IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: A211/2019

In the matter between:

BRENT HENRY First Appellant

JUANE JACOBS Second Appellant

and

THE STATE Respondent

Date: **21 February 2020**

JUDGMENT

MABINDLA-BOQWANA, J (NDITA and MANTAME JJ concurring)

Introduction

[1] The appellants appeal, with the leave of the trial court (per Henney J), against their sentences, having been convicted as follows:

In respect of both appellants:

1.1 count 1 - murder of one Carl Schoombie ("the deceased");

1.2 count 3 - assault with intent to cause grievous bodily harm of one John Cannon ("J Cannon");

In respect of the first appellant:

1.3 count 5 - assault on one Sarah Cannon ("S Cannon);

1.4 count 6 - assault on one Victoria Parker ("Parker");

In respect of the second appellant:

1.5 count 4 - assault on J Cannon.

[2] The sentences imposed by the trial court were as follows:

2.1 Life imprisonment in respect of count 1 on both appellants;

2.2 The first appellant was further sentenced to 6 months' imprisonment in respect of count 3; 60 days' imprisonment in respect of count 5; and 60 days' imprisonment in respect of counts 6 and 7, taken together for the purpose of sentence. It appears that the trial court may have erred by taking into account count 7 when sentencing, as it had acquitted the first appellant in respect of this count. Nothing turns on this, however, as this count was said to have been taken together with count 6 upon sentencing;

2.3 The second appellant's further sentence on the other hand was 3 years' imprisonment in respect of counts 3 and 4 (regarded as two separate assaults);

2.4 Sentences in respect of both appellants were ordered to run concurrently.

Background

[3] The facts underpinning the conviction of the appellants, arose from an incident which occurred in the early hours of the morning of 21 November 2015, at 4.00 am, in Claremont. The state witnesses testified that the deceased and his friends, J Cannon, S Cannon and Parker, had visited a night club known as "Tiger-Tiger" in Claremont, where they had spent an hour. Upon leaving the club they

hired an Uber taxi ("the taxi") to take them home. As they were driving along, an Audi motor vehicle suddenly cut the taxi off, forcing it to stop. Two men (the appellants), jumped out of this Audi vehicle, shouting and swearing at the occupants of the taxi. They tried opening the doors of the taxi, which were locked, while kicking and punching its windows. The taxi driver, Jean Pierre Muroncwa ("Muroncwa") tried to manoeuvre the taxi out of the situation, but was confronted with a *cul de sac*. That was when the Audi managed to block the taxi from moving. The appellants approached the occupants of the taxi, accusing them of having caused trouble at the club. They shouted at them aggressively, while insulting and threatening them. The occupants of the taxi, some of who were witnesses at the trial, testified that they had no idea what the appellants were talking about.

[4] The deceased got out of the taxi, followed by J Cannon. The second appellant, who was described as the larger of the two men, attacked the deceased, while the first appellant, who is a shorter man, attacked J Cannon, punching him on the side of the head. The second appellant punched the deceased with his fist and the deceased landed on the ground. He attacked the deceased's head by kicking it a number of times, pressing it with his knee and punching it with his fists. He was joined by the first appellant, who also punched and kicked the deceased's head. They repeated the attack on the deceased a number of times, also kicking him in his face, and using elbows onto his head with brutal force. J Cannon, who was also knocked to the ground by the first appellant during the scuffle, was pleading with them to stop. The second appellant threatened to shoot him, mimicking a gun with his finger. He was also thrown against a garage door. J Cannon could hear the appellants screaming hysterically at the deceased while attacking him. As this was happening, the women occupants, S Cannon and Parker were not spared. The appellants also threatened and swore at them.

[5] As the deceased lay there on the ground, helpless, he was bruised, bleeding profusely through his ears, nose and mouth, and snorting. The appellants left him

there in a helpless state. The deceased was taken to hospital where he lay in a coma for four days, after which he died of his injuries. The deceased's cause of death was noted in the post-mortem report as a blunt force head injury and the consequence thereof. The pathologist, Dr Gavin Kirk, noted extensive deep scalp bruising on the head, crack fractures on the parietal bone and skull, as well as a burr hole on the frontal bone. The type of injuries the deceased suffered were described by the pathologist as those occurring when the brain moves at a high velocity. They were deep in the brain. To get these injuries, the deceased's head would have had to be struck hard with a swinging object moving from side to side, to cause shearing. This, according to the pathologist, was a type of injury that occurred from motor vehicle accidents or where the victim fell from a considerable height.

[6] The trial court found the appellants to have formed a direct intention to murder the deceased, evidenced by the manner of the assault on him, which was continuously targeted at his head. According to the trial court, the appellants "*directed their will toward bringing about the death of the deceased*." They further formed a common purpose to murder him.

