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

CASE NUMBER: A11/2010

DATE: 011-03-10

In the matter between:

V CHITHABATHWA Appellant

and

THE STATE Respondent

J U D G M E N T

NDITA, J:

In this matter the appellant, who was legally represented, was tried in the Regional Court sitting in Wynberg, on a charge of murder. He was convicted as charged and a sentence of 15 years imprisonment, under the provisions of section 51(2) of the Criminal Law Amendment Act No.105 of 1997, was imposed. This section prescribes the imposition of a minimum sentence of 20 years imprisonment for murder in the case of a second offender.

The magistrate, having come to the conclusion after hearing evidence, that there were substantial and compelling circumstances justifying a departure from the ordained minimum sentence, imposed the aforementioned sentence.

The appellant now appeals against both conviction and sentence.

It was contended in a nutshell, on behalf of the appellant that the trial court erred in fact and in law by concluding that the evidence presented by the State established beyond reasonable doubt that the appellant intentionally caused the death of the deceased.

The facts as they emerge from the evidence tendered are that on 30 April 2006 the appellant had parked his vehicle at or near his sister's house at NY78 Gugulethu Township. At about 8 pm a vehicle driven by the deceased collided with the applicant's stationary vehicle. Members of the community converged to the scene of the accident.

After a while the police arrived and both the deceased and the appellant were taken to the police station. It appears that at the police station the parties agreed that they would resolve the matter amongst themselves. On this basis the police drove them back to the scene and left them there in order to resolve the matter.

It is common cause that the appellant drove with his friends and the deceased to his house in Hout Bay, and it is also

common cause that the deceased was found the following day in a bedroom at the appellant's house with multiple injuries and was already dead. The appellant denied causing the injuries sustained by the deceased and averred that the deceased must have sustained such injuries during the accident or may have been assaulted by community members who were at the scene of the accident.

Miss Zukiswa Chithabathwa gave an account of the events surrounding the collision. She testified that the appellant is her uncle. On the day in question he had paid her family at Gugulethu a visit and had parked his vehicle, a Mercedes Benz, outside her residence. A short while after the appellant's arrival, and as they were watching television, they heard a loud sound and went outside to investigate. They discovered that a Toyota Cressida driven by the deceased had collided with the appellant's vehicle. The person who was seated at the passenger seat in the deceased's vehicle fled the scene after the impact. She observed that the deceased had sustained an injury between the eyes and was bleeding. Both motor vehicles were extensively damaged. According to the witness the appellant's vehicle was moved three houses away by the impact.

Constable Richard Geldenhuys testified that on the day in

question he and a colleague, Constable Sikeyi, attended to the scene of the accident where they found the deceased still inside the vehicle which had collided with the applicant's. He did not observe any injuries on the person of the deceased but for a small cut on the nose, which was not bleeding. He, however, noticed a small amount of blood in the area of the cut or laceration and also observed that the deceased's clothes were not blood-stained.

Constable Geldenhuys further testified that the deceased admitted to him that he was the driver of the Toyota Cressida that was involved in the accident. In his opinion, the deceased appeared to be sober. There were also about 30 members of the community at the scene who were pushing and shoving. The witness testified that he did not see members of the community assaulting the deceased whilst he was at the scene. When it became difficult to control the crowd the policeman called for back up.

Constable Sikeyi confirmed this witness' evidence but differed from him regarding the location of the injury. According to Constable Sikeyi the injury was on the forehead. The deceased explained to him that he sustained the injury when his head hit the windscreen during the collision. The windscreen of the deceased's vehicle was cracked. They took

the deceased and the appellant to the police station in order to record an accident report. At the police station the appellant informed him that he did not want to make a report, all he wanted was for the deceased to pay for the damages he had caused to his vehicle. In the light of this revelation, the police took both parties back to the scene of the accident. This, however, occurred after the police had assisted them with looking for the owner of the vehicle that was driven by the deceased, but to no avail.

Both witnesses confirmed that the deceased was not assaulted by members of the community at the scene.

Mr Zanoxolo Phamili gave evidence to the effect that the appellant is his friend. He was telephonically advised by the appellant that his vehicle had been involved in an accident. This witness proceeded to the scene and was present when the appellant and the deceased returned from the police station. The deceased had an injury on his face. In this witness' opinion the deceased appeared to be confused. He drove with the deceased and the appellant to the appellant's home in Hout Bay. On their arrival the appellant informed his son "This is the dog who bumped your father's car". After uttering these words the appellant caused the deceased to sit on a chair, tied his hands and then kicked him on the mouth.

