IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A363/10

In the matter between:

ANELE MACHANYANA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT DELIVERED ON FRIDAY 12 NOVEMBER 2010

HENNEY, AJ

INTRODUCTION

[1] The appellant was arraigned in the Regional Court sitting at Blue Downs on 5 February 2008 on a charge of murder. He was convicted on 7 February 2008 and on 8 February 2008 he was sentenced to fifteen (15) years imprisonment.

[2] The appellant now appeals against his conviction and sentence after successfully petitioning this court.

[3] The appellant's main ground of appeal on the convictions is that the court *a quo* had erred in finding that the state had succeeded in proving their case beyond reasonable doubt, and failed to properly consider and find that the version of the appellant might reasonably possibly be true. In particular the appellant avers that:

i) the evidence of the two state witnesses was in no way enough to prove the guilt beyond reasonable doubt as there are contradictions between the two state witnesses, Thembelani Fatyela and Jeffrey Vumbe;

ii) the court *a quo* did not properly consider these contradictions and the impact thereof;

iii) the court *a quo* erred in finding that the contradictions were not material.

[4] With regards to sentence the appellant contends that the court a quo erred in finding that there are no substantial and compelling circumstances in terms of Section 105 of 1997.

[5] The State called two state witnesses. Further documentary evidence relating to the blood alcohol present in the body of the deceased and the post-mortem that was conducted was also admitted.

[6] The following seem to be common cause:

i) that the deceased was Mlondalozi Eric Mbali;

ii) that he died of a perforating gunshot wound to the chest and the consequences thereof.

[7] **SUMMARY OF THE EVIDENCE**

Evidence for the State:

Thembelani Fatyela testified that on 20 January 2007, he, the deceased and another friend Bataneli Mlova sat under a tree. The appellant arrived and joined them.

Initially, appellant and the deceased were alone together and they were talking while the witness and Bataneli were on their own talking. From his observation, the discussion between the deceased and the appellant seemed to be a friendly one. A person with the name of Anderson also joined them, stood behind the deceased and the appellant. At that moment, the appellant took out a firearm and pointed it to Anderson and wanted to know why he was standing behind them. At that stage, Anderson moved away and later ran away.

The deceased reprimanded the appellant and told him to stop what he is doing. An argument ensued between the deceased and the appellant. The appellant then wanted to know if he wants him (appellant) to shoot him. The deceased moved back. The appellant thereafter asked the deceased for a second time if he must shoot him.

Appellant thereafter shot the deceased once. The deceased fell down and the appellant walked away. The second witness, Jeffrey Vumbe was asked to transport the deceased to hospital.

At the time the deceased was shot, he was not armed and he did not do anything to the deceased. The witness denies that he was drunk or that he was drinking. He further denies that the appellant had left a bottle of brandy at the scene and that there was an argument between the deceased and the appellant about the bottle of brandy. He further denies that it was the deceased who took out a gun. He denies that there were a fight and a struggle to get hold of the gun between the appellant and the deceased. He denies that in the struggle for the gun a shot went off.

Jeffrey Vumbe testified that he was sitting in front of his house and he observed what happened on this particular day when the incident happened.

There is a public road between where he was sitting and the place where four persons including the appellant and the deceased, were sitting under a tree. At about 19h30 Vumbe saw two persons sitting under a tree, who were later joined by two other persons. The latter two persons initially had a discussion with the other two persons. The appellant then took out a firearm, pointed it at the deceased and shot him. He thereafter, walked away. Vumbe was requested to take the deceased to hospital.

He did not see appellant pointing the firearm at anyone other than the deceased.

He denies that there was any struggle between the deceased and the appellant to grab hold of the gun.

[8] **Appellant's Evidence**

The appellant's evidence was that on 20 January 2007, he was in the company of the deceased, Anele and Bataneli where this incident occurred. At that stage all of them were drinking. After they had consumed a certain amount of liquor, everybody including the deceased was intoxicated. Thereafter, the appellant briefly left to go and buy some more brandy. His younger brother arrived to tell him that he was being called by his father. The appellant went home, but before departing, told the deceased not to start drinking any of the appellant's brandy while he is gone. He came back after five (5) minutes and saw that the brandy bottle was half-empty. As a result of this, an argument

ensued between him and the deceased. The deceased lifted up his T-shirt during this argument and pulled out a gun. At that stage, the appellant grabbed the hands of the deceased, they struggled for possession of the firearm and a shot went off. The firearm was still in the hands of the deceased at that time and it fell out of his hand after the shot was fired. The appellant thereafter picked up the firearm and left the scene, and explained that he did so because he was afraid of the family of the deceased. He never pointed the firearm at anyone or was also never his intention to kill the deceased.

[9] **EVALUATION**

On a careful consideration of the evidence of the two state witnesses, it is clear that they observed the incident from two different vantage points.

