REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A382/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

LUZUKO FANYANA MAQALA Appellant

~~and~~And

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] On 12 February 2009, following a charge of murder as defined under Section 1 of the Criminal Procedure Act No. 51 of 1977 read with Section 51(2) of the Criminal Law Amendment Act No. 105 of 1997 (the Act), the Appellant appeared in the Regional Court for the Regional Division of South

Gauteng held at Germiston. Prior to his plea, he was warned that the provisions of the Act would be invoked in the event that he was found guilty as charged.

[2] The Appellant was legally represented throughout the proceedings. He pleaded not guilty as envisaged in Section 115 of the Criminal Procedure Act No. 51 of 1977 and exercised his right not to furnish a plea explanation. In the proceedings that ensued on 12 February 2009, the court convicted him and sentenced him to life imprisonment. In addition, the court declared him unfit to possess a firearm in terms of Section 103 of the Firearm Controls act No. 60 of 2000.

[3] In terms of Section 309(1) of the Criminal Procedure Act No. 51 of 1977, the Appellant had an automatic right to appeal both the conviction and sentence. He availed himself of this right and for this reason, the appeal is about conviction and sentence.

[4] The basis of the appeal is that the trial court erred by finding that the prosecution had proved the guilt of the Appellant beyond reasonable doubt. The Appellant characterized this case as one of mistaken identity. Insofar as he is concerned he did not murder Ben Lovemore Nkomo and does not know who did. He denies that he is Fanyana and maintained that his name is Luzuko. The Appellant also emphasized that the evidence of the prosecution ought to be approached ~~with caution~~with caution because it is evidence of a single witness.

[5] The prosecution for its part contends that appellant has been positively identified by a witness well known to him. The Appellant is known in the community as Fanyana. Accordingly, whether he is or not, the position is that Fanyana and the Appellant are one and the same person. Furthermore, argued the prosecution, the court can convict on the strength of the evidence of a single witness which is clear and satisfactory in all material respects.

[6] In an effort to prove the Appellant's guilt beyond reasonable doubt, the prosecution led the evidence of two witnesses, Mr Mhlanga ("Mhlanga") and the brother of the deceased, Mr Benjamin Sibanda ("Sibanda"~~) The~~) The Appellant, ~~also gave~~also gave testimony in support of his own case.

[7] The evidence of the prosecution's first witness, Mhlanga, was that he was in the company of the deceased and Tembelani on 17 May 2008 at his place at Makausi, a squatter camp in the area of Germiston. Three men, the Appellant amongst them approached them. One of the three men accused the deceased of being nuisance to his brother.

[8] The Appellant whom he referred to as Fanyana, put his hand inside his pocket, took out a knife and fatally stabbed the deceased in the area of his chest whereafter they all ran away from the Appellants and his friends. The Appellant gave chase and caught up with them and stabbed Tembelani at the back of his leg with the knife. Tembelani survived but the deceased died later that day.

[9] The incident happened at approximately 22h00 and the source of light was a tower light situated about 50 Metres away from the scene. He was able to observe the Appellant as a person that he has known for a few months. Moreover, the Appellant frequently came to his brother's place to purchase and drink liquor. He testified that he could identify the second man who was in the company of the Appellant but not the third, as he did not have sufficient opportunity to observe him as he did with the appellant

[10] Benjamin Sibanda testified that he did not witness how his brother was killed. He heard from members of the community that the deceased had been stabbed to death by Fanyana. Asked who Fanyana was, he pointed at the Appellant in the dock and stated that he had known him for approximately 3 to 4 years. His evidence concluded the case for the prosecution.

[11] The Appellant took to the stand and testified that he did not stab the deceased on 17 May 2008. Two people came to his place of residence and accused him for being responsible for the death of the deceased. Thereafter they requested him to accompany them to the local police station where he was arrested and locked up. He did not know why the deceased's brother would accuse him of the death of the deceased.