One Elias, who is also their friend, intervened whereafter the appellant instructed his friends to leave. The following morning Zanoxolo and Elias went to the deceased's house and the appellant informed them that he had kicked the deceased to death.

The appellant's son, Masixole Mnyathi, who at the time was 20 years old, testified that the appellant arrived at his home with the deceased and some other people at about 12 pm and instructed him to leave his bedroom and find another place to sleep as he was going to put the deceased in his room. The appellant his companion entered the room and questioned the deceased about where he resided. According to the witness the deceased was bleeding from the head. Because he did not want to witness what was about to take place Masixole testified that he spent the spent the night at a neighbour's house. The State unsuccessfully applied that this witness be declared a hostile witness.

Mr Elias Kayinda was also travelling with the deceased and the appellant on their way from Gugulethu to the appellant's home in Hout Bay. His evidence was to the effect that on their way to Hout Bay the appellant assaulted the deceased. Furthermore when they reached the appellant's home the

appellant further assaulted the deceased and Elias intervened. The witness flatly denied that the deceased was assaulted by members of the community in Gugulethu.

Much of the evidence of the last two witnesses was confirmed by Mr Zwandile Tandamisa who testified that earlier on during that day he and the deceased and their friends had been consuming alcohol at a traditional ceremony. The witness saw the appellant kicking the deceased on the mouth.

It is common cause that the deceased was found by the police in a room in the appellant's home, already dead. Constable Mbuyiseli Mduna, after telephonically receiving information regarding the commission of the present offence attended to the scene of crime at the appellant's home. He found the deceased lying on his back with blood on his face and body. Photographs of the scene were taken by Inspector Tembinkosi Radebe. He confirmed that the deceased was lying on the floor and there were bloodstains all around the walls and the ceiling. He also found an iron rod and shoelaces, which were covered in blood. The deceased was also lying in a pool of blood. I have indicated earlier on in this judgment that the appellant denied causing the injuries resulting in the deceased's death.

The next witness to testify was Dr Potela, a forensic pathologist, who conducted a post mortem examination on the body of the deceased. It is regrettable that this witness was not thoroughly examined by the state as he was merely asked to confirm the contents of the report. Dr Potela recorded the cause of death as multiple injuries. It is necessary to mention a few of those injuries because to this end the post mortem report reflects that an external examination revealed the following. Extensive bruises, fresh bruises on the lower part of the chest and epigastria, fresh bruise on the left chest wall, bruise on the right chest wall, haematoma behind the right ear, laceration above the right orbit, tramline abrasion on the right side of the face, left-hand swelling, laceration on the inner part of the lip with laceration of the frenulum of the upper lip and avulsion of the two upper front teeth, periorbital haematoma - 15mm laceration on the forehead – tramline bruise on the left side of the face. Abrasion associated with lacerations with 10mm laceration on the cubital fossa with related swelling. Bruises on the legs and a bruise on the cubital fossa with associated swelling of the arm.

According to Dr Potela the injuries sustained by the deceased are consistent with assault. However, he could not exclude the possibility that some were sustained as a result of the collision.

The appellant put up the following version: He was at his sister's residence when he realised that the deceased had collided with his stationary vehicle. When he arrived at the scene he observed members of the community forcibly removing the deceased from the Toyota Cressida. According to the appellant he is the one who intervened when members of the community assaulted the deceased. He vehemently denied assaulting the deceased and stated that the reason he took him to his home was to give him a place so that he could rest and recover, as he could not walk properly.

The appellant's version is that the deceased appeared to be shocked and there was blood on his face. For this reason the appellant brought a bucket of water so that the deceased could wash the blood from his own face, but he could not do so as his hands were too weak. Having realised this the appellant testified that he wiped the deceased's face himself. Because the deceased was bleeding he allowed him to sleep on the floor as he did not want his son's bed to be dirty. Some time during the night a police officer knocked on his window and enquired whether there was any problem at the homestead. His response was that there wasn't any problem and the police officer left. The appellant went to sleep in his bedroom with his wife. He says he learnt from his wife the following day that the deceased was dead.

