REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A175/2023

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

29/1/24
Date

[redacted]
Signature

In the matter between:

SIBUSISO LOURENS NKOSI THWALA **APPELLANT**

and

THE STATE **RESPONDENT**

Summary: Appeal against conviction and sentence – Evidence of a single witness is acceptable if supported by other corroborating evidence. The evidence of the appellant is not reasonably possibly true when regard is had to the uncontested fingerprints evidence. The single eyewitness's identification of the appellant is beyond any reasonable doubt and the appellant failed to establish an alibi and his evidence is false with regard to his alibi. The appellant was correctly convicted. There were no substantial and compelling circumstances shown to exclude the prescribed minimum sentences properly imposed. There is no legal basis to interfere with and disturb the sentence imposed by the Court below. Held: (1) The appeal is dismissed. Held: (2) The conviction and sentence are upheld.

JUDGMENT

MOSHOANA, J (Baqwa J and Neukircher J):

Introduction

[1] Before us is an appeal against the conviction and sentence of Mr Sibusiso Lourens Nkosi Thwala (the appellant). The appeal is against the judgment of the Court a quo per Moloto AJ. The present appeal is with the leave of the Supreme Court of Appeal per Mabindla-Boqwana and Weiner JJA, which leave was granted on 14 February 2023. The appeal is duly opposed by the State.

Background facts and evidence

[2] Given the limited bases upon which this appeal oscillates, it is imperative to punctiliously narrate the background facts and the evidence appertaining this appeal. The present appeal is grounded on the contended acceptance of the evidence of the State witnesses, despite contradictions and the acceptance of the identification testimony of a single witness which the appellant contends, is in disregard of the cautionary rules. With regards to sentence, the appellant contends that the sentence imposed by the Court a quo was shockingly harsh and that the Court a quo erred by not finding that substantial and compelling circumstances existed to justify departure from the imposition of the prescribed minimum sentence.

[3] Owing to the grounds advanced by the appellant, the brief salient facts of this appeal are that on the morning of 2 April 2013, the appellant shot and fatally wounded one Mr Mthetho Gquba (the deceased). On that fateful morning the deceased and his friend, Maseko, were driving from Embalenhle heading to their place of work at Syferfontein. Whilst so driving at a point, they offered a lift to three male hitch-hikers (the appellant and his co-assailants). The appellant and his co-assailants indicated to Maseko and the deceased that they were destined to Secunda. At a certain point during the drive, one of the assailants paid to Maseko R10.00 (ten rands) and requested him to stop so that he can alight. It was at this point that two of the assailants alighted and one of them opened the front passenger door. The deceased, who at the time occupied the front passenger seat, forcefully pulled the passenger door and closed it.

[4] The appellant remained at the backseat of the vehicle after having failed to open the right-hand side rear door. Maseko pulled off the vehicle and the two assailants who had held onto the passenger door fell off the vehicle. In the process of the drive, the appellant fatally shot the deceased. The appellant ordered Maseko to stop the vehicle or else he will shoot him as well. Maseko refused and continued to drive the vehicle in a zig-zag fashion in an attempt to draw the attention of other road users. At a point, the appellant jumped into the front seats area and tussled and grabbed the steering wheel away from Maseko, as a result of which, the vehicle veered off the road into a hill and stopped.

[5] In the process of the tussle for the control of the vehicle, the appellant butted Maseko with the firearm on his head, causing him some injuries. The appellant alighted from the vehicle and ran away. He ran into the bushes and in the process, got stuck in the mud whereafter he returned to the road and continued to run in an opposite direction. Maseko managed to call for help, he identified the appellant to the members of the public who were walking past the crime scene. At some point, a police vehicle arrived, and Maseko reported the incident to the police occupants of the police vehicle. He also pointed out the appellant, who at the time was still running, to the police occupants.