[12] Under cross-examination the Appellant stated that he had been living in Makausi since 2006. He denied that he was arrested by the community and reiterated that he was arrested by two community members. He admitted that he knew Mhlanga's brother and that he often drank liquor at his place of

residence. He denied knowing Mhlanga and had no reason for not knowing him yet he knew that Mhlanga was the brother of the person who sells liquor.

[13] He did not know why the whole community would accuse him of killing the deceased. He denied having stabbed the deceased at all. He stated that there were other people in Makausi who are known as Fanyana.

[14] It is settled law that the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true he is entitled to acquittal even if his explanation is improbable. See *S v V* 2000 (1) SACR 453 (SCA) at 455A. The court must always remind itself that it is not necessary for the prosecution to prove its case beyond all doubt. See *S v Van As* 1991(2) SACR 74 (W) at 82D-H.

[15] In evaluating the evidence presented, the court must not decide the matter in a “piece meal” fashion, but all the evidence presented must be taken into account. See *S v Radebe* 1991(2) SACR 166 (T) at 174. The court must also apply its mind not only to the merits or demerits of the prosecution and the defence witnesses, but also to the probabilities of the case. *See S v Mhlongo* 1991 (4) SACR 207 (A).

[16] Against that backdrop, it is common cause that the evidence that incriminates the Appellant is of a single witness. That evidence was given by Mhlanga. Under those circumstances the court is enjoined to bring into play the cautionary rule and apply extra vigilance. Section 208 of the Criminal

Procedure Act No. 51 of 1977 provides that it is competent to convict on the strength of the evidence of a single witness as long as such evidence is satisfactory in all material respects. In *State v Ganie* 1967(4) SA 203 (N) at 206H it was added that the evidence must be corroborated. ?????

[17] For this court to dismiss the appeal, it must be persuaded that the trial court was correct that the evidence of Mhlanga, as one of a single witness, complies with the requirements of Section 208 of the Criminal Procedure Act No. 51 of 1977 and that it was corroborated as per *S v Ganie* (*supra*). If not, the Appellant must be acquitted.

[18] The Appellant's contention that this matter is one of mistaken identity as the place was not well light must be immediately rejected as devoid of any merit whatsoever for three reasons:

18.1 It was Mhlanga's evidence that the light that illuminated the area of the scene of the crime was a tower light. Tower lights are meant to light up areas far beyond their immediate surrounding, which could easily cover an area in excess of 50 metres. Mhlanga could therefore not have been mistaken;

18.2 The Appellant is well-known to Mhlanga. His evidence in this regard is that he had known him for a few months and has seen him at his brother's place of residence where he (the Appellant)

buys and consumes liquor regularly. The Appellant himself conceded that he often visits the place of Mhlanga's brother;

18.3 The Appellant and his two friends first spoke to Mhlanga, Tembelani and the deceased before the deceased was stabbed. This must have given Mhlanga an opportunity to observe appellant

[19] The Appellant's denial that he is not Fanyana is preposterous and must be rejected as false. It is evident that he is known as such by the members of that community. Moreover, after his arrest, he turned to be the person who was seen by Mhlanga stabbing the deceased. This is a confirmation of the evidence of Mhlanga that the Appellant is in fact Fanyana.

[20] Benjamin Sibanda's evidence was that he had known the Appellant for about 3 to 4 years prior to the incident. He did not see how the deceased was stabbed but was told that Fanyana was responsible. He had no doubt as to who Fanyana was. He testified that he has known Fanyana to be the Appellant. This court is convinced that the trial court was correct to accept the evidence of Mhlanga as true albeit that he was a single witness.

[21] The evidence of the Appellant is simply a bare denial. Two people came to his place and accused him of murdering the deceased. They then took him along to the local police station. Surprisingly, his attorney put it to Mhlanga that he would testify that he was arrested by a group of community

members. He testified that he did not know Mhlanga yet somehow he knew that he usually bought and drank liquor at the residence of Mhlanga's brother.

