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**

Appeal number: A153/2016

In the matter between:

SAMUEL MENYATSO Appellant

and

THE STATE Respondent

CORAM: LEKALE, J *et* MHLAMBI, J

HEARD ON: 12 JUNE 2017

JUDGMENT BY: LEKALE, J

DELIVERED ON: 15 JUNE 2017

SUMMARY: Criminal law- Common purpose and inferential reasoning- Two witnesses effectively corroborating each other on identity and complicity of appellant in murder- One witness seeing appellant in a group which chased and

followed the deceased into the street leading to his residence- The other witness shortly thereafter witnessing appellant among a group of people attacking the deceased at his residence. Deceased later dying from injuries sustained in the attack - That appellant either attacked or made cause with actual perpetrators to murder deceased the only reasonable inference to draw from the facts - No cause shown to interfere with life imprisonment as prescribed minimum sentence. Appeal dismissed.

[1] On 8 June 2014 and in the early hours of the morning, one Matshediso Moshoaesi (the deceased) sustained 43 stab or chop wounds around the head and upper body, which eventually claimed his life, when he was attacked by between 12 and 20 men in the yard of his residential home at Kutlwanong Odendaalsrus. The appellant was, thereafter, arrested and identified at an identification parade as one of the culprits by the deceased's cousin sister. He was charged with murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act).

[2] About 17 months after his arrest and on 2 November 2015 the appellant, who was legally represented, was convicted and sentenced to imprisonment for life by the Regional Court sitting at Odendaalsrus. He feels aggrieved by that state of affairs and now exercises his automatic right of appeal against both the conviction and sentence before us.

[3] On returning the guilty verdict the trial court rejected the appellant's version as being devoid of any truth. The court below, further, accepted the State's version of events and concluded therefrom

that the appellant acted in concert with a group of some 20 people to stab the deceased 43 times.

[4] On the papers and in argument before us, Mr Reyneke for the appellant submits, *inter alia,* to the effect that his instructions are that the trial court should have accepted the appellant's version as reasonably possibly true regard being had to the fact that the eye witness was, in fact, a single witness on the actual attack of the deceased. According to his instructions the sentence is shockingly harsh and the court below erred in not finding cause to deviate from life imprisonment as the prescribed minimum sentence.

[5] On its part the State supports both the conviction and sentence with Mr Simpson contending, *inter alia,* to the effect that the eye witness' evidence was satisfactory in all material respects insofar as she did not contradict herself and the trial court, correctly, applied caution in dealing with her evidence both as a single witness and an identification witness. In his view the sentence imposed is not shockingly inappropriate and there existed no irregularity or misdirection on the part of the trial court with regard to the sentence imposed.

[6] The factual basis for the conviction is apparent from the evidence of the deceased's cousin sister, one **Dikeledi Moshoaesi** (Dikeledi) and his friend and one of his companions when he met his assailants one **Moahlodi Sefotlheho** (Moahlodi).

6.1 **Dikeledi** testified to, *inter alia,* the effect that in the early hours of the fateful morning she became aware of a group of

between 12 and 20 people in the yard attacking the deceased with pangas. She switched on the kitchen lights and went to her father's bedroom to alert him. She proceeded to the kitchen and drew the curtains whereupon she saw the appellant about 2 metres from the kitchen window. She looked at him for about 2 minutes and was able to see his face. Although it was the first time she saw him, she was able to recognise him by his complexion, height and pimple-like bulge on the right side of his face. Under cross examination she testified that she did not see any weapons in the appellant's possession and she, further, did not see him stab or attack the deceased. The appellant was the last one to walk away from the deceased when she drew the curtains while others immediately ran away. She confirmed that visibility was good as the lights outside the house were one and there was a high mass light (the so called apollo light) some 100 metres from the house. The deceased had sustained many stab wounds all over the body including the head. She identified the appellant at the identification parade.

