In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No. A213/21

In the matter between:

MOTLATSI LEHLOKA **Appellant**

and

THE STATE **Respondent**

Date of Hearing: *11 February 2022*
Electronically delivered: *16 March 2022*

JUDGMENT

LEKHULENI J

INTRODUCTION

[1] The appellant was convicted in the Regional Court sitting in Blue Downs on a charge of murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997. The regional magistrate found that there were compelling and substantial circumstances meriting a deviation from the prescribed minimum sentence and imposed a sentence of 15 years' imprisonment. He also declared the appellant unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000. Subsequent thereto, the appellant applied for leave to appeal against his conviction and sentence and his application was refused by the trial court. However, on petition

to the Judge President in terms of section 309C of the Criminal Procedure Act 51 of 1977 (*"the CPA"*), the appellant was granted leave to appeal to this court against his conviction only.

[2] The charge against the appellant is that on 17 December 2017 and at Green Park, Mfuleni, the appellant unlawfully and intentionally killed one Shupani Letseka ("the deceased") by hitting him with bricks. The appellant was legally represented throughout the trial. He pleaded not guilty to the charge and, in his plea explanation, he made formal admissions which were recorded by the trial court in terms of section 115(2)(b) of the CPA. Amongst others, the appellant admitted the identity of the deceased, the contents and the correctness of the medico-legal post-mortem report, and the fact that the deceased did not suffer further injuries on his body from the scene of crime to the place where the autopsy was performed.

THE FACTUAL MATRIX

[3] At the hearing of the matter in the court below, the state's case rested principally on the evidence of two witnesses, namely Ms Amkelani Sikonana (Ms Sikonana), a single witness, and on the evidence of Constable Mdau who was the investigating officer in the matter. The appellant testified and also called a witness to corroborate his version. The evidence that was led at the trial court can be summarised briefly as follows:

[4] Ms Sikonana, the deceased's girlfriend, was the first and only eyewitness to testify. The deceased was her neighbour. Their houses faced each other and are

separated by a street. She testified that on 17 December 2017 early in the morning around 09h00, she woke up when she heard noise outside her house. She went outside to investigate what the problem was and she saw an ambulance and police officers outside. She inquired from her mother and the latter informed her that one Mr Ndate had passed away and that his body was lying on the ground outside the deceased's yard. There were many men in the vicinity standing in front of the deceased's yard. The appellant was among the men who were standing outside the deceased's yard. A discussion ensued between the appellant and his companions regarding a cap of Mr Ndate that had been found in the deceased's yard. The concern was that the lifeless body of Mr Ndate was outside the deceased's yard while his cap was in the deceased's yard. Shortly thereafter, the deceased got out of his house and asked his neighbour what was going on. One of the men who was there asked the deceased why Mr Ndate's cap was in his yard but the police intervened and warned these men to back off. The body of Mr Ndate was then removed and the police left the scene.

[5] Subsequent thereto, the appellant and three other men entered the house of the deceased. At that time, the deceased and one Hewoo were seated in front of the deceased's house, drinking alcohol. After entering the deceased's premises, the appellant took four chairs and placed them in front of the deceased. They sat down and their sitting position made it clear to everyone that they were discussing a serious matter with the deceased. As Ms Sikonana was watching, she saw the appellant hitting the deceased with an empty bottle on his face. She screamed and her sister warned her not to approach as she could get injured. The other three men who were together with the appellant went to fetch bricks and they hit the deceased therewith on his head.

At that time Hewoo, who was with the deceased, went into the house fearing for his life.

[6] Ms Sikonana testified that the appellant also joined the three men in hitting the deceased with bricks. When she observed this incident, she was five meters away from the appellant and his companions. They continued to assault the deceased with bricks until they realized that he was dead and thereafter they left him. She then went to the deceased's house and she got a blanket and gave it to Hewoo to cover the body of the deceased. Shortly thereafter a mortuary vehicle came and fetched the deceased's body from the scene. She testified that one Nosisi, who referred to the deceased as his father, also witnessed the incident. The police arrived, but Ms Sikonana was emotional and in shock and she could not explain to the police what happened. The detective left his number and told her that when she was ready she should contact him. That was, in short, her evidence.