[6] The police vehicle gave the appellant a chase, and in a jiffy the police occupants returned with the appellant to the scene. Maseko confirmed to the police that the appellant is the one who fatally shot the deceased. Ultimately the appellant was placed under arrest. In due course, the appellant was charged with (a) murder; (b) attempted robbery with aggravating circumstances; (c) attempted murder; and (d) two counts of contravention of the Firearms Control Act.[1] The appellant was arraigned before the Court a quo to answer to those proffered charges. Having pleaded not guilty to all the charges, the State led the evidence of about six witnesses (namely, Maseko; Warrant Officer Ntuli; Constable Mbambo; Captain Ditshego; Sergeant Joubert; and Warrant Officer Ras) in order to prove the said charges.

[1] 60 of 2000.

[7] After having made certain formal admissions, the appellant was the only witness in his own defence. Importantly, the appellant admitted that Warrant Officer Ras obtained test samples from both his hands with primer residue evidence collection kit. Additionally, he admitted that at the crime scene Sergeant Joubert, collected 1 x 9mm Parabellum calibre fired cartridge case inside the Nissan Almera (the vehicle driven and owned by Maseko). Also, the appellant admitted that at the government mortuary Warrant Officer Ras received a sealed bag containing a 1 x 9mm calibre discharged bullet from Dr Du Ploy who removed it from the body of the deceased during the medico-legal post-mortem examination.

[8] During his trial, the appellant was legally represented by Advocate Joubert. In the course of the trial, the appellant did not dispute that there was an attempt to rob Maseko off his vehicle; that Maseko sustained an injury on his head as a result of being butted with a firearm by his assailants; that the deceased was fatally shot while travelling with Maseko and the three unknown men were in Maseko's vehicle; that the deceased died as a result of gunshot wound; that a discharged cartridge was found inside the vehicle and that the fingerprints were lifted from the vehicle which Maseko, the three unknown men and the deceased were travelling in; that the said cartridge was discharged from a firearm picked up in the bushes shortly after the deceased was shot and not far from the scene; and that the said fingerprints lifted from the vehicle matched the fingerprints that were obtained from the appellant by the investigating officer.

[9] The appellant in his defence, testified that on the fateful day, he was indeed arrested at the place where the State witnesses testified he was arrested at. However, on that morning he was from Secunda destined to Embalenhle. He was hitch-hiking for a lift from the vehicles travelling to Embalenhle. To his surprise, he was called by Captain Ditshego, and when he looked back white policemen pointed him with firearms. He was slapped on his face by one of the police officers, handcuffed and taken into Captain Ditshego's vehicle. He told the police officers who were questioning him that he was from a nightclub known as Club 16 situated in Secunda. From the Club he was given a lift by somebody who was travelling to Winkelhaak and dropped him off on the road close to a hiking spot where he continued to hitch-hike for a lift from the vehicles that were travelling to Embalenhle. The appellant denied that he was wearing a blue top at one stage and that he was carrying a

blue top just before his arrest. He actually denied ever seeing a blue top. He also denied dropping a pistol before he was arrested.

[10] As indicated above, the Court below found the appellant guilty as charged and sentenced him to life imprisonment for the murder charge, ten years' imprisonment for the robbery charge, five years' imprisonment for the attempted murder charge, and 15 years for the contravention of the Firearms Control Act charges.

Grounds of appeal

[11] In the main, the appellant predicated his conviction appeal on: (a) contradictions by State witnesses; (b) reliability of the evidence of his identification by Maseko, on whose evidence, he contends the Court below attached undue weight; and (c) failure to apply the cautionary rules in respect of Maseko's evidence, who was the State's solitary eyewitness. With regard to the sentence imposed, his gripe is that of harshness and inappropriateness of it, as well as the disregard of the substantial and compelling circumstances.

Analysis

[12] It is indeed so that the duty of the State in a criminal trial is to prove the charges beyond a reasonable doubt. It is also so that where the version of an accused person is reasonably possibly true an accused person is entitled to his or her acquittal.[2] Properly considered, the appellant's defence is that of an *alibi*. At the time of the commission of the offences, he was, on his version, at Club 16 or on his way from there. The Supreme Court of Appeal in *S v Musiker*[3] concluded that once an *alibi* is raised, the *alibi* has to be accepted unless it can be proven that it is false beyond a reasonable doubt. As it shall be demonstrated in due course, the *alibi* of the appellant was proven to be false beyond a reasonable doubt. In an attempt to bolster his *alibi*, the appellant sought to challenge his positive identification by Maseko after his arrest.

