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

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

Case No.: A63/2015

In the matter between:

PAPI SEPTEMBER MOSIA 1st 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: 8 DECEMBER 2016

I INTRODUCTION

[1] On 5 April 2011 the two appellants were convicted on a charge of murder and sentenced to 15 years' imprisonment

each in the regional court held at Sasolburg.

[2] On 25 April 2011 a notice for leave to appeal was filed on behalf of appellants. They also filed an application for condonation on 11 May 2011. The record shows that the application for leave to appeal was postponed several times and even struck from the roll more than once, but eventually heard on 23 April 2012, i.e. more than a year after convictions and sentences, whereupon the court *a quo* granted leave to appeal against convictions and sentences. 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 appellants' representative appointed by Legal Aid SA indicated before the first appeal date that he 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 postponed to 17 October 2016 as the record was still incomplete. The incomplete record was partially reconstructed, but the magistrate's full judgment with particular reference to his evaluation of the evidence and factual findings were not recorded. Several attempts

were made to have this recorded, but the magistrate was apparently seriously injured in a motor vehicle collision and could not assist with the reconstruction of his judgment. He also left the service of the Department of Justice.

[5] On 17 October 2016 the matter was postponed to 24 October 2016, only to again be postponed to 28 November 2016 with instructions that appellant and respondent's heads of argument should be filed by not later than 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 Manenze could not be regarded as a reliable witness as he was a former co-accused 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 transpiring. Mr Manenze is also accused of falsely implicating first appellant as the two of them had a quarrel over first appellant's girlfriend, Zodwa, earlier. Furthermore, according to the evidence, second appellant was not involved in the stabbing of the deceased and could not be convicted on the count of murder. 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 as not reasonably possibly true, holding against them contradictions between their own evidence and facts put to witnesses on their behalf in cross-examination.

2. Pertaining to sentence it is alleged that the court *a quo* erred in disregarding the period of two years spent by appellants in custody awaiting trial and in not taking into consideration that they did not have previous convictions; also 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 appellants' submissions at all. In all three instances the records of proceedings were incomplete and/or defective in that material evidence was not recorded. It was not possible to reconstruct the records. As mentioned in **S v Joubert**, the reconstructed record could only be relied upon if it was in all material respects a replica of the trial proceedings.

[8] An appeal is a re-hearing of the matter subject to the limitations contained in the grounds of appeal. Courts of

appeal find from time to time that trial courts have committed serious misdirections to such an extent that the evidence may be evaluated afresh for the courts of appeal to come to their 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 **Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another** 2002 (4) SA 408 (SCA) at para [24], referred to with approval in **Louwrens 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 secondary facts, bearing in mind the benefit of an overall conspectus of the full record. See also Schmidt and Rademeyer, **Law of Evidence**, issue 14 at 3-40 for a detailed assessment of evidence on appeal and in particular **S v Chabedi** 2005 (1) SACR 415 (SCA) at para [13].

[10] Insofar as Mr Van der Merwe decided to follow the aforesaid cause of action, he did not attempt to deal at all with the evidence and the merits of the appeal in his written heads of argument. During oral argument and upon invitation to deal with the merits of the appeal, he failed to present persuasive submissions why the appeal against convictions should succeed. However, he argued that the the sentences of 15 years' imprisonment should be interfered with and suggested that sentences 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 oral argument. 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** *supra* at para [6]:

> "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, appear from the record.

[12] Mr Hoffman also submitted that although Mr Manenze was a single witness and initially also a co-accused and that his evidence had to be treated with caution, his evidence overcame the applicable 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 Manenze in material respects, could not be faulted.

[13] Insofar as their sentences are concerned, Mr Hoffman initially supported the sentences in his heads of argument. However before us he changed tack and submitted that a more appropriate sentence would be 13 years' imprisonment, bearing in mind the fact that appellants spent two years in custody awaiting trial.

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, Legal Aid SA and the regional court in Sasolburg. This court is therefore obliged to assess the evidence based on the record which is complete insofar as the evidence has been transcribed properly. In the ultimate analysis we have to look at the evidence holistically in order to determine whether the appellants' guilt was proved beyond reasonable doubt.

[15] Inherent probabilities and improbabilities may be considered in evaluating the evidence in totality. See **S v Chabalala** 2003 (1) SACR 134 (SCA) at para [15]. It is permissible to test the appellants' versions 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 reasonably possibly be true. See **S v Shackell** 2001 (2) SA (CR) 185 (SCA) at para [30].

[16] 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*. Where the evidence of a single witness is corroborated in any way the caution enjoined 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.

[17] The State witness, Mr Manenze was a co-accused initially, but there is nothing to indicate that he was an accomplice 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, I am satisfied that the truth has been spoken and there is no reason to reject his version. See: **S v Francis** 1991 (1) SACR 198 (A) at 205f and **S v Johannes** 1980 (1) SA 531 (A) at 533.

