REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

Signature .....

Date 22/2/2019

CASE NO: AA07/2018

In the matter between:

GARNETH GEZANI NKUNA — **FIRST APPELLANT**

RHULANI CHAUKE — **SECOND APPELLANT**

And

THE STATE — **RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] This is an appeal against the conviction and sentence of the two Appellants by Mabesela J in the Gauteng Division, Pretoria (functioning as Limpopo Division) and sitting at Louis Trichardt on 7 March 2013. The Appellants were convicted and sentenced as follows:

1.1. Murder read with the provisions of section 51(1) of Act 105 of 1997 – both Appellants sentenced to life imprisonment.

1.2. Possession of a firearm and ammunition – second Appellant sentenced to three years imprisonment.

The appeal is with leave of the Supreme Court of Appeal.

[2] The First Appellant is linked to the commission of the crime in that he had made a confession to a Magistrate, which confession was ruled admissible by the trial Court after holding a trial within a trial. The First Appellant closed his case and did not testify in his defence in the main trial. The Second Appellant denied being there at the scene of crime, averring that he was in Tembisa. He does not even know the Giyani area, and was taken there for the first time after the arrest.

[3] The conviction stemmed from an incident on 10 May 2010 at Thomo Village, Giyani when the deceased, one Thirayisa Mthavini Nkuna was shot dead

outside her house during the night. The First Appellant also raised a defence of *alibi*, that he was at Tembisa on the date on which the offence was committed.

[4] The evidence that implicates the Second Appellant is that of Ms Mihloti Nkuna, the deceased's daughter. She testified that on 10 May 2010 at about 20h45 she was at her homestead together with the deceased when she heard a knock at the door. When she went to the door she met an unknown person who exchanged greetings with her. That person told her that he had been directed to her place by her neighbour and was looking for Mihloti. She confirmed that she is Mihloti. The unknown person said he got lost and wanted to be directed to one Maluleke's residence. The deceased also came and joined the conversation. The witness, Mihloti told the Court that the said unknown person was the Second Appellant before Court.

[5] Mihloti testified further that the Second Appellant told her and the deceased that he came from Mahoni and was there at Thomo Village because he was doing some building construction work. The Second Appellant was referred to a certain tavern where he would make some enquiries about the direction to Maluleke residence. Before he could leave, the Second Appellant asked for water to drink and Mihloti obliged. After he drank the water the Second Appellant and the deceased walked together with the deceased walking in

front of him, proceeding to the neighbour's homestead. After about 2 – 3 minutes, Mihloti heard two gun shots and when she went to the scene she found the deceased laying on the street alone approximately 10 metres from her house. The Second Appellant was no where to be seen.

[6] According to Mihloti at the time she spoke to the Second Appellant in front of her house there was a bright electricity light from inside and also outside in the street. She conversed with the Second Appellant for about 4 – 5 minutes and could see the clothing of that person clearly being black leather jacket, half boots and that he had nothing covering his face. On his head the person had a German cut.

After sometime and early in July 2010 the witness, Mihloti was invited to attend an identification parade at Giyani Police Station where she positively pointed out and identified the Second Appellant as the person who came to her homestead on the night of 10 May 2010.

[7] The evidence of Mihloti concerning the identity of the Second Appellant remained intact and unshaken during cross examination. It was put to her that she had an opportunity to meet or see the Second Appellant beforehand and prior to the holding of and the pointing out on the identification parade at the Police Station. She denied. Her evidence regarding the conduct of the identification parade is corroborated by the following Police Officers who took

part in conducting the identification parade: Warrant Officer Price Ndlovu, Warrant Officer Joseph Kubayi, Constable Caroline Vukeya, Constable Moses Tibane and Constable Lucky Baloyi. The evidence of the aforementioned Police Officers is equally unshaken and is thus credible to the effect that there was no irregularity in the conduct of the identification parade.

[8] It was argued on behalf of the Second Appellant that even if it were to be found that the Second Appellant was positively identified as the person who came to the deceased's house on the day of the incident and walked with her from the house to the street, there is no direct evidence that the Second Appellant is the person who shot at the deceased. That the evidence of Mihloti is lacking or insufficient in this regard, so the argument goes.

[9] This argument is flawed. The trial Court correctly made a finding that there was circumstantial evidence sufficient enough to find the Second Appellant guilty. The Second Appellant and the deceased left the deceased's house to the street en route to the neighbour's residence. The deceased was shot in the street approximately 2 – 3 minutes after she left her premises with the Second Appellant. Her body was seen on the street approximately ten metres away from her premises. No one was seen next to the body of the deceased or in the street immediately after the shooting. The Second Appellant

disappeared into thin air without any effort to assist the shot victim or run back to the deceased's house or neighbours to report the incident.

[10] In the absence of any evidence that there was someone other than the Second Appellant who was either in the company of the deceased or was present in the street where the deceased got shot and killed, the Court *a quo*, correctly in our view, drew an inference that the Second Appellant is the person who shot and killed the deceased.

See: **R v Blom 1939 AD 202**.

