 December 2014, he attended at his homestead after receiving a call from a church member, and on his arrival he saw a crowd of people standing at the gate. He testified that the deceased was severely assaulted and injured. The appellant and accused 2 were standing next to his brother and he asked them what had happened. The appellant responded that he must ask the deceased. Emmanuel further testified that prior to this date, he did not know the appellant.

[15] On the appellant's version, he confirmed the contents of his section 115 plea statement, and corroborated Mthiyane's version that he was a ward councillor during 2014. The appellant testified that on 7 December 2014, the deceased addressed the community where he was chairing a meeting together with accused 2 in the Makaga area. The deceased reported to the community that he had taken accused 2's firearm, money and cellular phone, whereafter the community members started assaulting the deceased using twigs and sticks. However, the appellant reprimanded the community members. When the community did not listen to his instruction to stop assaulting the deceased, the deceased was taken to the appellant's motor vehicle by accused 2, as the deceased requested that the appellant and accused 2 accompany him to Port

Dunford to retrieve the firearm. On arrival at Port Dunford, the appellant noticed that other motor vehicles had followed him. The community members could not assault the deceased as the appellant was guarding him. When questioned why he did not stop at the police station, his response was that he did not want to interfere with the deceased's arrangement with accused 2.

[16] During cross-examination, the appellant confirmed that the deceased was assaulted because they wanted him to admit where the firearm was, and that the deceased was not taken to the police station because he refused to be taken to it.

[17] The appellant called a witness, Mr Falakhe Maphumulo (Maphumulo), who testified that accused 2 drove the appellant's motor vehicle when transporting the deceased to Port Dunford. Maphumulo testified that the appellant did not do anything to the deceased. He further testified that Mthiyane eventually arrived and spoke to the councillors and transported the deceased to the clinic. During cross-examination, Maphumulo testified that accused 2 had pushed the deceased with his knee, and stomped on his chest and that this happened in sight and in front of the appellant. He also stated that when Mthiyane arrived at Siboniso's homestead, he was not with the appellant. He also testified that Siboniso had arrived before Mthiyane.

[18] The appellant in his ground of appeal contends that:

(a) the court erred in accepting the evidence of Sibusiso;

(b) the evidence of Siboniso was not clear and satisfactory in every material respect;

(c) the court erred in accepting that Siboniso's evidence had been corroborated;

(d) the court erred in relying on hearsay evidence for corroboration;

(e) the court erred in placing any reliance on the evidence of Emmanuel.

[19] Our law requires that the guilt of the accused must be proved beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if it is reasonably possibly true that he might be innocent. The court has to take all the evidence into account, consider inherent strengths, weaknesses, probabilities and improbabilities on both sides. 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 was wrong.[2]

[20] It is also trite that a court *a quo* must be cautious when considering the reliability of evidence provided by a single witness. It is apparent from the judgment of the court *a quo* that the court was at all times aware of the dangers when considering the evidence of Siboniso as he was a single witness. Section 208 of the Act provides that 'an accused may be convicted of any offence on the single evidence of any competent witness'.

[21] The court *a quo* relied essentially on the evidence of Siboniso and Mthiyane which was corroborated to some degree by the evidence of Emmanuel. The court *a quo* was alive to the fact that Siboniso's evidence was that of a single witness and that he was the deceased's cousin.

[22] For the appellant to contend that the evidence of Siboniso was not clear and satisfactory in every maternal respect, there must, however, be an evidential basis for suggesting that the evidence of a single witness may be unreliable. The court in *S v Sauls*[3] held as follows:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the 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 contradictions in the testimony, he is satisfied that the truth has been told . . .It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[23] The court *a quo* found that Siboniso's evidence did not exhibit any bias adverse to the appellant and furthermore that his evidence was corroborated to a certain extent by that of accused 2. The court *a quo* was also very much alive to Siboniso having an interest as to what happened, as he is a member of the deceased's family, they were in a church at his house when they were attacked by this group of people and the

[2] *R v Dhlumayo and another* 1948 (2) SA 677 (A).
[3] *S v Sauls and others* 1981 (3) SA 172 (A) at 180.

deceased having been assaulted in his presence. These factors would warrant that the perpetrator be adequately dealt with.

