IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A224/2015

DATE: 21 AUGUST 2015

In the matter between:

TOKELO MOTUMI Appellant

And

THE STATE Respondent

J U D G M E N T

RILEY, AJ:

[1] The appellant was charged in the Regional Court, sitting at Wynberg, with murder, read with the provisions of section 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997, and a count of robbery read with sections 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997. In regard to the count of robbery the State alleged that aggravating circumstances were present as the appellant had used a knife during the commission of the robbery.

[2] On 16 August 2007 the appellant, who was represented at all times, pleaded not guilty to both counts. On 28 January 2008 the appellant was convicted on both counts, and on the same day sentenced to 15 years imprisonment on each count. The court *a quo* however ordered that seven years of the sentence on count 2 run concurrently with the sentence on count 1 which meant that the appellant was effectively sentenced to 23 years imprisonment on both counts. On 9 April 2015 the appellant was granted leave to appeal against both his conviction and sentence.

[3] It is common cause that the record of the proceedings in this matter was missing and or was lost and that the court *a quo* had to reconstruct the record of the proceedings. The reconstruction was done in open court with the aid of the trial magistrate's contemporaneous notes that he had kept during the trial, his *ex tempore* judgment on the merits, the medico-legal post-mortem report, the photos of the deceased at the time that the post-mortem was conducted and written submissions made by the appellant. All the parties collaborated with the reconstruction of the record and everyone was satisfied with the reconstructed record.

[4] It is further common cause that the judgment on sentence by the trial magistrate could not be reconstructed and that the

only information of assistance in regard to sentencing, is the notes of the submissions made by Mr Botman, the appellant's legal representative and the prosecutor at the trial at the time of sentencing.

[5] In this court, Ms De Jongh who appeared on behalf of the appellant, contended that although there was participation by the parties in the reconstruction of the record, that the appellant did not fully agree with the accuracy of the trial magistrate's contemporaneous notes of the proceedings and that the notes could therefore not be regarded as an accurate reflection of what was said during the proceedings. She submitted further that the record was incomplete due to the fact that the sentence proceedings could not be perfectly reconstructed.

[6] In S v Chabedi 2005 (1) SACR 415 (SCA) at 417, Brand JA said the following regarding the record on appeal:

> "[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the hearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record

must be adequate for proper consideration of the appeal, not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible, (see, for example, S v Collier 1976 (2) SA 378 (C) at 379A-D and S v S 1995 (2) SACR 420 (T) at 423b-f).

[6] The question whether defects in the record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia* on the nature of defects in the particular record and on the nature of the issues to be decided on appeal."

In Machaba & Another v The State (20401/2014) [2015] ZASCA 60 (8 April 2015), the record of the proceedings on appeal was not complete as the recording of the last week of the recordings had not been fully transcribed. The recordings could not be traced. Attempts to reconstruct the portions of the record were unsuccessful. The record did not deal with the evidence relating to a trial-within-a-trial in respect of the second accused; the evidence relating to the sentencing proceedings and part of the judgment on the merits. On account of the paucity of the information regarding the

appellant's personal circumstances on sentence, and the absence of that part of the record of the proceedings, Schoeman AJA placed reliance on the information relating to the personal circumstances of the appellants in that matter in the bail application proceedings. In his view, the adjudication of that appeal on the record as it stood, would not prejudice the appellants. He held, at paragraph 5 that:

> "The appellants' convictions and sentences can therefore not be set aside merely on the basis of the record being incomplete."

[7] In my view the only material shortcoming in the reconstruction of the record in the present matter is the absence of the judgment on sentence. Without it one is unable to determine the magistrate's reasons for the sentence imposed, what factors he took into account and what weight he gave them. This in turn effectively deprives the right of the appellant to challenge the magistrate's reasoning and approach and without which his right of appeal is stripped of much of its content. It goes without saying that the right of appeal forms an important element of an accused's constitutional right to a fair trial. See S v Zenzeli 2009 (2) SACR 407 (WCC) and S v Gora 2010 (1) SACR 159 (WCC).

[8] It follows from what I have said that the appellant has been prejudiced by the partial reconstruction of the sentencing proceedings. I consider however, that such prejudice can be completely met by notionally ignoring the sentence imposed by the trial magistrate and considering sentence afresh on appeal. In other words this Court regards itself as having, within the constraints of the statutory sentencing framework and bearing in mind that there is no cross-appeal, an unfettered discretion to sentence afresh. The same considerations and facts as were before the magistrate are before us now and the appellant's counsel took up the invitation to address us fully on an appropriate sentence. In my view such an approach pays full regard to the appellant's right to a fair trial including his right to an appeal. At the same time it also has regard to the interest of justice in the wider sense of the criminal justice system serving the interests of the community as well and not lending itself too readily to the overturning of convictions and sentences for reasons of a purely technical nature.