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[2] *Michael Jantjies v S* [2024] ZASCA 3 (SCA) at para 22
[3] 2013 (1) SACR 517 (SCA) at paras 15-16 (See also *Zwelithini Maxwell Zondi v The State*).

[13] The approach to be adopted by the Courts with regard to identification was perfected by Holmes JA in *S v Mthethwa*.[4] The erudite Justice correctly suggested that such evidence requires a cautionary approach. He suggested that honesty by the identifying witness is not enough. A Court must still test the reliability of his observation. In doing so, various factors such as lighting, visibility, eyesight, proximity of the witness, opportunity for observation and others must be considered. These factors are not individually decisive, they ought to be weighed one against each other in light of the totality of the evidence and the probabilities.

[14] As indicated in *Zondi*,[5] the identification must not only be credible but must also be reliable. Maseko positively identified the appellant after a lapse of no time after the incident. Regard being had to the totality of the evidence, Maseko had spent reasonable time with the appellant in the vehicle shortly before shooting the deceased (when he took the lunch box from the rear seat to the boot of the vehicle and back and when he saw his face through the rear mirror of his vehicle) and after the shooting when he drove the vehicle in a zig-zag fashion as well as when they tussled for the steering wheel. Such a traumatic experience must have indelibly edged the face of the appellant in the mind of Maseko, to a point that the probabilities are that few moments later when the same face, that probably inflicted trauma on him, is presented to him, he reliably identified the face. It ought to be considered that it is the same face that promised to shoot him if he does not stop the vehicle. It is also the same face that butted and injured his head.

[15] Thus applying the factors suggested by the learned Holmes JA, this Court has no reason to conclude that the identification was unreliable. Indisputably, Maseko was a single eyewitness. Again, the general rule is that the testimony of a single witness ought to be approached with caution. However, it does not follow that a Court cannot base its finding on the evidence of a single witness. Where the evidence, as in this case, is substantially satisfactory in every material respect and is corroborated, such evidence can be relied on to make the necessary findings.[6] As indicated above, the evidence of Maseko for reasons

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[4] 1972 (3) SA 766 (A) at 768A-C.
[5] *Zwelithini Maxwell Zondi v The State* [2022] ZASCA 173 at para 14.
[6] *S v Mahlangu and another* 2011 (2) SACR 164 (SCA) at para 22.

already exposed above is satisfactory in every material respect. Undoubtedly, his *viva voce* evidence is firmly corroborated by the fingerprints evidence. There was incontrovertible evidence that fingerprints were uplifted from the vehicle of Maseko on the same day of the incident and those fingerprints matched those of the appellant. Of course, if for a moment, the *alibi* of the appellant is accepted, the key question will be why his fingerprints were found on the vehicle of Maseko when at all the material times he was at Club 16 or on his way back when the deceased was shot. Although his testimony was one of bare denial with regard to the dropping of the pistol, a spent cartridge that was found in the vehicle, which in his version, he never got close to at any stage, matched the pistol that was dropped, and the bullet removed from the body of the deceased matched the spent cartridge. This evidence when considered in the light of the undeniable fingerprints evidence proves beyond any reasonable doubt that the appellant is the one who fatally shot the deceased.

[16] During the cross-examination of Maseko, a half-hearted attempt was made by the new appellant's counsel to cast a shadow of doubt on the testimony of the fingerprints found on the vehicle. The trial transcript reveals a long line of questioning around where Maseko parked the vehicle and the possibility of the vehicle being touched by members of the public This line of questioning did not culminate to "*I put it to you that the fingerprints of the appellant were possibly embedded on the vehicle at the mall or some other place*". If ever there was any *scintilla* of doubt on the fingerprints evidence, such doubt was removed by the appellant when he testified under cross-examination to the following effect:

> "MR MOLATUDI: ... Your fingerprints on the vehicle of Mr Maseko also links you to this offence, perfectly. What is your comment?
>
> ACCUSED: There is nothing that I can say about those fingerprints, because at the end the person who uplifted the fingerprints, he is an expert.
>
> MR MOLATUDI: Hmm. Can you explain then why they were on that car?
>
> ACCUSED: There is nothing that there is to explain, because even the expert explained when coming to this issue of the fingerprints. He did not say he uplifted them from the motor vehicle. There may be a chance that he uplifted them from some other place. So, there is nothing there to explain about that. I think the explanation that he gave to the Court, I mean the Court understand it."