[11] The evidence of the witness, Mihloti Nkuna is that of a single witness. Section 208 of the Criminal Procedure Act No. 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any witness. The evidence of such a witness should be treated with caution. In **S v Leve 2011 (1) SACR 87 (ECG)** Jones J pointed out that if a trial Judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but instead demonstrably subjects the evidence to careful scrutinity, a Court of appeal will not readily depart from his conclusions. An Appeal Court's powers to interfere on appeal with the findings of fact of a trial Court are limited. In the absence of 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.

See also: **S v Monyane and Others 2008 (1) SACR 543 (SCA) at [15]**.

[12] The cautionary rule is a rule of practice, not a rule of law, and that in applying the cautionary rule it is well to have regard to the warning of Holmes JA in **S v Artman 1968 (3) SA 339 (A) at 431 C**:

"…..while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt, and Courts must guard against their reasoning tending to be stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense…."

[13] In *casu*, we are satisfied that the trial Judge applied the necessary caution on the evidence of the single witness, Mihloti Nkuna. Her evidence is satisfactory in every material respect. Her evidence on the identity of the Second Appellant is reliable. She saw the Second Appellant in light cast by an electric light inside and outside the house. She spoke to him for about 4 – 5 minutes in a relaxed atmosphere where she even gave him water to drink. She could describe his haircut and clothing and above all the Second Appellant was an arm's length from her when speaking to him.

[14] The witness later identified the Second Appellant at an identification parade. This identification serves as further and objective corroboration of the

witness's honesty and reliability. In the circumstances the Court *a quo* cannot be faulted in accepting the evidence of Mihloti Nkuna.

[15] The Second Appellant averred that the only reason why the witness identified him at the identification parade was because she had seen him beforehand at the Police Station prior to the identification parade. The version of the Second Appellant in this regard was correctly rejected by the Court *a quo* as not being reasonably possibly true. The evidence produced by the State through several Police Officers regarding the correctness and requirements of the identification parade proved beyond reasonable doubt that this parade was properly held – **S v Mbuli 2003 (1) SACR 97 (SCA) at [46] – [48]**.

It is noteworthy to mention that all the twelve suspects who appeared on the parade were almost identical in colour, size and all were wearing blankets.

[16] The conviction of the First Appellant is based on the confession he made to a Magistrate. In the confession the First Appellant states that he suggested to his brother and sister that he should get someone to kill somebody in order to prevent many deaths which occurred in their family. He suspected the deceased as the person responsible for the deaths of his family members and then got hold of the Second Appellant to carry out the killing. It is appropriate that the whole contents of the First Appellant's confession be set out hereunder.

[17] The contents of the statement (confession) made by the First Appellant reads as follows:

"Thereafter the DECLARANT who appears to be in his sound and sober senses, voluntary makes the following statement: I had a problem after my mother and younger brother died on the 16th February 2009. We went to a traditional Healer at Phalaborwa and we were told that there was something buried at our homestead which was occupied by my deceased mother. She told us that she will need R 1500 per homestead to uproot the buried herb and it totaled R 7500. I was with my uncle, Justice Hlungwani and my brother Solly Nkuna, Caswell Nkuna and Sadick Nkuna.

We did not have money and we told her that we shall come back when we have sufficient funds. She did not tell us as to who had buried the said herbs or who was responsible for it. It was after the funeral of the two deceased persons. The reason we went to the traditional healer it was because of the continuous deaths of family members as my sister, Annicky Nkuna who died after short illness in 2005 and then my mother and brother in a car accident.

We arranged for unveiling together with the deceased, MTHAVINI NKUNA, but she failed to attend the ceremony. We had problems regarding her failure to attend. I thought that she knew what was causing the death.. I told Caswell. Sadick and Tunic, our sister that it was better to get someone to kill somebody so that the deaths in the family should stop. They agreed with me and I was mandated to look for a person who could carry out the evil deed. I found RHULANI who was from either XIGALO/MAHUNISI but he stays at SECTION 7 IVORY PARK TEMBISA, but I do not know the house number.

He charged me R 10 000.00 for the job. He contacted me and we came back together in a motor vehicle which was arranged by the said Rhulani. I was driving. It was on Monday the 10th May 2010 and we arrived at THOMO VILLAGE between 19h00 and 20h00. I left him at a short distance from the premises of the deceased and waited a distance further from where I left him. He joined me and told me that the job was done. We drove back to the Reef. I paid him the whole amount on the 11/05/10.

I was contacted telephonically by Caswell on the 11/05/2010 and he told me that our mother, the deceased had been shot dead. I arranged for leave but it was refused and I eventually came back on Friday, the 14/05/10. Rhulani has not yet been arrested. He used his firearm.

Signature of Declarant..... Date.....

Signature of Official Interpreter..... Date

Signature of Presiding Officer.....

.....

Date Stamp "

[18] The admissibility of the aforesaid confession was contested by the First Appellant who averred that same was not made freely and voluntarily. The First Appellant alleged that he was assaulted by the Police and was denied his right to legal representation. The allegations of assault were denied by the Police who gave evidence in a trial within a trial. The Magistrate who took down the confession also testified and from his evidence it became clear that the allegations of assault on the First Appellant and the alleged denial of a right to legal representation were baseless and not reasonably possibly true.