It is a well established principle governing the hearing of appeals against findings of fact that in the absence of demonstrable and material misdirection by the trial Court its findings of fact are presumed to be correct and can only be disregarded if the evidence shows them to be clearly wrong. This regard one can see S v Hadebe & Others 1997(2) SACR, 641 (SCA). This in my view is certainly not a case in which a reading of the record leaves me in any doubt as to the correctness of the trial Court's factual findings. The magistrate made favourable credibility findings in respect of the witnesses. In my view those findings were justified and there is clearly no basis for this Court to interfere with them. On the other hand the appellant's version was rejected as not being reasonably possibly true. Again this is justified when regard is had to the totality of the evidence, the probabilities, the proved facts and for the following reasons: The two policemen testified that the appellant after the accident has sustained a minor laceration on his face. The only reasonable inference that can be drawn from this fact is that the deceased sustained the external injuries reflected in the post mortem report after the accident. In fact it is unnecessary to even draw an inference. There is direct evidence that en route the appellant's residence the appellant had already started assaulting the deceased. If the appellant was concerned

about the injuries sustained by the deceased he would not have let him sleep on a floor in his son's room without ensuring that he received medical attention. Furthermore even when a police officer, during the same night, enquired whether there was a problem the appellant did not deem it fit to disclose that there was an injured person who needed medical attention.

Secondly, there is overwhelming evidence that the appellant assaulted the deceased at his home whilst his hands were tied, in short, whilst he was restrained. This fact is strengthened and corroborated by the discovery of the bloody shoelaces, the iron rod as well as the injuries on the appellant.

Thirdly, it is highly improbable that the reason the appellant took the deceased to his home was for him to recover from his injuries in the light of the evidence of the state witnesses who corroborate each other in stating that the appellant kicked the deceased on the mouth as he sat on a chair with his hands tied. This is further supported by the evidence that Elias intervened on the deceased's behalf, at which point the deceased instructed his friends to leave his house.

Fourthly, the most probable version as supported by true facts is that the appellant took the deceased to his home with the

intention of assaulting him. This is borne out by the evidence as well as the iron rod recovered from the room wherein the deceased was lying. Furthermore the blood spurts spats on the walls and the ceiling lend credence to Dr Potela's opinion that the injuries were caused by blunt force. It may well be that appellant sustained some injuries as a result of the motor vehicle collision but the Court *a quo*'s findings and conviction based on *dolus eventualis* cannot be faulted in the circumstances.

For all these reasons I am of the view that the conviction is justified in the light of the evidence tendered. It has been argued on behalf of the appellant that this Court is entitled to interfere with the sentence on the basis that the trial Court did not exercise its judicial discretion properly or did not properly weigh and consider the factors in this matter for the following reasons:

1. The magistrate did not give sufficient attention to the appellant's personal circumstances as well as the mitigating factors.
2. The Court *a quo* emphasised the gravity of the offence and the interests of the community over the appellant's personal circumstances.
3. The magistrate failed to take into account that the

appellant was in custody awaiting trial for three years.

4. The magistrate over-emphasised the fact that the appellant had been convicted of murder 20 years before the commission of the offence.

That is not entirely correct. The period is 17 years before the commission of the offence. It is a well-established principle that:

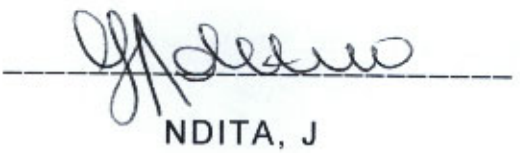
> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were a trial Court and then substitute the sentence arrived at simply because it prefers it. To do so would be usurp the sentencing discretion of the trial Court. When material discretion by the trial Court vitiates its exercise of that discretion, an Appellate Court is of course entitled to consider the question of sentence afresh."

In this regard one can see S v Malgas 2001(1) SACR 469 (SCA).

I am unable to agree that we should interfere with the sentence. I disagree that the sentence of 15 years imprisonment reflects an over-emphasis on deterrence rather

than rehabilitation. Clearly this is a serious offence. The trial Court gave serious consideration to all other circumstances impacting on the appellant and correctly balanced such circumstances against the legitimate interests of society. This in my view is the correct approach. The magistrate correctly considered the circumstances under which the present offence took place, including the fact that the offence is a direct result of the police failing to charge the deceased criminally for colliding with a stationary vehicle. There is nothing on the record which would justify a finding that the magistrate exercised his discretion improperly or that he or she was unreasonable in his/her decision to sentence the applicant to 15 years imprisonment.

In the result the appeal against both conviction and sentence is dismissed and the **CONVICTION AND SENTENCE IS HEREBY CONFIRMED**.



NDITA, J