IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: A63/2015

In the matter between:

PAPI SEPTEMBER MOSIA 1ste Appellant
DANIEL LOFI MOSIA 2nd Appellant

and

THE STATE Respondent

CORAM: DAFFUE, J *et* MBHELE, J

JUDGMENT BY: DAFFUE, J

HEARD ON: 28 NOVEMBER 2016

DELIVERED ON: 1 DECEMBER 2016

I INTRODUCTION

[1] The two appellants were convicted on a charge of murder and sentenced to 15 years imprisonment each by acting

regional court magistrate S A Ebrahim in Sasolburg.

[2] On 7 April 2011 written notices for leave to appeal were prepared on behalf of appellants and they also filed an application for condonation dated 11 May 2011 which was filed with the clerk of the criminal court in Sasolburg on the same day. The record shows that the applications for leave to appeal were postponed several times and even struck from the role more than once, but eventually heard on 23 April 2012, i.e. more than a year after conviction and sentence whereupon the court *a quo* granted leave to appeal against conviction and sentence. The delay herein cannot be regarded as in the interest of justice, but the further delay until the appeal was eventually heard on 28 November 2016, more than 4 years later, is really a travesty of justice.

[3] It is not clear what transpired from April 2012 to 16 May 2016 when this matter was to be heard for the first time by the High Court. It is however apparent that appellant's legal aid counsel indicated before the first appeal date that it would be seeking a postponement in order for the trial record to be fully transcribed and reconstructed.

[4] The matter was again set down for hearing of the appeal on 25 July 2016 but on that date it was postponed to 17 October 2016 as the record was still incomplete. In particular the magistrate's full judgment with particular reference to the evaluation of the evidence and his factual

findings were not recorded. Several attempts were made to have this recorded, but it is apparent that the magistrate was involved in a motor vehicle collision and seriously injured and could not assist in reconstruction his judgment. He has also left the service of the Department of Justice.

[5] On 17 October 2016 the matter was postponed to 24 October 2016, only to be postponed on that day to 28 November 2016 with instructions for appellant and respondent's heads to be filed on 7 November and 14 November 2016 respectively.

II GROUNDS OF APPEAL

[6] Appellants rely on several grounds of appeal which can be summarised as follows:

1. The first state witness, Mr Maneneze could not be regarded as a reliable witness as he was a former co-accused of appellants in respect of the same crime. Furthermore he testified that he was drunk at the stage when the incident occurred and that he allegedly could not see what was going on. Mr Maneneze is also accused of implicating first appellant as the two of them had a previous quarrel over a girlfriend Zodwa. Evidence did not show that second appellant was involved with the stabbing of the deceased and therefore there could be no common purpose with first appellant in murdering the deceased. The court *a quo* was also

wrong in finding that there were no improbabilities in the state's version, that the state witnesses gave their evidence in a satisfactory manner and in rejecting the evidence of the appellants has not been reasonably possibly true and in doing so, holding against them contradictions between their own evidence and facts put to witnesses in cross-examination.

2. Pertaining to sentence it is alleged that the trial court erred in disregarding the period of two years spent by the appellants in custody awaiting trial and in not taking into consideration that they did not have previous convictions and that there was an absence of any planning.

III THE ARGUMENTS BEFORE US

[7] Mr Van der Merwe on behalf of the appellants argued that the convictions and sentences should be set aside due to the incomplete record. He referred to three authorities to wit **S v S** 1995 (2) SACR 420 (T), **S v Van Wyngaardt** 1965 (2) SA 319 (O) and **S v Joubert** 1991 (1) SA 119 (A). These judgments do not support the appellant's submissions at all. In all three instances the transcriptions were incomplete and/or defective and it was not possible to reconstruct the record. However, in all three cases the missing portions contained the evidence and as mentioned in **S v Joubert**, the reconstructed record did not contain the controverting evidence.

[8] An appeal is a re-hearing of the matter subject to the limitations contained in the grounds of appeal. It often happen that a court of appeal finds that the trial court has made serious misdirections to such an extent that the evidence may be evaluated afresh for the court of appeal to come to its own conclusions. I refer to the following dicta of Davis AJA in **R v Dhlumayo and Another** 1948 (2) SA 677 (AD) at 706:

> "10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
> 11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter."