[7] The evidence of the investigating officer, briefly, was that he obtained the statement of Ms Sikonana in December 2017. After he made inquiries in the vicinity of the crime scene, he managed to locate the witness but at that time she was in shock and traumatised. She could not speak to him and she was also pregnant at that time. He did not take her statement on the same day of the incident. He could not arrest the appellant immediately after the incident as the appellant was out of the province. He arrested the appellant on 16 January 2017.

[8] The version of the appellant is slightly different from the version of the state. The appellant's testimony was that on the day in question he saw the deceased at the

time when the police were cordoning off Mr Ndate's premises. There were people outside the deceased's premises who were shouting at the deceased. These people suspected that the deceased was the one who killed Mr Ndate. He testified that after the body of Mr Ndate was removed, the deceased called him to his house. The appellant requested three elderly men to accompany him to the deceased's premises. The deceased offered them chairs to sit. At that time, there was a man who was with the deceased drinking brandy.

[9] Appellant testified that the deceased then told him that the Basotho people were accusing him of killing Mr Ndate and denied that he killed him (Mr Ndate). The elders who accompanied him told the deceased that they would not blame the deceased for something he did not do and that they would inform the people outside that he was not the person who killed Mr Ndate. They then left the deceased's premises and went to a place where they usually had their meetings. The place was about 300 meters away from the deceased's house. While at that place, one of his companions received a call that there was a fight at the place where they had come from and they returned to the scene. Upon arrival, he saw two gentlemen who were in the deceased's yard carrying sticks running out of the yard in the presence of the police. He saw the deceased's body on the ground which was later collected from the scene. He denied that he had assaulted the deceased.

[10] The appellant confirmed during cross-examination that he knew the deceased's girlfriend Ms Sikonana. He confirmed that he saw her when they arrived at the deceased's premises and that she was present on the day the deceased was killed. It was his testimony that when they exited the deceased's yard, Ms Sikonana

was in front of them standing at her gate and looking at them. He denied that he was involved in assaulting the deceased as alleged or at all. He called David Mpale to corroborate his version. Mr Mpale testified that he was present when the body of Mr Ndate was removed. He confirmed the evidence of the appellant on how the incident unfolded but testified that he did not see the two men coming out of the deceased's premises carrying sticks as the appellant testified. That was in brief the evidence that was tendered before the trial court.

GROUNDS OF APPEAL

[11] This appeal is based mainly on facts and the appellant's grounds of appeal can be summed up as follows: First, the appellant contends that the trial court misdirected itself in relying on the evidence of a single witness whose evidence was unsatisfactorily and was not corroborated. Secondly, it was submitted that despite the state failing to establish the motive for the appellant to kill the deceased, the trial court erred in convicting the appellant for murder. Thirdly, it was contended that the court should have invoked the provisions of section 186 of the CPA and called on one of the other eyewitnesses to testify. Fourthly, it was contended that the trial court erred when it found that the version of the appellant was not reasonably possibly true despite the minor discrepancies in the defence evidence.

ANALYSIS

[12] The only issue in dispute before the trial court was the identity of the people or the person who killed the deceased. It is trite law that a court of appeal should be slow

to interfere with the findings of fact of the trial court in the absence of material misdirection: *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706). An appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited: *S v Francis* 1991 (1) SACR 198 (A) at 204E. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. When an appeal is lodged against the trial court's findings of fact, the appeal court should take into account the fact that the trial court was in a more favourable position than itself to form a judgment because it was *inter alia*, able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial: *S v Monyane and Others* 2008 (1) SACR 543 (SCA).