[24] The statement by the deceased to Mthiyane was admitted by the court *a quo* as evidence. Apparent from the record, as well as the judgment delivered by the court *a quo,* was that the appellant's legal representation did not argue against the admission of that evidence. The court *a quo* nonetheless, correctly in my view, held that section 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 provides the circumstances that the court needs to take into consideration in dealing with hearsay evidence.

[25] In *S v Trainor*[4] it was held:

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety.'

[26] In my view, the court *a quo* was correct in admitting the evidence of Mthiyane and to an extent that of Siboniso, both of whom were present when the statement was made by the deceased. Due consideration was also given to the absence of the lack of objection to the admission of the evidence by the appellant.

[27] The court *a quo* accepted that Siboniso's evidence and that of Mthiyane corroborated same.

[28] The court *a quo* rejected the evidence of the appellant, and in particular found that the version proffered by the appellant differed from that set out in his section 115 plea statement at the commencement of the trial.

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[4] *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

[29] The appellant's version as contained in his section 115 plea statement, compared to his testimony during the proceedings, was correctly described by the learned magistrate in the judgment as follows:

'Unfortunately their versions are infested with the greatest of contradictions and improbabilities. Accused 1 denied certain portions of his statement, exhibit "A". He attributed the presence of such contradictions to the issue of language between himself and the person who took the statement. When questioned by the prosecutor as to the reasons behind his signature and acceptance of the correctness of the contents of exhibit "A", his answers in that regard were absolutely feeble.'

[30] The appellant as well as his witness, Maphumulo, were proved to be dishonest and unreliable witnesses. The court *a quo* found that Maphumulo was an appalling witness, who at any given stage was ready to alter his evidence to align itself with the question. He contradicted the appellant as well as himself. The appellant admitted that he was a councillor and a man who exercised a degree of authority. It was accordingly nonsensical that he would not assume the role of a person of authority and contact the police when the incident took place or to report the incident to the police or to assist the deceased by taking him to a clinic for medical assistance.

[31] The court *a quo,* correctly in my view, held that Siboniso's evidence should be accepted, and that accordingly, the appellant and accused 2 had assaulted the deceased. The appellant used a stick whilst accused 2 used a sjambok. As a consequence of the assault that the appellant perpetrated on the deceased, other members of the public joined in and also assaulted the deceased, and the deceased was so severely assaulted that he died 11 days later at Ngwelezane Hospital.

[32] The court *a quo*, in my view, correctly concluded that the appellant was present at the scene where the deceased was assaulted, and that he was aware that the deceased was being assaulted by others. But more importantly, the appellant made common purpose by assaulting the deceased with a stick. Of significance, and taking into consideration the appellant's section 115 plea statement, the appellant clearly stated: 'we told them if they continue to assault Thulani he will die'.

[33] The Constitutional Court in *S v Thebus and another*[5] confirmed the principles applicable to the doctrine of common purpose, and held that:

'The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. *Burchell and Milton* define the doctrine of common purpose in the following terms:

"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime."

Snyman points out that "the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others". These requirements are often couched in terms which relate to consequence crimes such as murder.' (Footnotes omitted.)

[34] There is therefore no doubt in my mind that the appellant did foresee that the assault upon the deceased would lead to his death. I am not persuaded that the trial court was wrong in convicting the appellant of murder. The appeal on the conviction is devoid of merit, and it falls to be dismissed.

[35] The appellant, being found guilty of murder read with the provision of section 51 and Schedule 2 of the Amendment Act, was sentenced to life imprisonment in terms of the prescribed minimum sentence applicable in this matter. It is trite that punishment is a matter for the discretion of the sentencing court. An appeal court will only interfere with the sentence imposed by the sentencing court if it did not exercise its discretion property and judicially.