[9] In **Lowrens v Oldwage** 2006 (2) SA 161 (SCA) at para [14] the court found that a court of appeal may often be in a better position to draw inferences, particularly in regard to second reflects, bearing in mind the benefit of an overall conspectus of the full record. See also Schmidt and Rademeyer, **Law of Evidence**, issue 14 for a detailed assessment of evidence on appeal.

[10] In so far as Mr Van der Merwe decided to follow the aforesaid cause of action, he did not attempt in his written

heads of argument to deal with the evidence at all. During his oral argument and upon invitation to deal with the merits of the appeal, he failed to present persuasive submissions why the appeals against convictions should succeed. He however argued that there should be interference with the sentence of 15 years imprisonment and that a sentence between 10 and 13 years would be more appropriate.

[11] Mr Hoffman on behalf of the state dealt with the merits of the appeal in his heads of argument as well as during his oral submissions. He submitted that although the record is incomplete this court is still in a position to properly deal with the appeal with reference to the following dictum in **S v Chabedi** 2005 (1) SACR 415 (SCA) at 417D-H:

> "The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."

Consequently he submitted that the evidence of all the state witnesses and appellants was properly and adequately recorded to the extent that the material aspects relating to whether the crime was committed or not appears from the record.

[12] Mr Hoffman also submitted that although Mr Maneneze was a single witness and initially also a co-accused of the appellants and his evidence had to be treated with caution.

His version was reliable and credible and should be accepted. See **Stevens v S** 2005 (1) All SA 1 (SCA) at 5D-E. The evidence of Captain Gift Matseka who corroborated Mr Maneneze on material aspects could not be flawed as well.

[13] In so far as their sentence is concerned, Mr Hoffman indicated correctly that the court *a quo* did not follow a balanced approached. The sentence does not even contain a half of a page of the record and was merely recorded that no substantial and compelling circumstances could be found. Mr Hoffman did not support the sentence of 15 years and submitted that bearing in mind the fact that appellants were two years in custody awaiting trial, probably under the influence of alcohol and that the attack took place on the spur of the moment, that a more appropriate sentence would be 13 years imprisonment.

IV ASSESSMENT OF THE EVIDENCE

[14] As indicated *supra* the court *a quo*'s assessment of the evidence does not form part of the record and could not be obtained notwithstanding diligent efforts from the personnel of the High Court, the Legal Aid personnel as well as the personnel of the regional court in Sasolburg. This court is therefore obliged to assess the evidence based on the record which is complete in so far as the evidence has been transcribed properly. In the ultimate analysis we wherefore have to look at the evidence holistically in order to

determine whether the guilt of the appellants was proved beyond reasonable doubt in the court *a quo*. Inherent probabilities and improbabilities may be considered in evaluating the evidence and totality. See **S v Tshabalala** 2003 (1) SACR 134 (SCA) at para [15]. It is permissible to test the appellant's version against the inherent probabilities but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot be reasonably possibly true. See **S v Shackle** 2001 (2) SA (CR) 185 (SCA) at para [30]. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so decide whether it is satisfied that the truth has been told despite any shortcomings or defects in the evidence. See **S v Sauls** 1981 (3) SA 172 (AD) at 108E-G and **Stevens v S** *supra*. Whether evidence of a single witness is corroborated in any way the caution in joint may be overcome and acceptance facilitated, but corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.

[15] The state witness Maneneze was formally a co-accused but there is nothing to indicate that he was an accomplished to

the murder. Even if it could be argued that his evidence should be considered with caution for these reasons as well which I doubt – See **S v Francis** 1991 (1) SACR 198 (A) at 205F and **S v Johannes** 1980 (1) SA 531 (A), I am satisfied that the truth has been spoken and there was no reason to reject Mr Maneneze's version.

[16] The appellant's were represented by an experienced attorney and it would have been expected of him to put the material aspects of his client's versions to the state witnesses. He failed to do so as will be shown *infra*.