The first witness, Thembelani Fatyela, because of his position, must have had more clearer and intimate knowledge of the incident, than the second witness, Jeffrey Vumbe who was positioned across the road.

Fatyela was also better placed because he was at the incident and closer involved. He was almost part of what transpired between the deceased and the appellant. Vumbe was not interested and was an independent observer.

There was initially no reason for him to be involved in the altercation and the happenings between the group of people on the opposite side of the road.

The evidence clearly paints a picture that his involvement in the whole incident was far less than that of Fatyela and would not have been so involved or observant than Fatyela.

It is clear from the evidence therefore that things that Fatyela observed and saw, Vumbe did not see or is not aware of.

It is not uncommon for witnesses especially in criminal trials who have seen the same incident, to give different accounts of their observations.

If one has to have regard to the merits of the evidence of each witness, both of them came across as honest and reliable. They were very adamant as to what they said.

The discrepancies are in my view of not such a nature that it negates the reliability of their evidence on the material aspects.

Therefore on a conspectus of the evidence, I am in agreement with the findings of the trial magistrate where he accepted their version as to how the death of the deceased was caused, above the version of the appellant.

[10] A further factor that strengthens the finding of the trial magistrate in favour of the State, was the highly improbable and unconvincing version of the appellant, especially where he tried to explain how the deceased was shot. The undisputed evidence recorded in the post mortem finding was that the tract of the gun shot wound

was in an upward direction whereas the appellant testified that, at the time the shot was discharged, the deceased, who was still holding the firearm, was pointing it in a downward direction. As already stated, the post mortem report is admitted and the physical evidence regarding the tract of the gun shot wound cannot possibly be reconciled with the appellant's version of how the shot was fired. The fact that appellant's version is irreconcilable with reliable and objective factual evidence is a compelling indication that the appellant's version cannot be reasonably possibly true.

In my view, the trial magistrate correctly rejected his version.

[11] Therefore, for the reasons stated, the appeal against the conviction cannot succeed.

[12] **SENTENCE**

The trial court after conviction found that there was no substantial and compelling circumstances and imposed a sentence of fifteen (15) years imprisonment in terms of Section 51 of Act 105 of 1997 (The Criminal Law Amendment Act). The court of appeal will only interfere with the trial court in exercising its sentencing discretion, if it finds that the trial court did not act properly or judiciously. In **S v Malgas 2001 (1) S.A.C.R 469 SCA** at **478 D-E**.

In Malgas it was further stated at 482 F:–

"All other factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role none is excluded at the outset from consideration in the sentencing process".

[13] The appellant at the time when he was sentenced, was 23 years of age. One of 13 children. The father of a one year old child. His level of education is standard 9 and he worked and earned R70,00 per week. The accused is also a first offender.

[14] In my view, the trial court over emphasised the seriousness of the offence at the expense of the other factors that a court would have taken into consideration in imposing an appropriate sentence. Even though there is a minimum sentence, the court did not consider the totality of all the circumstances in order to arrive at a finding whether it is substantial and compelling. I do not believe that the legislature intended, in promulgating section 51 of act 105 of 1997, to restrict a court, when considering sentencing a person convicted of an offence governed by the aforesaid legislation, to have regard only to the retributive element of sentencing and to ignore the other well-established elements namely the personal circumstances of the accused, the fact that any sentence is *inter alia* and at the rehabilitation of the accused, and the interest of the community in ensuring that the punishment meted out for crime seeks to achieve a balance between the elements of retribution, prevention and rehabilitation.

[15] In my view, the following circumstances should have been listed as substantial and compelling to deviate from the minimum sentence in terms of Section 51(3) of Act 105 of 1997:-

a) the age (23 years) of the accused in relation to the number of years (15 years) he had to serve as a minimum sentence;

b) the accused spent almost one year in custody awaiting trial;

This was also not adequately addressed.

c) the court failed to consider the element of leniency towards the accused;

d) the fact that he was a first offender was not given due weight and consideration.

These factors together with the rest of the personal circumstances of the accused, accumulatively should have been regarded as substantial and compelling in order to justify a deviation from the prescribed minimum sentence.

[16] A sentence of twelve (12) years imprisonment in my view, would have been fair and equitable.

[17] **CONCLUSION**

In the result, I make the following order:

a) the appeal against the conviction is dismissed;

(b) the appeal against the sentence succeeds. The imposed sentence is set aside and substituted with the following:

Twelve (12) years imprisonment

(c) It is ordered that in terms of Section 282 of Act 51 of 1977 (Criminal Procedure Act), that the sentence be antedated to the date of sentence in the Regional Court, being 8 February 2008.

RCA HENNEY, AJ

I agree

A C OOSTHUIZEN, AJ

12 November 2010