6.2 **Moahlodi,** on his part, testified to, *inter alia,* the effect that on 7 June 2014 he met the deceased at a tavern in Kutlwanong Odendaalsrus after 8:00 in the morning and they remained in each other's company, enjoying alcohol from one tavern to the other together with other people until about 02:00AM on the 8th June 2014. On their way from a tavern at Block 5 Kutlwanong, while trying to locate a battery for his cellphone which he had thrown to the ground, the deceased alerted

them to a group of people which was approaching them. The appellant, who was at the forefront of the group in question, started calling out at him and the deceased accusing them of being FBI members and insulting them by referring to their mothers' private parts. Visibility was good as they were in close vicinity of the apollo light. He knew the appellant very well as they grew up together playing street soccer and stayed in the same area at Block 7. The group consisted of more than 12 people who had dangerous objects in their possession. They turned and ran away with the group very close on their heels as he could see the shadows of the objects in their possession which were shining. They entered the street leading to the deceased's residence and, when they felt that it was safe to pause and look back, they noticed that the group and the deceased were no longer following them. He could see the appellant's dress code. They then went home to sleep and he later learnt that the deceased was murdered. He was once a member of FBI gang but resigned therefrom between 2007 and 2008 after he was stabbed in the neck.

[7] In our law the factual findings of the trial court, its acceptance of oral evidence and conclusions thereon are presumed to be correct unless and until they are shown to be wrong on adequate grounds. (See **S v Francis** 1991 (1) SA SACR 198 (A)).

[8] When confronted with conflicting versions which cannot be reconciled the court adopts a holistic approach towards the totality

of available evidence and has regard to probabilities. (See **S v Guess** 1976(4) SA 715 (A) at 718E-H).

[9] The application of cautionary rule to the evidence of a single witness requires of the trial court to accept the same only if it is satisfied that the truth has been told, despite its shortcomings or defects or contradictions, after weighing up its merits and demerits. (See **S v Carolus** 208(2) SACR 207 (SCA) at *par* [15]).

[10] In dealing with circumstantial evidence in criminal matters the court reasons by inference and has regard to the two cardinal rules of logic demanding that the inference sought to be drawn be consistent with the facts proved and be the only reasonable inference that can be drawn therefrom. (See **R v Blom** 1939 AD 188).

[11] The test for determining whether or not cause, in the form of substantial circumstances compelling a departure from prescribed minimum sentences, exists is whether or not the cumulative impact of mitigating factors on aggravating factors, inclusive of the interests of society, renders such a sentence unjust. (See **S v Malgas** 2001(1) SACR 469 (SCA)).

[12] It is true that state witnesses did not contradict themselves or each other in material respects and that the trial court applied cautionary rules when dealing the relevant evidence. It is, further, apparent *ex facie* the record that the trial court had regard to probabilities when it, *inter alia*, rejected the appellant's version as false.

[13] There is nothing before us to suggest that the trial court's factual findings and acceptance of the evidence of the two State's witnesses were demonstrably wrong. As correctly found by the court below, the eye witness who was also the deceased's cousin sister did not exaggerate the facts and was honest insofar as she admitted that she did not see any weapons in the appellant's possession and, further, that she did not see him stab the deceased. If she had wanted to incriminate the appellant falsely she had all the opportunity to do so and could have easily said that she saw him stab or chop the deceased.

[14] It is clear from the totality of evidence before the court *a quo* that the two witnesses in question corroborated each other, to a material extent, on the identity of the appellant as one of the deceased's attackers as correctly and effectively found by the trial court. The preceding finding is, in my view, borne out by the fact that, if the appellant, on Moahlodi's evidence, led the group that pursued the deceased-them in the early hours of the fateful morning until they entered the street leading to the deceased's residence and was later, during the same early morning hours, seen among the group attacking him at his residence, then he, by necessary and the only reasonable conclusion flowing from the aforegoing, was either one of the attackers or made common enterprise with the actual perpetrators to murder the deceased. In my judgment the conviction can, therefore, not be faulted at all.

[15] It is true that the powers of the court of appeal are limited when it comes to a sentence. It can only interfere with the same if the

sentencing court did not exercise its discretion properly or at all. (See **S v Pieters** 1987 (3) SA 717 (A)).

[16] There is nothing *ex facie* the record to suggest that the trial court did not exercise its sentencing discretion properly insofar as it considered the appellant's personal circumstances as against the aggravating circumstances, inclusive of the interests of society, and, in the end, found no cause whatsoever to depart from life imprisonment as the prescribed minimum sentence. In our view the court below struck a healthy balance between the triad in question.

[17] We are, therefore, not persuaded by the material serving before the trial court to interfere with the sentence imposed.

ORDER

[18] In the result the appeal is dismissed.

[19] The conviction and sentence are confirmed.

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LJ LEKALE, J

I concur

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JJ MHLAMBI, J

On behalf of appellant:	Mr JD Reyneke Instructed by: Bloemfontein Justice Centre BLOEMFONTEIN
On behalf of respondent:	Mr A Simpson Instructed by: Office of Director of Public Prosecutions Bloemfontein