Grounds of appeal

[7] In respect of the first appellant, the complaint against the trial court is that it overlooked the appellant's personal circumstances, in particular that he was a productive member of society and a first offender. It further disregarded the appellant's alcohol intake and the role he played in the commission of the offences; the fact that a fight broke out at the club; the fact that what transpired later was based on mistaken identity; and that the first appellant is not a violent person. He acted out of character that particular evening. The court, accordingly, should have found that there were substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment.

[8] Submissions on behalf of the second appellant centred on the trial court's evaluation of the evidence of the Probation Officer, Ms Cawood. The second

appellant's counsel contended that the trial court failed to give due regard to his mental health diagnosis, bipolar disorder and attention deficit hyperactive disorder ("ADHD"), and consequently his "*moral blameworthiness*", as well as his alcohol and drug abuse problem. It was also contended that he was assessed by Ms Cawood to have shown remorse and that he was a candidate for rehabilitation. It was further submitted that the trial court should have further allowed a report by a psychiatrist, Dr Zabow, which substantively talked to this aspect.

[9] The quarrel for both appellants was essentially that the imposed sentence of life imprisonment in respect of murder was disproportionate.

Analysis

[10] It is well established that the determination of sentence is pre-eminently a matter for the trial court's discretion. Grounds upon which a court of appeal may interfere are circumscribed. I do not wish to traverse those, save to mention that "[*t*]*he test for interference by an appeal Court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate*." (See ***Director of Public Prosecutions, KwaZulu-Natal v P*** 2006 (1) SACR 243 (SCA) at para 10).

[11] In exercising its discretion the trial court must weigh both mitigating and aggravating factors, focused on the nature of the crime, the personal circumstances of the offender and the interests of society. The contention in this case, is that the trial court accorded insufficient weight to the personal circumstances, as well as the moral blameworthiness, of the two appellants.

[12] As to the first appellant, he testified in mitigation of sentence that he was 40 years old, unmarried, with three children, 16, 14 and 10, two residing with their mothers and one with the appellants' mother. The first appellant completed grade 9 and went on to further his studies in industrial electronics, and fitting and turning. Before the incident he worked as a system matters expert for two years.

He maintained his children financially. His mother is still alive, while his father passed away in 2014. He had no previous convictions. His counsel placed much emphasis on the role alcohol may have played in the commission of the crime, the fact that this was a case of mistaken identity, and the role played by the first appellant, which, according to him, was lesser than that of the second appellant, as factors that the trial court overlooked.

[13] With regard to the second appellant, Ms Cawood, who is a social worker in private practice, presented hers and various other collateral reports in mitigation of sentence. The second appellant also called Loriane Van Zyl ("Van Zyl"), who testified about his character. Testimonials from various individuals were also handed up in court. Among the reports was that of Dr Zabow, a psychiatrist, relating to the appellant's diagnosis as suffering from ADHD, which the trial court ruled was not properly introduced as expert evidence before the court, and that Ms Cawood, not being an expert in that field, could neither present the report nor base expert opinion on it. I find it unnecessary to deal with Dr Zabow's report because the trial court had rightfully rejected it, as it did not conform to the rules applicable to admission of expert evidence.

[14] In a nutshell, the personal circumstances presented on behalf of the second appellant were that he was born in 1980 in Cape Town. His parents divorced in 1987. His mother and siblings relocated to Johannesburg, while he opted to remain with his father. He grew up a compassionate child. He was reportedly sexually abused by a closely related uncle, which left him scarred for life. His school history was erratic and this, according to Ms Cawood, was possibly linked to the development of "supposed" bipolar symptoms in childhood and adolescence. He achieved up to grade 9 at school and later an NT1 qualification, which equipped him to work as a safety officer. He started his own businesses at some point. He was seemingly diagnosed with bipolar disorder at the age of 18, by one Dr Weinkove. He is also HIV positive. He has three daughters, two of whom are minors and residing with their mothers. He contributed financially to the upkeep

of his daughters. He is married. He had been convicted of housebreaking in 2002, and malicious damage to property and common assault in 2009, but was treated as a first offender for the purposes of sentence in that case, seeing that a period of more than 10 years between 2009 and the date on which the offences were committed had lapsed.

[15] In the decision of ***DPP, Gauteng v Pistorius*** 2018 (1) SACR 115 (SCA), where the physical vulnerabilities of the accused were acutely pronounced, the SCA at para 22, referring to ***S v Vilakazi*** 2009 (1) SACR 552 (SCA), reiterated the point that "[*i*]*n cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background*." Of course this is not to say that personal factors are not important, they are essential in assessing the person of the accused. In that assessment though, the nature and circumstances of the crime and the interests of society may not be relegated to the background. It is a question of weighing both mitigating and aggravating factors.