MR MOLATUDI: Are you, suggesting that your fingerprints were not uplifted from the car?

ACCUSED: As I am saying I was not present when he uplifted the fingerprints so I will not testify about something that I don't know.

MR MOLATUDI: Are you saying they could be lying about this?

ACCUSED: I do not have any comment about that, I will not say he is lying.

MR MOLATUDI: But you have the right to, to dispute, to say no, those are not my fingerprints."[7]

[17] When the State counsel pressed on this important issue, the appellant sought to shift a blame to a counsel whose services he terminated. Since Mr Molatudi, the State counsel, was unrelenting like a *Bull Terrier*, the appellant, after distancing himself from the versions put by his erstwhile counsel with regard to the possibility of him touching the vehicle when Warrant Officer Ras took the primer residue because he took him closer to the car, ultimately the appellant testified thus:

"MR: MOLATUDI: And Mr Maseko was clear in his evidence when he said when the incident happened he only had the car, his car for a week and he never drove it to public places. He parked it in the garage. It was first time he decided to go to work with it. Now the question will be where did you touch it?

ACCUSED: I do not have an answer to that question as I have already said that I did not touch it."

[18] The appellant's new counsel other than skirting around the issue of the touching of the motor vehicle, he never put to the State witnesses that appellant did not touch the vehicle at all, or the vehicle was touched at some place before 2 April 2013. The importance of putting versions was emphasised by the Constitutional Court in the matter of *President of the Republic of South Africa and others v South African Rugby Football Union and others.*[8] Failure to put a version is fatal, particularly where a party is legally represented. The appellant having not touched the vehicle before, it must axiomatically follow that the only time his fingerprints were embedded on the vehicle was when he and his co-assailants attempted to rob Maseko of his car and when he got into the car and ultimately fatally shot

[7] Volume 1 of 7-page 99 line 17 up to page 102 lines 1-2.
[8] 2000 (1) SA 1 (CC).

the deceased. Applying the test in *Musiker*, the *alibi* of the appellant is proven to be false beyond reasonable doubt. More recently the Supreme Court of Appeal re-approved, as it were, its earlier decision in *Mthethwa* in *Cupido v S.*[9] More particularly, the SCA cautioned that the appeal Court should be slow to interfere with the findings of the Court below with regard to the acceptability of the testimony of a single witness. The erudite Tokota AJA writing for the majority reasoned thus:

> "[23] Relying on *S v Mthethwa* (*Mthethwa*) the trial court said: 'after considering the above factors and the guiding principles set out in *S v Mthethwa* I accept that not only was Mr Brown honest in his identification of Cupido but that was also reliable'. It is trite that the factual findings of a trial court are presumed to be correct. Therefore, a party seeking interference therewith must demonstrate that there was a misdirection on the part of a trial judge which can be clearly identified in order to justify interference with the findings on appeal The trial court was alive to the fact that it was dealing with the evidence of a single witness and properly applied the cautionary rules. Consequently, I hold the view that the credibility findings of the trial court were justified in that regard..."[10]

[19] It is clear from the judgment of the Court a quo that it was alive to the fact that it was dealing with the evidence of a single witness. It resourcefully relied on the authority of *S v Gentle*[11] where the SCA pointedly stated that other evidence which supports the evidence of the complainant tends to render the evidence of the accused less probable.

[20] To the extent that the appellant places store on the contradictions between State witnesses, the Court a quo dealt appropriately with that argument and superbly placed reliance on binding authorities of *S v Mokgotle* and *Sithole v S.* Masterfully, the Court below, made factual findings that this Court as a Court of appeal is loath to interfere with. This Court shares the view of the Court a quo to the effect that the contradictions do not affect the credibility of Maseko's testimony. Accordingly, this Court concludes that none of the grounds raised by the appellant drive this Court to a conclusion that the appellant was wrongly convicted. Indeed, the State succeeded in proving its case against the appellant

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[9] [2024] ZASCA 4.
[10] Id at para 23.
[11] 2005 (1) SACR 420 (SCA) at para 18.

beyond any reasonable doubt. The evidence of the appellant is not reasonably and possibly true and it was correctly rejected as being false.

