

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

APPEAL NUMBER: A01/2022

Reportable: NO

Of interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

TSEKO JOHANNES MASETLA

APPELLANT

and

THE STATE

RESPONDENT

HEARD ON: 30 MAY 2022

CORAM: NAIDOO, J et De KOCK AJ,

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 27 SEPTEMBER 2022

- [1] The appellant, who was one of two accused and appeared as accused 2, was convicted on 19 June 2019, in the Welkom Regional Court, on one count of murder, and sentenced to life imprisonment. The appellant approaches this court in terms of his automatic right of appeal, and the appeal lies against both his

conviction and sentence. Adv (Mr) P Mokoena appeared for the appellant and Adv (Mr) M Strauss for the respondent.

[2] The Appellant's grounds of appeal against the conviction and sentence are, in essence, that in respect of the convictions, the court *a quo* erred in finding that:

2.1 There were no improbabilities in the state's case;

2.2 The complainant's version was satisfactory in all material respects and that the court could rely on such evidence;

2.3 the evidence of the complainant, can be criticised in detail only, whereas the evidence was contradictory in nature

2.4 not properly analysing and evaluating the state's evidence and rejecting the version of the appellant as not being reasonably possibly true;

In respect of sentence, the court erred by:

2.5 imposing a sentence that is strikingly inappropriate, excessive and which induces a sense of shock;

2.6 over-emphasising, *inter alia*, the interests of the community and the seriousness of the offences over the personal circumstances of the appellant;

[3] The background to this matter, briefly, is that on the morning of 1 January 2018, Mpho Archibolt Motsekoa (the deceased) and his girlfriend, Dietsekeng Patricia Dikane (Dietsekeng) were at a tavern in Thabong in Welkom, celebrating the New Year. They were enjoying a few drinks when the appellant, accused 1 and another person arrived at the tavern. Accused 1 asked the deceased where the owner of the tavern is, to which the latter replied that he was inside the house. Accused 1 went into the house, while the appellant remained outside. He began insulting the deceased, which seems to have been a follow on from an incident that took place earlier in the

week, when the appellant quarrelled with the deceased. Thereafter the appellant, accused 1 and the other person left the premises. A while later, the deceased and Dietsekeng decided to go to another tavern.

[4] On the way there, they encountered the appellant, accused 1 and the third person again. A confrontation between the deceased and appellant ensued, resulting in them slapping each other. At this stage, accused 1 drew a knife and approached the deceased, who ran away. He was pursued by accused 1 onto a neighbouring property, where accused 1 stabbed the deceased in the chest area. Thereafter the appellant came to the deceased who was lying on the floor, being held by Dietsekeng. He pulled Dietsekeng away from the deceased and stabbed the him twice. The appellant, accused 1 and the other person then left the scene. Dietsekeng, who was the only eye witness and who testified for the state, indicated that the area was well lit, and she was able to see everything that happened. The appellant and accused 1 were well known to her and the deceased.

[5] The version of the appellant and accused 1 was similar to that of the state, agreeing in most respects with the version tendered by Dietsekeng. The point of departure was their participation in the stabbing of the deceased. The appellant and accused 1 alleged that Dietsekeng was so drunk that she could not have observed them. When they arrived at the tavern she was leaning against the deceased in a way that she looked like she had a blackout. Dietsekeng's version is that she only met the deceased after midnight, on her return from greeting her family and the parents of the deceased. She, the deceased and another friend drank two quarts of beer amongst them. She only started drinking after she met the accused in the early hours of 1 January 2018. She testified that she was only moderately intoxicated and was able to see everything that happened during the incident.

[6] An inspection *in loco* was also conducted at the request of the accused 1. The court placed on record a detailed note of the observations of the scene at the inspection *in loco*, and both the appellant and accused 1 agreed with such observations. The court, thereafter, undertook a detailed analysis of the

versions of the state and the appellant. As correctly pointed out by the court *a quo*, the state bears the onus to prove the guilt of an accused beyond reasonable doubt and that the accused person bears no onus to prove his innocence. It was asserted that there were discrepancies in Dietsekeng's evidence in that prior to the inspection *in loco*, she indicated that she entered the neighbouring yard closer to the feet of the deceased, as depicted in the photograph album handed in as an exhibit. After the inspection she changed her version, alleging that she entered that yard from the side closer to the head of the deceased. Much was also made of the position of the lights referred to by the witness and observed during the inspection. Hence, it was argued that her evidence is unreliable and should have been rejected.