[18] The appellants were represented by an experienced attorney and it was expected of him to put the material aspects of his clients' versions to the State witnesses. He failed to do so as will be shown *infra*.

[19] Mr Maneneze knows appellants. First appellant went to school with him and the second appellant was known to him as first appellant's brother. On the night of the murder, 24 May 2009, he met the two appellants at Steve's tavern. On their way to first appellant's residential home he stayed behind to urinate. When he approached his friends again he noticed a person lying on his back with second appellant on top of him, busy searching him. First appellant was standing at the head of the victim and he was hitting the victim with a panga to his upper body. He can't say exactly where the blows landed, but he saw blood oozing from an open wound to the victim's head. He managed to separate the two appellants from the victim whereafter they left the scene and eventually went to Mankola's place. Mr Manenze did not report the incident to the SAPS as he was very scared and believed that the two appellants might be able to kill him in the same way. They warned him not to

"let the cat out of the bag". At a later stage he confided to a friend, one Sediso as to what the appellants had done. He was later approached and arrested by members of the SAPS. There was no bad blood between him and the two appellants.

[21] During cross-examination it came out that he knew the deceased to whom he at a stage referred as his grandfather. The deceased apparently merely married into his grandmother's family. When he was apprehended he voluntarily handed his blood-stained trousers, which he had washed in the meantime, as well as his knife to the SAPS. He admitted that he was drunk at the time of the attack, but on a question of the court *a quo* he said in this regard "the evidence that I gave is solid your Worship, it is something that I saw" and further on that he was drunk, but "I could walk and I could see".

[22] It was merely put to the witness in cross-examination that the two appellants denied being in his company that particular night. It was never put to the witness that first appellant knew him for a few months only and that they did not go to school together. Also, that second appellant met him for the first time after the murder 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, it was merely put to the witness that he had a problem with first appellant regarding Zodwa 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.

[23] Captain Gift Matseka corroborated Mr Manenze's version in all material aspects. According to him Mr Manenze 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 Matseka also testified that Mr Manenze had given his co-operation from the beginning, but contrary thereto, he had difficulty finding first appellant to such an extent that he believed that his family was warning him of the SAPS' endeavours to find him. First appellant was eventually found hiding. He found a T-shirt and trousers belonging to first appellant in his shack which appeared to be containing blood stains. These clothing as well as a knife and clothing belonging to Mr Manenze were sent for forensic evaluation, but could not be positively linked to the DNA obtained from the deceased.

[24] The usual admissions were made and recorded in terms of s 220 of the Criminal Procedure Act before the State closed its case. Appellants admitted the findings of Dr Humphreys in his post mortem report handed in as exhibit "C", the photo album, exhibit "D", the identification of the body of the deceased, exhibit "E", and that the deceased died as a result of the injuries sustained during the attack.

[25] First appellant testified that Mr Manenze became known to him during January 2009, four months before the deceased was killed. This is in direct contradiction with Mr Manenze's undisputed testimony that they knew each other since attending school together. According to first appellant he visited a shebeen called Sam's Place at the night of the incident where he enjoyed one beer whereafter he went home. He was never in the company of second appellant or Mr Manenze that particular night. First appellant testified, contrary to what was put to Mr Manenze, that they "fought for Zodwa when Zodwa was coming to fetch me." According to him Mr Manenze had an affair with his 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 Manenze. 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 when the court *a quo* raised the matter 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." (emphasis added).

Although he did not remember her address he mentioned that he would be able to point out her residential address to the SAPS. Hereupon the court *a quo* indicated that it would like to call Zodwa as a court witness and the necessary arrangements were made to trace her. It was eventually placed on record that she had been located, but was unwilling to come to court to testify.

[26] Second appellant told the court that he did not know Mr Manenze, that he was not his friend and that he was never in his company when a robbery was committed. He met Mr Manenze in the Sasolburg prison when Mr Manenze and first appellant arrived there. At that stage he, second appellant, had already been incarcerated. When asked whether he had told his lawyer about this, he remarked as follows:

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

This is obviously no explanation as to why the lawyer never put it to Mr Manenze that they were not known to each other and only met after commission of the murder.

[27] Second appellant denied that he normally went out with his brother as he was staying with his grandmother and mentioned that she "is too old and needs to be taken care of." He never told his lawyer that he and his brother didn't go out together because of the illness of his grandmother. According to him first appellant was staying with his mother

whilst he was staying with his grandmother at the time. Another reason why he did not go out with his brother was that his brother is older than he and they had separate circles of friends. Although he alleged that he had informed his lawyer accordingly, this crucial aspect was never put to Mr Manenze in cross-examination.