[19] In the trial within trial four Police Officers, the Magistrate and First Appellant's brother, Solly Nkuna testified for the State. The First Appellant also testified. The Court *a quo* took into consideration the credibility of all the witnesses and came to a factual finding that the confession was freely and voluntary made and was thus admissible. In our view, the factual findings of the Court *a quo* in this regard cannot be faulted.

[20] It is trite that a Court of appeal will be hesitant to interfere with the factual findings and evaluation of evidence by a trial Court – see **R v Dhlumayo and Another 1948 (2) SA 677 (A).** In **S v Francis 1991(1) SACR 198 (A) at 198j – 199a** the approach of an appeal Court to findings of fact by a trial Court was crisply summarised as follows:

"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the Appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has in seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

See also **S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e – f**.

[21] After the confession was ruled admissible the First Appellant closed his case without giving evidence on the merits. Section 209 of the Criminal Procedure Act No. 51 of 1977 provides that –

"An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such a confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed."

[22] From the contents of the confession the following facts show that the First Appellant was involved in the killing of the deceased:

22.1. The First Appellant suspected the deceased of being responsible for the death of his family members. There was therefore a motive to kill the deceased.

22.2. The name of the Second Appellant (Rhulani) who stays in Tembisa is mentioned by the First Appellant. The Second Appellant had not been arrested by then.

22.3. First Appellant states that they arrived on 10 May 2010 at Thomo Village between 19h00 and 20h00. This is in line with the evidence of Mihloti Nkuna that the killing of the deceased occurred on that date at about 20h45.

22.4. First Appellant states that he left Second Appellant at a short distance from the premises of the deceased and waited a distance further from where he left him. The Second Appellant joined him and told him that the job is done. They drove back to the Reef. Indeed after the Second Appellant shot the deceased he disappeared into the darkness. A reasonable inference to be drawn is that he went to join the First Appellant where the latter had been waiting. Thereafter they drove back together to Tembisa, where they came from. Both Appellants stated in their defence that they were in Tembisa on the 10 May 2010 and not at Thomo Village.

[23] We are satisfied that with the sufficiency and the cogency of the evidence against the Second Appellant and the admissibility of the confession made to the Magistrate by the First Appellant, the conviction of both Appellants on the charge of murder is in order. Furthermore the conviction of the Second Appellant on the charges of unlawful possession of a firearm and ammunition is also in order.

[24] The Appellants appeal against the sentence of life imprisonment. The Court *a quo* convicted the appellants on murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 which prescribes a sentence of life imprisonment for murder where such murder was premeditated or committed in the furtherance of a common purpose, unless the Court finds that there are substantial and compelling circumstances that justify a lesser sentence.

[25] In *casu* the murder of the deceased was clearly preplanned and involved common purpose on the part of the two Appellants. The deceased was assassinated after being lured outside her house. She was shot and killed for no reason other than apparent belief that she might have been responsible for the death in the family of the First Appellant. The murder was also a murder for hire, that is a contract killing.

[26] In **S v Ferreira and Others 2004 (2) SACR 454 (SCA)** it was held that contract killing or murder for hire is an abomination which is corrosive at the very foundation of justice and its administration. Furthermore it was said to be the most offensive crime known to the law and that it would be highly unlikely for substantial and compelling circumstances to be present.

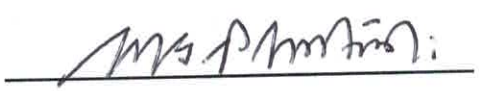
See also **Director of Public Prosecutions Gauteng v Tsotetsi 2017 (2) SACR 233 (SCA)** where a sentence of 20 years imprisonment imposed by the trial Court was set aside on appeal and substituted with a sentence of life imprisonment.

[27] In the present case we are of the view that the Court *a quo* was correct to have found the absence of substantial and compelling circumstances. The sum total of the mitigating features in the Appellants' instance amounted only to their personal circumstances. There has been nothing mitigating in their case in the actual commission of the murder. Accordingly there is no misdirection on the part of the Court *a quo* with regard to the sentences imposed.

[28] In the result the appeal against conviction and sentence in respect of the two Appellants is dismissed and the sentences imposed by the trial Court are confirmed.

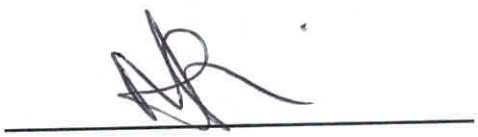
E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I agree



M G PHATUDI
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I agree



M S SIKHWARI
ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	:	**15 February 2019**
Judgment delivered on	:	**22 February 2019**
For the Appellant	:	**Mr M P Legodi**
		Legal Aid South Africa
		Polokwane Justice Centre
For the Respondents	:	**Adv J J Kotze**
		Director of Public Prosecutions
		Limpopo Division, Polokwane