[7] It is noteworthy that these aspects were not canvassed with the witness or even raised when the court sought confirmation of its recording of what transpired during the inspection *in loco*. The court, in its evaluation of the evidence, dealt with the aspect of the entrance through which the witness says she entered the yard where the deceased was stabbed. In my view, the court correctly found that it was more a question of the orientation of the witness when viewing the photographs than a discrepancy. Once she viewed the scene during the inspection, she was able to correct her evidence in this regard. With regard to the lighting, the court pointed out that the inspection *in loco* was held at the insistence of accused 1 who was adamant that there was no electric light close to where the deceased was stabbed. The inspection in fact revealed that there was indeed a light where the witness said it was. In any event, the appellant confirmed that there was lighting in that area and that visibility was good. I pause to mention that during oral evidence in court, Mr Mokoena conceded that the only discrepancy that he could find in Dietsekeng's evidence was in respect of whether she approached that deceased from the head or his feet. Mr Mokoena also conceded that court *a quo* had dealt appropriately with this discrepancy.

[8] The task of analysing and evaluating evidence is vested in the trial court. An appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it would have come to a different finding or

conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. This is a principle that is well established in our law.

- [9] In *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: "The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." A similar view was adopted in *S v Pistorius* 2014 (2) SACR 315 (SCA) par 30, which cited, *inter alia* *Dhlumayo* with approval:

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings."

- [6] As indicated earlier, the trial court, in this matter, undertook a comprehensive analysis of the evidence for the state and the appellant. The court compared the evidence of Dietsekeng with that of the appellant and his co-accused and listed the similarities in both versions, which led to the court accepting the version of the state witness as reliable and credible. The court also correctly rejected the appellant's version that the state witness was so drunk that she had passed out.

[7] I am unable to fault the reasoning of the magistrate in concluding that the evidence of the state witness was reliable and credible, and that the version of the appellant and his co-accused was so improbable that it could be rejected as not being reasonably possibly true. The concessions made by Mr Mokoena, which I have mentioned earlier, are further fortification for the correctness of the magistrate's reasoning. In view of what I have said, the appellant's grounds of appeal, which I have listed above, cannot be sustained.

[8] With regard to sentence, Mr Mokoena argued that his instructions were that the court should have taken into account that liquor might have played a part in the commission of the offence, and that twelve years' imprisonment would have been an appropriate sentence. The state argued that the appellant had a previous conviction and that court's reasoning in respect of sentence was correct, rendering the sentence of fifteen years' imprisonment appropriate. The sentence was not shockingly harsh or inappropriate. I point out that the court did in fact consider that the accused as well as the Dietsekeng and the deceased had consumed alcohol while celebrating the New Year, but that it was satisfied that alcohol did not play a part in the commission of this offence.

[9] With regard to sentence, it is well established that sentencing is a matter which is within the discretion of the trial court. It is trite that an appeal court will only interfere with a sentence if the trial court misdirected itself in imposing sentence or its discretion is vitiated by irregularity, or if the sentence is unreasonable, unjust or disproportionate to the offence. This trite principle has been well settled in our law, and was succinctly enunciated approximately 47 years ago in the case of *S v Rabie 1975(4) 855 (A) at 857*, where Holmes JA said:

“1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

(a) should be guided by the principle that punishment is
"pre-eminently a matter for the discretion of the trial Court";
and

(b) should be careful not to erode such discretion: hence the further principle

that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

This principle was subsequently re-iterated in the much-quoted case of *S v Malgas 2001(1) SACR, 469 (SCA) at, 478 para12*, where the court remarked that:

"...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh...".

[11] In this matter, the personal circumstances of the appellant placed on record are that he was a 33 year old unmarried man who was casually employed, earning between R1000.00 and R1500.00 per month. He has two minor children from two different women. He has two previous convictions for assault, and his legal representative conceded that this was indicative of violent tendencies on his part.

[12] The trial court's comprehensive analysis of the various factors, as well as the law, relevant to sentencing in this matter cannot be faulted, and I am unable to find any misdirection in the imposition of the sentence in this matter. The seriousness of the offence in this matter is deserving of harsh sanction, and I am of the view that the sentence of fifteen years' imprisonment is neither shocking nor inappropriate.

[13] In the circumstances, the following orders are made:

13.1 The appeal against the conviction and sentence is dismissed.

13.2 The conviction and sentence imposed on the appellant are confirmed.

NAIDOO, J

I concur.

D. DE KOK, AJ

On behalf of appellant: Adv P Mokoena
Instructed by: Legal Aid South Africa
Bloemfontein Local Office

On behalf of respondent: Adv. M Strauss
Instructed by: The Office of the DPP
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