[28] The DNA results were negative, but this is a neutral factor and cannot assist the appellants and first appellant in particular. The stains found by Captain Matseka on the clothing of Mr Manenze and first appellant, which appeared to be blood stains, serve as corroboration for Mr Manenze's version that first appellant was the aggressor who hit the deceased with a panga, causing open wounds from which blood was oozing, whilst he (Mr Manenze) eventually separated the aggressors from the victim. The severity of the wounds appears from the photographs of the deceased's body handed in as exhibit "D". Appellants' lawyer is apparently an experienced lawyer. He even boasted that he was always fully prepared when conducting trials. The failure to put crucial statements to Mr Manenze leads one to the inescapable inference that the two appellants changed their versions as time went by.

[29] Although it was dark and Mr Manenze was under the influence of alcohol to a certain extent, there can be no uncertainty about his identification of the perpetrators. 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 was a reliable and credible witness who had sufficient time to make proper observations.

[30] I accept that Mr Manenze caused confusion about the relationship between him and the deceased and even gave contradictory versions in this regard. It took some time to establish that there was indeed no blood relationship between the two. Mr Manenze may also be blamed for not informing the SAPS immediately of the murder which he witnessed, but bearing in mind the threat and the belief that he might be killed, his version cannot be rejected. He apparently decided to inform a friend of the murder, but it is not clear what led to his arrest. Thereafter he gave full co-operation to the SAPS and his version is, as mentioned, materially corroborated by Captain Matseka. I am satisfied that Mr Manenze's version is reliable as well as credible and although he was a single witness, I am prepared to accept that he has spoken the truth notwithstanding the defects referred to. In any event, as mentioned, he is corroborated in material respects by the Captain.

[31] The two appellants put up a poor show. Their testimony differs from what was put to Mr Manenze. I also find it strange and inherently improbable that they would never be going out together merely because they had their own circle of friends and the one was staying with their mother and the other with the grandmother. Insofar as the credibility and reliability of identification was of utmost importance, I find it

improbable that it would not have been put to Mr Manenze that first appellant knew him for a couple of months only, whilst second appellant met him for the first time in the Sasolburg prison after the murder.

[32] There is no onus on an accused to prove his defence and in this case his alibi. If the two appellants' versions are to be accepted, first appellant would be at home with his mother and second appellant would be at home with his grandmother. These two ladies were not called to testify in support of appellants' versions.

[33] I have considered the evidence in compartments, but when standing back and evaluating the evidence in totality, I am satisfied that the appellants' versions are so improbable and far-fetched that it cannot be regarded as reasonably possibly true. In fact, I am satisfied that the appellants' versions are false and that the State has proven its case beyond reasonable doubt.

V SENTENCE

[34] 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 PB** 2013 (2) SACR 533 (SCA) at [20] and **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [23].

[35] 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 factors 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 trial court did not exercise its discretion at all or exercised it improperly or unreasonably. See **S v Kubido** 1998 (2) SACR 213 (SCA) at 216g-i.

[36] It has 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 imposed 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 Fhetani** 2007 (2) SACR 590 (SCA) at para [5]; **S v Bogaards** 2013 (1) SACR 1 (CC) at para [41].

[37] In *casu* the court *a quo* merely stated that no substantial and compelling circumstances existed. It 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 two years. This in itself is not sufficient reason to deviate from a prescribed minimum sentence. I always try to follow the approach of Ponnan JA in para [23] of **S v Matyityi** *supra* and refuse to deviate from the minimum sentences prescribed by the legislature for any flimsy reason. Insofar as I have rejected the appellants' versions and accepted the State's version I am duty-bound to accept that appellants had been drinking at Steve's tavern, that Mr Manenze was under the influence of alcohol and that his drinking partners, first and second appellants, were on all probabilities to a certain extent under the influence of alcohol as well. There is no evidence that the two appellants were on the lookout for victims to be robbed and possibly killed in the process. In fact, they left Steve's tavern and were on their way to first appellant's residential home. It is also probable 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 Manenze'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."

[38] In my view the court *a quo* did not follow a balanced approached. The judgment on sentence does not even

contain half a page of the record and it was merely recorded that no substantial and compelling circumstances could be found. The cumulative effect of the time spent in custody, the fact that appellants were probably under the influence of alcohol and that the attack took place on the spur of the moment, should have been regarded as substantial and compelling circumstances. Therefore we are entitled to reconsider the sentence afresh. Bearing in mind what I have mentioned *supra*, the court *a quo* should have found that the following, cumulatively considered, constituted substantial and compelling circumstances:

1. Appellants were on their way home after visiting a tavern, being intoxicated to a degree;
2. They were not on the lookout to rob and/or to kill;
3. Their attack on the deceased must have occurred 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, inflicting fatal wounds in the process;
5. Appellants were incarcerated for two years as awaiting-trial prisoners.

[39] 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 appeal against sentence should succeed.

VI ORDERS

[40] Consequently the following orders are made:

1. First and second appellants' appeal against their convictions is dismissed and their convictions are confirmed.
2. First and second appellants' appeal against their sentences is upheld and the sentences of the court *a quo* are set aside and replaced with the following:

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

3. The sentences are ante-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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