[13] The basic principles of criminal law and the law of evidence that applies in this matter are trite. The first principle is that in criminal proceedings, the state bears the onus to prove the accused's guilt beyond reasonable doubt: *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Jackson* 1998 (1) SACR 470 (SCA) and *S v Schackell* 2001 (4) SACR 279 (SCA). No onus rests on the accused to prove his or her innocence: *S v Combrinck* 2012 (1) SACR 93 (SCA) at para 15. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt: *S v V* 2000 (1) SACR 453 (SCA) at 455B. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false: *S v Sithole and Others* 1999 (1) SACR 585 at 590.

[14] The version proffered by the state and that of the appellant at the trial are diametrically opposed to each other as far as the identity of the person or people who killed the deceased is concerned. Ms Sikonana's evidence was that she saw the appellant assaulting the deceased with a beer bottle and bricks. The appellant on the one hand contends that when the deceased was killed he was not there at the scene, but in the vicinity. The two versions in my view are mutually destructive.

[15] The approach to resolving two irreconcilable, mutually destructive factual versions is well-established in our law and require no repetition: see *Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others* 2003 (1) SA 11 (SCA) para 5. Applying these principles to the evidence above, it is common cause that the state relied on the evidence of a single witness. It is trite that the evidence of a single witness must be approached with caution and should be clear and satisfactory in all material aspects. However, our courts have stressed the fact that the exercise of caution must not be allowed to displace the exercise of common sense: *see S v Artman and Another* 1968 (3) SA 339 (SCA).

[16] In my view, the trial court was alive to the fact that it was dealing with the evidence of a single witness and the applicable cautionary rule. The court below found that there was no motive for Ms Sikonana to incriminate the appellant falsely as there was no bad blood between them. From her evidence and that of the appellant this witness was indeed at the scene at the time of the incident. The trial court made a finding that Ms Sikonana made a good impression to the court in her demeanour and the manner in which she clearly and directly answered the questions put to her. The trial court found that there were no contradictions in her version, both in her evidence

that she gave in court as well as the statement that she had made to the police. The trial court was satisfied that she knew the appellant very well and that this was confirmed by the appellant's testimony. More so, the bulk of her evidence was uncontested. In my respectful view, these findings by the trial court are beyond reproach, spot on and to the point. They cannot be faulted at all.

[17] That the evidence of Ms Skonana was clear and unequivocal cannot be denied. She was at her house very close to the scene of crime when this incident happened. She was at a distance of 5 metres from the deceased when she observed the assault. Her evidence that she was at the scene and saw the appellant was corroborated by the appellant who confirmed during cross-examination that he knew this witness very well and saw her when they arrived at the deceased's premises and when they exited the deceased's yard. She was facing them and was standing at her gate looking at them. The appellant admitted in cross-examination that this witness was present when the deceased was killed and could not deny that she witnessed the assault.

[18] In addition, the appellant's evidence corroborates the version of Ms Sikonana on all fours regarding the sequence of events that eventually led to the death of the deceased. This is borne out by the following facts: Ms Sikonana testified that when she woke up, she saw people who surrounded the body of Mr Ndate who was lying on the ground. There was a cap in the deceased's premises belonging to Mr Ndate. The people who were outside wanted to go to the house of the deceased as they suspected that he had had a hand in the death of Mr Ndate. The appellant confirmed this version. The appellant's version further corroborated Ms Sikonana's evidence that after the police left and the body of Mr Ndate was removed from the scene, the appellant and

his three companions went into the yard of the deceased. He confirmed that the deceased gave them chairs and they sat around him as Ms Sikonana testified. The appellant's evidence is also in congruence with the evidence of Ms Sikonana in that upon their arrival at the deceased premises, the deceased was with Hewoo who was drinking brandy. The only part of her evidence that is denied by the appellant is that he and his companions assaulted and killed the deceased.

[19] Furthermore, the evidence of Ms Sikonana concerning the manner in which the deceased was assaulted was corroborated by the medico-legal post-mortem report regarding the injuries that the deceased sustained that led to his death. Notably, the appellant admitted the medical evidence. In the light of the evidence presented to the trial court, I am of the view that the trial court accounted for all the evidential material that was placed before it and there is no basis in law or fact for this court to interfere with the factual findings made by the trial court.