Common purpose

[21] In his closing address counsel for the appellant submitted regarding count 2 of attempted robbery with aggravating circumstances, that the appellant ought not to have been convicted on that count as attempted robbery had not been proved by the state.

[22] The evidence regarding count 2 was that at some point, one of the assailants paid R10 and requested Maseko to stop for him to alight. Two of the assailants alighted and one of them opened the front passenger door, pulled the deceased, and ordered him and Maseko to get outside the car or else they would be shot. The deceased grabbed the door and closed it. The right-hand side door behind Maseko would not open from inside and as a result the appellant remained in the car.

[23] Maseko drove off and the two assailants who held on to the front left hand side door fell off. It was at this point that the appellant fatally shot the deceased. Maseko drove in a zig zag fashion to draw the attention of other road users and prevent them from driving past him. The appellant grabbed the steering wheel after threatening to shoot Maseko if he did not stop the vehicle. The vehicle veered off the road and came to a stop next to a hill whereupon the appellant alighted and fled the scene.

[24] The evidence shows that the assailants, including the appellant were acting in concert from the time they stopped Maseko's vehicle. They had a common intention to dispossess and rob Maseko of his vehicle.

[25] As submitted by counsel for the respondent, Mr Molatudi, the assailants including the appellant acted in furtherance of a common purpose and that the acts of the one became the acts of the other in terms of the Doctrine of Common Purpose.[12]

[12] *S v Mgedezi and Others* [1989] 2 All SA (13) A.

[26] In the circumstances the submissions by the appellant's counsel regarding count 2 are not sustainable. Factually and legally the conviction on count 2 was the correct one.

Sentence

[27] Turning to the question of sentence, there is no lawful basis for this Court to conclude that the sentence induces any sense of shock, nor it is disproportionate to the offences that the appellant was found guilty of. As a guiding principle, the imposition of a sentence is the prerogative of the trial Court. An appellate Court may not interfere with the discretion of the trial Court simply because it may have imposed a different sentence.[13] The only time a Court of appeal may interfere with sentence imposed is where there has been an irregularity that results in failure of justice; the Court below misdirected itself to such a degree that its decision on sentence is vitiated or the sentence is so disproportionate or shocking that no Court acting reasonably could have imposed it.[14] This country is struggling with violent crimes. As a deterrence, Courts must impose stiffer sentences in order to send a clear message to the world of malefactors. The deceased did not deserve to die in the manner in which he did. As an honest citizen he was on his way to work for his family only not to return to his family. Where a sentence is prescribed statutorily, unless substantial and compelling circumstances are shown to exist, the prescribed sentence must be imposed and cannot be interfered with on appeal.[15] Accordingly, this Court finds that the appellant was correctly sentenced and it shall not interfere with the sentence imposed by the Court below.

[28] For all the above reasons, I propose that the following order is made:

ORDER

1. The appeal is dismissed.
2. The conviction and the sentence of the appellant are confirmed.

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[13] *S v Hewitt* 2017 (1) SACR 309 (SCA) and *S v Livanje* 2020 (2) SACR 451 (SCA). E Du Toit *et al Commentary on the Criminal Procedure Act* (Jutastat RS 66 2021) at Ch30 p42A.
[14] *S v Bogaards* 2013 (1) SACR 1 (CC) at para 41.
[15] 2009 (1) SACR 552 (SCA) at para 7.

[redacted]

GN MOSHOANA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

[redacted]

B NEUKIRCHER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

(I Agree)

[redacted]

SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

(I Agree and it is so ordered)

Date of the hearing: 22 January 2024

Date of judgment: 29 January 2024

APPEARANCES:

For the Appellant: Mr M G Botha

Instructed by:

Pretoria Justice Centre, Legal Aid Board.