[36] The test is whether the sentence is vitiated by irregularity or misdirection or is startlingly inappropriate.[6]

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[5] *S v Thebus and another* 2003 (6) SA 505 (CC) para 18.
[6] *S v Rabie* 1975 (4) SA 855 (A) at 857D–E.

[37] The Constitutional Court has however held in *S v Bogaards*[7] that an appeal court has jurisdiction to interfere with a sentence imposed by a trial court

'. . .where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.' (Footnotes omitted.)

[38] The court *a quo* noted the following personal circumstances of the appellant: he was the father of five minor children, was previously employed and was a first offender. The court *a quo* was cognisant of the fact that the offence was serious and that society cannot afford to have members become 'a law unto themselves'.

[39] The court *a quo* also considered and compared the appellant's personal circumstances, the nature of the offence, and the interests of society when deciding on the appropriate sentence. Furthermore, the court *a quo* was alive to and considered the objectives of sentence, namely deterrence, retribution and rehabilitation and that same needed to be exercised judicially.

[40] The court *a quo* found that the appellant displayed no remorse, did not accept responsibility for his actions and therefore the prospects of rehabilitation were seriously limited.

[41] It was stated by Henriques J in *S v Pillay*[8] that

'[w]here a court is convinced that, after consideration of all the factors, an injustice would be done if the minimum sentence is imposed, then it can characterise such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.'

[42] In *S v Vilakazi*[9] the court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Ultimately in deciding whether substantial and compelling

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[7] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.
[8] *S v Pillay* 2018 (2) SACR 192 (KZD) para 11.
[9] *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA).

circumstances exist, one must look at the traditional mitigating and aggravating factors and consider the cumulative effect thereof.

[43] In my view, the court *a quo* failed to consider whether the prescribed sentence will be disproportionate to the offence, taking into account all the circumstances of not only the offence itself but also the circumstances of the parties involved.

[44] The court *a quo* failed to note the appellant's age, namely 52 years, and did not place proper weight on the personal circumstance of the appellant. Secondly, the appellant was responsible for supporting five children and was employed prior to his incarceration. Finally, and most significantly, the appellant was a first offender. The court *a quo* failed to balance the fact that the appellant was a first offender to the pertinent fact that the appellant was at an advanced age of 52 years. Another important factor which was not considered by the trial court was that the appellant did not initiate the assault. I am alive to the fact that the appellant joined in the assault on the deceased and used a stick to assault a defenceless person, which is an aggravating factor. It is nonetheless notable from the post mortem report that the cause of death of the deceased was 'extensive blunt force trauma to body and subsequent death'. These injuries were more severe than are likely to have been inflicted by the appellant alone, using a stick.

[45] The crime of murder is an overt disrespect of the right to life of another human being. The right to life is recognized and protected by our Constitution, although it is often not respected by human kind. It is true that any offence which lacks respect for the sanctity of human life will always be viewed in a serious light.

[46] I am therefore satisfied that a lengthy custodial sentence is justified. However, in my view, the appellant is a candidate for rehabilitation being a 52-year-old first offender, and life imprisonment is not warranted, and was disproportionate to the offence. It must also be borne in mind that the appellant did not initiate the assault and there is no evidence to suggest that the death of the deceased was caused solely by the actions of the appellant. This court is therefore at liberty to impose an appropriate sentence.

[47] Affected members of society may be tempted to take the law into their own hands if sentences which the courts impose are perceived to be too lenient. The court has a duty to instil public confidence in the criminal justice system and also general respect for the law by imposing sentences which meet the expectations of society. Nevertheless, the indignation of society must not be allowed to cloud a court's judgment when determining the most suitable and just sentence.

[48] I am of the view that an appropriate sentence is a term of 15 years' imprisonment.

Order

[49] I accordingly propose the following order:

1. The appeal against the conviction is dismissed, and the conviction is confirmed.

2. The appeal against the sentence succeeds. The sentence of the court *a quo* is set aside and is substituted with the following:

'The appellant is sentenced to 15 years' imprisonment, such sentence antedated to 11 October 2018.'

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Jasat AJ

I agree

_____

Olsen J

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Delivered:	02 December 2021
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