[17] Mr Maneneze knows appellants. First appellant was with him at school and the second appellant was known to him as first appellant's brother. He met the two appellants at Steve's tavern on the night of 24 May 2009. On their way to first appellant's residential home he stayed behind to urinate. When he came closer to his friends he noticed a person lying on his back and second appellant on top of him busy searching him. First appellant was standing at the head of the victim and he was busy hitting him with a panga to his upper body. He can't say exactly where the person was hit but he saw blood and an open wound to the person's head. He manage to separate the two appellant's from the victim and they left the scene to eventually go to Mangola's place but he was very scared and believed that the two appellants might be able to kill him in the same way. They also warned him not to "let the cat out of the bag". At a later stage he confided to a friend, one Sidiso as

to what the appellants had done. He was later approached by members of the SAPS. There was no bad blood between him and the two appellants.

[18] During cross-examination it came out that he knew the deceased which he initially refer to as his grandfather. But the deceased apparently merely married into his family. He handed his trousers with blood stains but which he had washed in the meantime as well as his knife to the police when he was apprehended. He admitted that he was drunk but on a question of the trial court he said in this regard “the evidence that I gave is solid your Worship, it is something that I saw” and further on “I was that drunk your Worship, where I was unable to walk or to see, I could walk and I could see”.

[19] It was merely put to the witness in cross-examination that the two appellants denied being in his company that particular night. It never put to the witness that second appellant met him for the first time when they were in custody. It was never put to the witness that the two appellants, they being brothers, never go out at night together. Although reference was made to the lady Zodwa who was the witness’s girlfriend at a stage, it was merely put to the witness that he had a problem regarding Zodwa with first appellant which was denied. This matter was not taken any further and it was never put to the witness that he had reason to falsely incriminate first appellant.

[20] Captain Gift Matseka corroborates Mr Maneneze's version in all material aspects. According to him Maneneze informed him that the person who stabbed the deceased was Papiki, the name of first appellant and that his brother, the second appellant was the one who searched the deceased. Captain Maseka also testified that contrary to Mr Maneneze who gave his co-operation from the beginning, he had difficulty finding first appellant to such an extent that he believed that his family was warning him of their SAPS endeavours to find him. First appellant was eventually found hiding. He found a T-shirt and trousers belonging to be the first appellant in his shack which appear to be containing blood stains. These clothing as well as a knife and clothing belonging to Mr Maneneze were sent for forensic evaluation but could not be positively identified to a blood sample obtained from the deceased. The usual admissions were made and recorded in terms of section 220 of the Criminal Procedure Act before the state closed its case. The contents and finding of Dr Humphreys in his post mortem report handed in as exhibit "C" as well as the photo album exhibit "D" were admitted. The identification of the body of the deceased was admitted as exhibit "E" and it is furthermore admitted that the deceased died as a result of the injuries sustained during the attack.

[21] First appellant testified that he became known to Mr Maneneze during January 2009, four months before the deceased was killed. This is in direct contradiction with Mr Maneneze's testing that they knew each other since school

day age which was never denied in cross-examination. According to accused 1 he was the shebeen called Sam's Place at the night of the incident where he had one beer after which he went home. He was never in the company of second appellant or the _____ the particular night. First appellant state contrary to what was put Mr Maneneze that they "fought for Zodwa" when Zodwa was coming to fetch me. According to him Mr Maneneze had an affair with appellant's one's girlfriend at the time, a point that was never raised in cross-examination to that extent. First appellant more than once used the words "I do not remember", for example he did not remember having a weapon with him the particular day that the deceased was murdered and he did not remember that he and his brother threatened to kill Mr Maneneze. When he was taken on in this regard in cross-examination his evidence was really confusing to say the least. First appellant indicated that he did not have any contact with Zodwa as he was in custody awaiting trial and she also never came to visit him. However he believed that she would corroborate his version, but strangely enough in re-examination he said the following:

> "So are you saying that you do not intent calling her as a witness? --- I do not <u>want</u> to call her because I cannot found her."