[22] He denied that he is Fanyana and probably hoped that by referring to himself as Luzuko would change that he is the one who murdered the deceased. . He could not explain why everyone referred to him as Fanyana nor could he state why there was no doubt in the community that he was Fanyana.

[23] This court is satisfied that the trial court cannot be faulted in its rejection of the evidence of the Appellant as false beyond reasonable doubt and accepting that of the prosecution as true. The prosecution has in view of that proved the guilt of the Appellant beyond reasonable doubt and his appeal on conviction therefore fails.

[24] This represents an opportune moment to turn to sentence. Here there are two issues to decide and these are firstly, whether or not the trial court was right to impose life sentence notwithstanding that the charge sheet referred to a Section of the Act that required it to sentence the Appellant to a minimum sentence of fifteen years. Secondly, whether or not there were substantial and compelling circumstances that should have persuaded the trial court to impose a sentence less than the minimum.

[25] I shall attend to the issues in the order presented in the preceding paragraph. The charge sheet reads that the Appellant was charged with

murder as defined in Section 1 of the Criminal Procedure Act No. 51 of 1977 as read with Section 51(2) of the Act. Section 51(2) of the Act provides as follows:

> "*Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in- fa) Part II of Schedule 2, in the case of –*
>
> *a first offender, to imprisonment for a period not less than 15 years;*
>
> *a second offender of any such offence, to imprisonment for a period not less than 20 years; and*
>
> *(Hi) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years*."

[26] The Appellant has contended that the trial court misdirected itself by imposing a life sentence when in fact in terms of Section 51(2) of the Act the minimum sentence applicable was 15 years because the Appellant was a first offender. On the contrary, the prosecution argued that the , the Appellant was warned that that the court could impose the minimum sentence applicable in terms of the Act. The prosecution submitted that under these circumstances it did not matter that the charge sheet alluded to Section 51(2) instead of Section 51(1).

[27] In support of its assertion, the prosecution contended that the unreported case of the Supreme Court of Appeal, of *Ndlovu v The State* (204/2014) [2014] ZASCA 149 is on 'all fours' with the case *in casu*. This case overturned its earlier decision in *Mashinini v The State* 2012 (1) SACR

604 (sca) where the majority of the court acquitted an appellant on the ground that the charge sheet referred to Section 51(2) instead of Section 51(1) of the Act.

[28] Refusing to follow the decision in *Mashinini supra*, the court in *Ndlovu supra* unanimously held that the *Mashinini* case decision was based on an incorrect reading of Section 51. The minimum sentence prescribed by the Act should be read as such. In other words, the court cannot, unless it finds that there are substantial and compelling circumstances, impose a sentence that is less than that which is prescribed in the Act.

[29] Understood in that manner, there is nothing that can prohibit the imposition of any sentence above the minimum sentence prescribed in the Act and this would include life sentence provided the evidence does demonstrate that such sentence is defensible. The Appellant argued that it is always desirable that 'the charge sheet should set out the facts which the prosecution intended to prove in order to bring the accused within an enhanced sentencing jurisdiction.'

[30] Theron JA in *Ndlovu supra* continued to state as follows in paragraph [7]:

> "*This court has, with good reason, been reluctant to lay down a general rule as to what the charge sheet should contain. Lewis JA in S v Makatu put it thus:*
>
> > *'As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder,*

> *it should state this in the indictment. This rule is clearly neither absolute nor inflexible*.'"

31] The Appellant in the present matter was warned of the likelihood of the imposition of the minimum sentence prescribed by the Act in terms of Section 51(2). The trial court sentenced him to serve a life term imprisonment. In the circumstances, the trial court was entitled to impose any sentence as long as it was not below the minimum and that the evidence demonstrated that the murder was premeditated. I agree that the manner in which the Appellant executed the murder was reminiscent of a planned murder.