The merits of the Appeal:

[9] The evidence of the state witnesses can be summarised as follows. On 17 March 2006 at about midnight, they were walking the appellant home after they had been drinking at a shebeen. It is common cause that they were all under the

influence of intoxicating liquor. En route they came upon the deceased, an elderly man, whose estimated age according to the medico-legal post-mortem examination, was 59. The appellant then grabbed hold of the deceased, demanded that he hand over his valuables and even though the deceased agreed that the appellant could take his valuables, the appellant nevertheless stabbed the deceased with a knife and took the deceased's wallet containing R30,00. The appellant threw the wallet away and suggested that the witnesses, who were his friends, accompany him to a shebeen to spend the R30,00 but they declined.

[10] According to the medico-legal post-mortem examination report which was formally admitted by the appellant in terms of section 220 of the Criminal Procedure Act, 51 0f 1977, the deceased died as a result of stab wounds to the chest. The chief post-mortem findings were as follows:

1. There was a penetrating stab wound on the left anterior chest wall with a wound track going through the blood vessels and the trachea.
2. A penetrating stab wound on the left anterior chest wall with a wound track going through the left lung.
3. Blood aspiration.

[11] The appellant raised an alibi and testified that at the time that the murder occurred he was at his aunt's house at Khayelitsha where he had slept over. He denied any knowledge of the murder and averred that the state witnesses had conspired against him and had falsely accused him due to the fact that they had an argument with him the previous day when they told him that they would show him what they would do to him.

[12] In a well reasoned and detailed judgment, the magistrate summarised and critically evaluated the evidence of the state witnesses and concluded that although there were contradictions between the evidence of the different state witnesses, that the contradictions were not of a material nature. The court found that on the whole the three state witnesses corroborated each other materially in that they were all in agreement that:

1. They were walking home with the appellant.
2. They met up with the deceased.
3. The appellant went to the deceased and demanded his property.
4. The appellant stabbed the deceased.
5. The appellant robbed the deceased of R30,00.
6. Some of the witnesses were still on the scene when the police and ambulance services arrived on the scene.

7. The deceased died on the scene.

[13] It is trite law that where two or three witnesses contradict each other on a particular aspect it does not follow that the witnesses are not telling the truth or that the aspect does not exist. See S v Mokoena 1978 (1) SA 229 (O) at 232F. It is further accepted law that there "...is no reason in logic why the mere fact of a contradiction or several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness." See S v Oosthuizen 1982 (3) SA 571 (T) at 576.

[14] In my view, the trial magistrate correctly found that the

> "... minor contractions is an indication that there were [sic] no conspiracy amongst the witnesses to falsely implicate the accused. This is also not the evidence of a witness who wants to falsely implicate the accused. Mr Tomsana is related to the accused and it is common cause that there were no problems between them. Accused was not able to give the court reason why the witness could falsely implicate him."

In my view the allegation by the appellant that the State

witnesses, i.e. his friends, had falsely implicated him to protect someone else, was but a last ditch attempt on the part of the appellant to escape blame in circumstances where the totality of the evidence pointed overwhelmingly to his guilt. The trial magistrate correctly rejected his evidence in this regard as being without merit. The trial magistrate correctly found that where an alibi is raised there is no onus on the accused to establish it and that if it might reasonably be true he must be acquitted. See R v Hlongwane 1959 (3) SA 337 AD at page 340H. Placing reliance on Hlongwane (supra) the trial magistrate correctly held that the alibi of an accused should not be considered in isolation but should be viewed in the light of the totality of the evidence of the particular matter and the court's impression of the witnesses. The trial magistrate found that when the accused's alibi was assessed against the totality of the evidence presented by the state it could not stand and accordingly rejected it. The court found the state witnesses were generally honest and reliable and that the overwhelming weight of the evidence supported a finding that the state had proved beyond a reasonable doubt that the appellant had murdered and robbed the deceased. See S v Malefo & Others 1998 (1) SACR (W) at 157(i)-158(d).

[15] On a consideration of the totality of the evidence led at the trial, there is no basis to find that the trial courts'

evaluation of the evidence is not correct. I am satisfied that the trial magistrate correctly rejected the appellant's alibi defence and correctly found on the totality of the evidence, that the State had proved the guilt of the appellant beyond a reasonable doubt. In the result I consider that the appeal against the conviction must fail.

[16] Although the appellant's heads of argument are silent on the issue of sentence, Ms De Jongh made the following submissions to us during argument. She submitted that substantial and compelling circumstances were present in this matter, in that the appellant was 20 years old at the time of the sentencing. When the incident occurred in 2006 he was 19 years old. He was accordingly relatively young, a first offender, intoxicating liquor played a role at the time of the commission of the offences and the appellant had spent almost two years in custody. She submitted that these factors should be viewed cumulatively in deciding on an appropriate sentence. She conceded that although long term imprisonment was a reality, that the court should not lose sight of the fact that rehabilitation should also be considered. She submitted that a sentence of between 15 to 20 years would be appropriate in the circumstances of this particular case.