Although he did not remember her address he would be able to point out her residential address to the police. Hereupon the court indicated that it would like to call Zodwa

as a court witness and the necessary arrangements were made to trace her. It was placed on record that she was located but that she was unwilling to come to court and to assist.

[22] Second appellant told the court that he did not know Mr Maneneze and that he was not his friend and that he was never in his company when a robbery was committed. He only started he name Maneneze in the Sasolburg prison and at this stage when Mr Maneneze and first appellant arrived at the prison, second appellant was already incarcerated. When asked whether he told his lawyer that he only started to know Mr Maneneze in prison he remarked as follows:

> "Yes, I did tell Mr Selongo just a little."

This is obvious no explanation for the fact that the lawyer never put it to Mr Maneneze that the two were not known to each other and only met after the murder was committed.

[23] Second appellant denied that he normally go out with his brother to drink as he was staying with his grandmother, she is too old and needs to be taken care of. He also never told his lawyer that he and his brother don't go out together because of the illness of his grandmother. According to him first appellant is staying with his mother whilst he was staying with his grandmother at the time. Another reason why he is not going out with his brother safe for the fact that

they are not staying together is that his brother is older than him and has got his own friends whilst second appellant has got his own circle of friends. Although he alleged that he informed his lawyer accordingly, this crucial aspect was never put to Mr Maneneze in cross-examination.

[24] The fact that the DNA results were negative is a neutral factor and cannot assist the appellants and first appellant in particular that the stains that appear to be blood stains were found by the Captain on the clothing of Mr Maneneze as well as first appellant and this serves as corroboration for Mr Maneneze's version that first appellant was the aggressor who hit the deceased with a panga causing open wounds whilst he (Mr Maneneze) when he eventually arrived at the scene and separated the aggressors from the victim. Appellant's lawyer is apparently an experienced lawyer. He even had a stage bragged that he was always fully prepared when going into trial. The failure to put crucial statements to Mr Maneneze is indicative of one thing only en that is that the two appellants changed their versions as time went by.

[25] Although it was dark and Mr Maneneze was under the influence of alcohol to a certain extent, there can be no uncertainty about his identification. He and the two appellants were at the same tavern before the murder and were on their way to first appellant's residential home when the incident occurred. He is a reliable and credible witness with sufficient time to make proper observations.

[26] I accept that he was confused about the relationship between him and the deceased and it took some time to establish that there was indeed no blood relationship between the two. Mr Meneneze may also be blamed for not informing the police immediately of the murder which he eye witnessed, but bearing in mind the threat that he might be killed, it cannot be said that his version should be rejected. He apparently decided to inform a friend of the murder, but is not clear that led to his arrest. Thereafter he gave full co-operation to the SAPS and his version is as mentioned, materially corroborated by the Captain. I am satisfied that Mr Maneneze's version is a reliable as well as credible and although he was a single witness, I am satisfied that he has spoken the truth notwithstanding the defects referred to. In any event, as mentioned, he is corroborated in material respect by the Captain.

[27] The two appellants put up a poor show. Their versions as testified too, differ from what was put to the state witnesses and Mr Maneneze in particular. I also find it strange and inherently improbable that they would never be going out together merely because they have their own circle of friends and the one is staying with their mother and the other with the grandmother. In so far as the credibility and reliability of identification was of utmost importance, I find it improbable that it would not have been put to Mr Maneneze that first appellant only knew him for a couple of months whilst second appellant met him for the first time in the

Sasolburg prison after the murder.

[28] There is no onus on an accused to prove his defence and in this case his alibi. If the two appellant's versions are to be accepted, first appellant would be at home with his mother and second appellant would be at home with his grandmother. Neither of these two ladies were called to testify in support of appellant's versions.

[29] In conclusion and bearing in mind the evidence in totality, I am satisfied that the appellant's two versions are so improbable that it cannot be regarded as reasonably possibly true. The state has proven its case beyond reasonable doubt.