[32] If one argues, as Counsel for the Appellant did, that it was not carefully planned, how can this court make sense of the following:

32.1 The Appellant and his two co-perpetrators approaching the deceased, Tembelani and Mhlanga to ask one question only;

32.2 Before the deceased or any of the three could answer, the Appellant ~~produced a~~produced a knife from his pocket and administered a fatal stab wound;

32.3 The wound was inflicted at a vital part of the body, the neck;

32.4 It resulted in the desired outcome, the death of the deceased; and

32.5 As though that was not enough, the Appellant thereafter still chased the deceased, Tembelani and Mhlanga and in fact inflicted a further injury, this time on Tembelani.

[33] It is difficult not to come to the conclusion that the Appellant and his co-perpetrators did not know what they set out to do. Why was there a need to arm himself with a knife if the purpose was merely to establish why the deceased bothered the brother of one of them? The Appellant knew or must have foreseen the possibility of the use of the knife becoming necessary and that its use could have fatal repercussions. Accordingly, the trial court was correct to find that the murder was premeditated.

[34] The next and probably the last issue involving sentence in this case is to determine whether, the trial court having imposed a life sentence imprisonment term, was correct that there were no substantial and compelling circumstances as envisaged in Section 51(3) of the Act justifying a deviation from the imposition of the life sentence. The determination of the existence or non-existence of substantial and compelling circumstances is for all intents and purposes a factual enquiry. The Appellant maintained that the following taken together constituted substantial and compelling circumstances:

34.1 The Appellant was 20 years when he committed this offence;

34.2 He is a first time offender and is therefore not beyond rehabilitation;

34.3 He is a father of a 2 year old child and he is unemployed;

34.4 He managed to pass grade 8 at school, whereafter he could not proceed with further schooling due to financial constraints; and

34.5 He stabbed the deceased once.

[35] Ponnan JA stated in *S v Matyityi* 2011 (1) SACR 40 (SCA) that *S v Malgas* 2001 (1) SACR 469 (SCA) sets out how the minimum sentencing regime should be applied and in particular, how the enquiry into substantial and compelling circumstances is to be conducted by a court. It is constructive to refer to the following extract from *Matyityi supra*:

> "..... *To paraphrase from Malgas: the fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present*."

[36] It is common knowledge that the main objective for the introduction of the minimum sentence legislation was to curb the ever-spiralling wave of crime in the country. To date there is no solid evidence showing that crime is

declining. This has prompted courts to call for more rigorous adherence to the minimum sentence legislation unless of course circumstances warrant otherwise. See *S v Kwanape* [2012] ZASCA 168 where Petse JA, quoting from the *Matyityi* case *supra* stated:

> "*This court reiterated in S v Matyityi 2011 (1) SACR 40 (SCA) that 'the crime pandemic that engulfs our country' has not abated. Thus courts are duty-bound to implement the sentences prescribed in terms of the Act and that 'ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness' ought to be eschewed*."

[37] It is against the above background that the actions of the Appellant must be adjudged. While the crime is indubitably serious, this court should not lose sight of the fact that he committed this crime when he was only twenty years old and therefore immature and probably very impetuous. His relative youthfulness, that he was a first offender and that he stands a better chance of rehabilitation, all taken together , militate against the imposition of a life sentence.

[38] Having stated that though, it does not take away the fact that the Appellant committed a heinous crime. The fact that he stabbed the deceased once does not make him less culpable for the horrendous deed. For that reason, the court must endeavour to strike a balance between the seriousness and prevalence of the crime in the area of jurisdiction of this court and the interest of the Appellant on the other.

39] I agree that the trial court emphasized the seriousness and prevalence of the offence in the community and in so doing placed insignificant value on the personal circumstances of the Appellant. Given the less emphasis on the personal circumstances of the Appellant, it is understandable why the trial court misdirected itself.

[40] In the result, the appeal against sentence succeeds and I make the following order:

1. The appeal against conviction is dismissed.

2. The order of the trial court on sentence is set aside and is replaced with the following:

   "The Appellant is sentenced to a direct imprisonment term of twenty years."

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B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered

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E MATOJANE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING: 14 ~~APRIL 2015~~APRIL 2015

DATE OF JUDGMENT: 14 MAY 2015