[17] Ms Erasmus, who appeared for the respondent,

contended that considering the circumstances of this particular case that although she ultimately had to concede that substantial and compelling circumstances are indeed present, that in her view, an effective sentence of 18 years imprisonment was appropriate.

[18] The appellant's personal circumstances are favourable. He was 19 years old when the offence was committed. He was 20 years old at the time of sentencing. He was unmarried, had no children and had been employed as a grouter, earning R750,00 per week. On the face of it he was a first offender. It appears further that the appellant had spent approximately two years in custody before the finalisation of the matter.

[19] The provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 would ordinarily apply to the sentencing regime. In the present matter the murder was committed during an armed robbery and would attract a prescribed minimum sentence of life imprisonment, unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence. The prescribed sentence for robbery with aggravating circumstances is 15 years imprisonment unless substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

[20] Our courts have repeatedly held that society demands that persons who make themselves guilty of crimes of this nature must be severely dealt with. In cases such as the present the element of retribution and deterrence rather than the interest of the offender come to the fore in the assessment of an appropriate sentence. See S v Vilakazi 2012 (6) SA 353; [2008] ZASCA 87 (SCA) para [58]. The attack by the appellant on the deceased was utterly callous. The deceased was an elderly man who had readily agreed that the appellant could take whatever valuables he had in his possession. The appellant's friends tried to dissuade him from stabbing the deceased but he nevertheless proceeded to do so. At the time of the commission of the offence and at the sentencing stage, the appellant was very young.

[21] Our courts have consistently emphasised the importance of obtaining pre-sentence reports in the case of juvenile offenders, even if the offender was over the age of 18 years at the time of the commission of the offence. See S v Van Rooyen 2002 (1) SACR 608 (C) 611i-612b. Regrettably that was not done in the present instance. On appeal, more than seven years later the importance of such a report has, however, substantially diminished. In dealing with juveniles or persons of relative young age as in the present matter, courts must "...ensure that whatsoever sentence he or she decided to

impose will promote the rehabilitation of that particular offender and have its priority the reintegration of the youthful offender back into his or her family, and of course the community." See Brandt v S 2005 (2) ALL SA 1 (SCA).

[22] Our courts have also consistently held that where a court has to impose a sentence for multiple offences, as in the present matter, the court has to seek an appropriate sentence for all offences taken together. Accordingly when dealing with multiple offences the court must not lose sight of the fact that the aggregate penalty must not be unduly severe. See S v Moswathupa 2012 (1) SACR 259 at para [8], page 263g and S v Mabunda 2013 (2) SACR 161 (SCA).

[23] Although this is a case where the counts are closely connected in time, place and circumstances this is not necessarily an appropriate case for them to be taken together for the purpose of sentence and treated as one since each one is subject to its own statutory sentencing structure and such an approach would arguably limit the Court to the sentence already imposed on count 1. Nonetheless, in the present matter the evidence shows that the murder and the robbery are "inextricably linked in terms of locality, time, protagonist and importantly the fact that they were committed with one common intent." See S v Mokela 2012 (1) SACR 431 (SCA) at para

[11].

[24] I am satisfied that the principles referred to hereinbefore find equal application in the present matter. In my view, notwithstanding the appellant's youthful age at the time, the seriousness of the offence and the callousness of the murder dictate that a sentence of no less than 15 years direct imprisonment on the murder conviction will meet the requirements of a fair and balanced sentence. The appellants' youthfulness, the role alcohol played in the offence, the fact that he acted on the spur of the moment and his favourable personal circumstances constitutes substantial and compelling circumstances which permit the court to deviate from the prescribed minimum sentence in respect of both convictions.

[25] As regards sentence for the robbery conviction, as I have indicated, the robbery was closely tied to the murder and to impose a further lengthy term of imprisonment on this count, would in effect, punish the appellant twice over for the same conduct. The robbery was, however the motive for the appellant's murderous attack upon the deceased and for this and the further reasons set out above should be separately sentenced. In my view a sentence of **FIVE (5) YEARS IMPRISONMENT** on this count would be appropriate, but that it should run concurrently with the sentence on count 1.

[26] In the result I propose the following order:

(i) The appeal against the conviction is dismissed.

(ii) The appeal against the sentence succeeds in part.

(iii) The sentence of 15 years imprisonment on count 2 is set aside and substituted with a sentence of five years imprisonment.

(iv) It is ordered that the sentence imposed on count 2 will run concurrently with the sentence of 15 years imprisonment imposed on count 1.

(v) The new effective sentence of 15 years imprisonment is antedated to the date upon which sentence was originally imposed by the trial court, i.e. 28 January 2008.

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RILEY, AJ

I agree and it is so ordered.

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BOZALEK, J