V SENTENCE

[30] The Supreme Court of Appeal has emphasised in a number of judgments that prescribed minimum sentences should not be departed from lightly or for flimsy reasons. See **S v BP** 2013 (2) SACR 533 (SCA) at [?] and **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [20].

[31] The determination of a sentence in a criminal case is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in deciding which factor should be allowed to influence the court in determining the measure of punishment and the value to attach to each factor taken into account. A failure

to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard. A mere misdirection is not by itself sufficient to entitle the court of appeal to interfere with the sentence as the misdirection must be of such a degree or seriousness that it shows that the court had not exercised his discretion at all or exercised it improperly or unreasonably. See **S v Kubido** 1998 (2) SACR 213 (SCA) at 216G-I.

[32] It is also been stated that the court of appeal will not alter a sentence imposed by the trial court unless it is found that no reasonable person ought to have impose such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient or that the trial court has not exercised its discretion properly. See **S v Fhedani** 2007 (2) SACR 590 (SCA) at para [5], **S v Bogaards** 2013 (1) SACR 1 (CC) at para [41].

[33] In *casu* the court *a quo* merely stated that no substantial and compelling circumstances exist. He did not refer to the personal circumstances of the appellants or the circumstances in which the murder was committed. The appellants were in custody awaiting trial for 2 years. Under this stage the case against him were withdrawn but later re-instated again. I normally _____ to the warning contained

in the dictum Ponan JA in para [23] of **S v Matyityi** *supra*. I do not have a willingness to deviate from the minimum sentences prescribed of the legislature for any flimsy reason. In so far as I have rejected the appellant's version and accepted the state's version that appellants were in fact in the presence of Mr Maneneze on the crucial night when the deceased was murdered and that the two of them were the assailants, first appellant being the actual attacker with the panga and second appellant being the person on top the deceased keeping him down whilst searching him, I am also duty bound to accept the remainder of Mr Maneneze's evidence. According to him he was in the company of the two appellants where they have been drinking at Steve's tavern. He was under the influence of alcohol and there is no reason to find that his drinking friends, first and second appellants were not to a certain extent under the influence of alcohol as well. There is no evidence of Mr Maneneze that the two appellants were on the lookout of victims to be robbed and possibly killed in the process. In fact they went from Steve's tavern to his house and from there they were on their way to first appellant's residential home. It is also possible that first appellant in particular was incited by the fact that the deceased fought back by using a knife and I quote the following from Mr Maneneze's evidence:

> "As I was listening I heard accused 2 saying do not stab me, this person is stabbing me… Apparently accused 2 was telling accused 1 that this person is stabbing him."

[34] In the light of the circumstances and the trial court's

unbalanced approach to sentencing, we are entitled to reconsider the sentence afresh. Most of what I have mentioned *supra*, the court *a quo* should have found that the following constituted substantial and compelling circumstances:

1. They were on their way home from a tavern and were intoxicated, the degree of which is uncertain;
2. They were not at the lookout to rob and/or to kill;
3. Their attack on the deceased must have been on the spur of the moment;
4. The deceased fought back and stabbed second appellant which incited first appellant and caused him to assault the deceased with a panga;
5. Appellants were incarcerated for two years as awaiting trial prisoners.

[35] The substantial and compelling circumstances tabulated above are such that a deviation from the minimum sentence of 15 years is warranted. Accordingly I am of the opinion that a lesser sentence, to wit 13 years imprisonment is a more appropriate sentence and therefore the appeals against sentence should succeed.

VI **ORDERS**

[36] Consequently the following orders are made:

1. The appeal of first and second appellants against their convictions is dismissed.
2. The conviction of first and second appellants on a charge of murder is confirmed.
3. The first and second appellants appeal against their sentences is upheld and the sentence of the court *a quo* is set aside and replaced with the following:

   "Both accused are each sentenced to 13 years imprisonment."

4. The sentences are anti-dated to 5 April 2011.

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J.P. DAFFUE, J

I concur.

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N. M. MBHELE, J

On behalf of the appellants: P.L. van der Merwe
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondents:	Adv. M. Lencoe Instructed by: Director: Public Prosecutions BLOEMFONTEIN

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