[16] Returning to the issues in contention, the appellants' counsel criticised the trial court for not paying particular attention to the state of mind of the appellants while the attack on the victims, and in particular the deceased, was being carried out. The appellants both elected not to testify in the trial. The court therefore did not have the benefit of their version as to what went through their minds. They were the only ones who could tell the court about their level of intoxication, how it impaired their judgment and what role it may have played in their actions on the day of the incident. It cannot be expected of the court to assume that alcohol played a part in the brutal attack that led to the death of an innocent individual.

[17] The second appellant's counsel strenuously argued that the appellant's alleged mental disorder may have played a role in the commission of the crime, and that he may have skipped his medication on that day. His unstable state of mind may have also been aggravated by alcohol. No evidence was led on this issue. Other than an attempted reference to Dr Zabow's report by Ms Cawood, there was no evidence as to the second appellant's diagnosis and, in particular, how

it affected his actions and his mental state on the day in question. While the appellant had a right to remain silent, there are consequences to that. An attempt is now made to gain the sympathy of the court, after the fact, on an issue as crucial as the appellant's mental state.

[18] Even assuming that Ms Cawood was an expert in psychiatry, which she is not, she could not be in a position to tell the court why the second appellant acted in the manner he did on the day of the incident. I must add the court owed no duty to call Dr Zabow, as the second appellant's counsel sought to suggest. The second appellant was represented by a very experienced lawyer who chose not to call Dr Zabow – a choice for which he may have had his reasons.

[19] As to the issue of mistaken identity, the appellants did not take the court into their confidence as to what motivated them to continue attacking the deceased, even though they were told numerous times that they were attacking the wrong people. Not much can be attached to the excuse of mistaken identity. As the trial court observed, the appellants were clearly advised, prior to attacking the occupants of the taxi, that they were making a mistake, the taxi occupants had not been involved in an incident at that club. They however forged ahead at accosting them. They brutally attacked the deceased, in the face of pleas that they were attacking the wrong person. The excuse of mistaken identity can only assist the appellants up to a point. The court cannot assume the motivation behind the repeated attack on the deceased, despite desperate pleas from himself and his comrades for the appellants to stop. In any event, even if they were mistaken, they had no right to assault, let alone kill, the deceased. The tragedy is made worse by the fact that there was no confrontation by the deceased.

[20] The appellants showed no remorse for their actions, which is usually a pointer as to whether an accused person takes responsibility for his or her actions and is therefore a candidate for rehabilitation. The first appellant was given several opportunities to explain what he was sorry about, when he testified in mitigation of sentence. He refused to acknowledge that he had done wrong, but simply stated

that he felt sorry for the deceased's family for the loss of their son. That is not being remorseful.

[21] Ms Cawood also tried on behalf of the second appellant to suggest that he took responsibility for his actions. She could not, however, articulate what he actually said to her. The court sought clarity from her, but her testimony became less direct on an issue which ought to have been simple to answer. It was equivocal and confusing. At some point she pointed out "*I wasn't interviewing about the actual crime itself, I was wanting to see his capacity to be able to show insight and a realistic conscience, that's what I was looking for*."

[22] Later an impression was created that the second appellant was made to understand that he had to take responsibility and that he agreed to do so. Ms Cawood testified "*Mr Jacobs agreed that he has to take full responsibility for his choices and actions that night. He did share that he had looked up to Henry, who is a few years older than he is…*". This is not the kind of contrition for the plight of another that Ponnan JA referred to in ***S v Matyityi*** 2011 (1) SACR 40 (SCA), at para 13. There, Ponnan JA poignantly found, inter alia, that "*before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions*." (Own emphasis.) None of that has happened in this case, as I have already indicated. There was no genuine remorse, or unequivocal acceptance of wrongdoing and penitence by any of the two appellants.

[23] This is one of those cases, in my view, where personal circumstances pale into inconsequentiality when compared to the aggravating factors. The second appellant was a Muay Thai fighting expert. It was stated by a witness that the shins of these fighters are particularly hardened and can cause more damage than feet can. The deceased clearly suffered a severe brain injury. The first appellant also fully participated in the assault, kicking and placing his knees and elbows on

the head of the deceased. He further threatened one of the witnesses, and prevented the witness from seeking help by calling the police. His conduct was far from being half-hearted and minor.

[24] In the circumstances I find no misdirection on the part of the trial court, and therefore no reason to interfere with its discretion in imposing life imprisonment on the murder charge.

[25] In the result, I would propose the following order:

1. The appeal in respect of both appellants is dismissed.

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N P MABINDLA-BOQWANA

Judge of the High Court

I agree and it is so ordered.

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T C NDITA

Judge of the High Court

I agree.

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BP MANTAME

Judge of the High Court

APPEARANCES

For the first appellant:	Mr Solomons, Legal Aid South Africa
For the second appellant:	Mr du Plessis, David H Botha, Du Plessis & Kruger (BDK), Pretoria C/O Mathewson Gess Incorporated, Cape Town
For the respondent:	Adv. CL Burke, State Advocate