[20] The same cannot be said with the version proffered by the appellant. The appellant and his witness were poor in their testimony, contradictory and mendacious in certain respects. For instance, when they arrived at the deceased's premises for the second time after they received a telephone call, the appellant testified that he saw two men coming from the yard of the deceased. His witness said he did not see these people at all. In my view, the appellant was trying to create an impression that these two men were the culprits who attacked the deceased. I have some difficulty with this version in that the police were present at the scene and they were stopping people from entering the yard of the deceased. The appellant was also stopped from entering the yard of the deceased. If indeed there were two males as suggested by the

appellant, the question is why did the police not arrest them. Ordinarily the police would have arrested them.

[21] To my mind, in the light of the solid uncontroverted evidence by Ms Sikonana, the evidence of the appellant and his witness that he was not involved in the murder of the deceased is contrived, far-fetched and cannot be said to be reasonably possibly true. It must be stressed that the incident happened in the morning at 09h00. Ms Sikonana was 5 metres away from them when the incident happened. The appellant and Ms Sikonana knew each other very well. Ms Sikonana had ample time to observe what was happening in the deceased's yard. She had a clear vision and could identify the appellant and his friends. This in my view cannot be a case of mistaken identity. The fact that other people were not called as witnesses is inconsequential. Section 208 of the CPA is relevant herein. It provides that an accused may be convicted of any offence on the single evidence of any competent witness. The trial court cannot be faulted in accepting the evidence of the witness as satisfactory notwithstanding that she was a single witness. The bare denial by the appellant of the assault is to be expected in the circumstances but cannot be accepted as true.

[22] Lastly, the argument that the court should have invoked the provisions of section 186 and called other eyewitnesses to come and testify cannot fly. Section 186 of the CPA provides as follows:

> 'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.'

[23] This section gives a court a discretion to subpoena witnesses or to cause witnesses to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case. This section introduced an inquisitorial element and essentially caters for two situations, namely the court's discretion to call a witness and the court's duty to do so: see Joubert *Criminal Procedure Handbook* 12ed at 335. In the former situation the court has a discretion which it is bound to exercise judicially bearing in mind that an accused has a constitutional right to have his trial concluded within a reasonable time: *Basson* 2007 (1) SACR 566 (CC). In the latter situation the section places a duty on the court to call a witness if it is essential to the just decision of the case: *S v Helm* 2015 (1) SACR 550 (WCC).

[24] In my view, this section does not imply that the court must take over the prosecution of the matter to close gaps in the evidence of the state or to poke holes in the defence's evidence. The court can only invoke this section if upon assessment of all the evidence placed before it, it considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result: see *S v Gabaatlholwe and Another* 2003 (1) SACR 313 (SCA) at 316. In other words, the court will call such witnesses if it appears to the court that the evidence of that witness is essential to the just decision of the case.

[25] Taking into account the evidence that was led at the trial and the fact that the court was satisfied with the evidence of the single witness, which was in any event corroborated by the appellant and the medical evidence, I am of the view that there was no need for the trial court to call witnesses. There was nothing at all to suggest that justice would not be done at the end of the trial if other witnesses were not called.

[26] In the light of the evidence presented to the trial court, I am satisfied that on the conspectus of the evidence, the factual findings made by the trial court were correct and cannot be faulted. In my judgment, the trial court was correct in finding that the state succeeded to prove the guilt of the appellant beyond reasonable doubt.

ORDER

[27] In the result, the following order is hereby granted.

The appeal is hereby dismissed.

LEKHULENI J

JUDGE OF THE HIGH COURT

I agree.

VAN ZYL AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:	Adv. Parries
Instructed by:	*R Davies Attorneys*
For the Respondent:	Adv. M Koti
Instructed by:	*Office of the Director of Public Prosecutions*