IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG **CASE NO: A246/2020**

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

17/04/14. .....

SIPHATHENGANE NCUBE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MONAMA, J

[1] This is a full court appeal, with leave of the trial court, against both the conviction and sentence. On 24 May 2010 the appellant was convicted by a single Judge on six counts. These are murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Amendment Act) [**Count 1**]; attempted robbery with aggravating circumstances [**Count 2**]; the unlawful possession of firearm [C**ount 3**]; unlawful possession of ammunition [**Count 4**]; attempted murder read with the provisions of Section 51(1) of amendment Act [**Count 5**]; and unlawful possession of firearm [**Count 6**].

[2] The appellant was sentenced on 25 May 2010. Count 1 attracted a prescribed sentence of life imprisonment in terms of Section 51(1) of the Amendment Act. The court is

entitled to deviate from that sentence if it found to exist, substantial and compelling circumstances. The trial court found such circumstances, and sentenced the appellant to **22 years'** imprisonment. On count 2, (attempted robbery) he was sentenced to **18 years** imprisonment, on count 3 (possession of firearm) he was sentenced to **3 years** imprisonment, on the count 4 (unlawful possession of ammunition) he was sentenced to **6 months** imprisonment, on count 5 (attempted murder) he was sentenced to **12 years** imprisonment; and on count 6 (unlawful possession of firearm) he was sentenced to **3 years** imprisonment. The sentence in counts 2, 3, 4 were ordered to run concurrently with the sentence of 22 years imposed in count 1. Finally, the trial court ordered half of 12 years imposed in respect of count 5 to run concurrently with the sentence of 22 years imposed in count 1. He was sentenced to an effective period of 31 years imprisonment.

[3] The appeal on the conviction is based on two grounds – the sufficiency of the identification evidence and the admissibility of a statement made to a police officer. As regards the sentence the appellant contends that the sentence imposed is shockingly inappropriate.

[4] The facts which led to the appellant's conviction may be summarised as follows. On 16 September 2007 there was an attempted robbery in the centre of Johannesburg. It was carried out by an armed group. The deceased in count 1, Mr Ismael Patel was shot dead inside his shop during the attempted robbery. The robbers then fled. During their escape, three police officers on foot patrol happened to be in the vicinity. A shootout with the police ensued during which Constable Passmore Morgan Molefe was shot and injured. On 11 February 2008 Inspector Martin Mashao, Captains Timothy Mngomezulu and Lekgowa Sydney Magampa arrested the appellant in Hillbrow, Johannesburg. During the arrest a firearm without serial numbers was recovered. After the arrest he was interviewed and allegedly indicated that he wanted to make a statement. The necessary arrangements were made and a statement was taken by Lieutenant Colonel Moses Sebastian Khumalo. Eventually, he was identified by Constables Molefe and Mabe at the identification parade on 22 January 2009. During the trial the admissibility of the statement referred to above, was challenged

and a trial within a trial was held. The trial court found that the statement was admissible as a confession.

[5] During the trial the State led evidence of seven witnesses. The appellant testified in his defence and did not call any witnesses. In addition thereto the court exercised its powers in terms of Section 186 of the Criminal Procedure Act as amended and recalled two witnesses to clarify certain issues.

[6] Constable Molefe and his colleague Constable Mabe testified that on 16 September 2007 they were in the center of Johannesburg. It was during the day. They heard a sound of gunshot. They became alert and observed the appellant and others running towards them. The appellant and his companions were armed, and shot at them. Constable Molefe was shot in the leg. They never attended any court proceeding in the magistrate's court where the appellant appeared. They only attended an identity parade and identified the appellant.

[7] As consequence of the alleged assault in the procurement of the statement a trial within a trial was held. Mngomezulu, Khumalo and Masithela testified for the State and the appellant for himself.[1] In essence these witnesses denied assault and the allegations of coercion. The appellant testified that he was assaulted by various unknown and known police officers. The assault also included electrocution. The court evaluated the evidence and found that the statement was indeed a confession and rejected the allegations of assault and coercion. The evaluation was thorough. I am satisfied that there is no misdirection. The contents of the confession put the appellant on the scene. He was in possession of a loaded hand gun and they robbed the patrons of the hair salon, during which they also shot Mr Patel.

[1] Pages 94 – 176 of the Record.

[8] I now turn to the main trial. In this regard the court relied on the testimony of Constables Molefe and Mabe.[2] These two officers were eyewitnesses to the shooting. The evidence of Captains Magampa, Khumalo, Mngomezulu and Inspector Samuel Masithela concerned the arrest of the appellant, the interview, the taking down of the confession and the holding of the identification parade. The appellant did not challenge the outcomes of the identification parade nor it process. Constables Molefe and Mabe were recalled by the trial court.[3]

[9] I have already summarized the evidence of the eye witnesses to the shooting. The appellant denies that he was part of the robbers. He denies the knowledge of the death of Mr Patel. He challenged the evidence of Molefe and Mabe regarding the identification. These witnesses gave reasons why they identified the appellant at the identification parade even though it was held approximately 16 month after the shooting. It is so that they did not give any specific feature of the appellant.

[10] The approach regarding the evidence of identity is well settled. It is trite that the court must caution itself in dealing with such evidence. In **S v Mthetwa**[4] it was stated that:

> *"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must be tested"*

Honesty does not automatically translate into reliability because the accuracy of a witness depends on various factors. These include the observation , recollection and narration. Sometime the magnitude of the event play a significant part in the process of identification . The event may be such as to leave within the memory of the witness an indelible mark which cannot be tested by mathematical equation. However, it is paramount that the evidence of identification is approached with caution.

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[2] See the Summary in Paragraph 6 (above)
[3] Section 186 of Act 51 of 1977, as amended. "the Act"
[4] 1972 (3) SA 766 (A).at 768.

[11] The trial court was aware of the human fallibility. It applied the guidelines rigorously. The evidence of both eye-witnesses was assessed and the reliability of their observations at the identification parade corroborated their identification. It took them less than 30 seconds to point the appellant. The trial court also invoked its power in terms of Section 186 of the Criminal Procedure Act, 51 of 1997, as amended. It recalled Constable Molefe to get more evidence of how he was able to identify the appellant. After careful assessment of his evidence of how he remembered the appellant he was found credible. He gave answers as to why he identified the appellant after a lapse of time. His answers were satisfactory and the conclusion of the court is without misdirection. The appellant's contention about proof of the identity is without merit and stand to be dismissed.

[12] Constables Mabe and Molefe corroborated each other about the shooting and to some extent about the identification. In this regard they took about 20 – 30 seconds to point the appellant at the identification parade whom they had last seen some approximately 16 months ago before the parade. These witnesses testified how their attention was drawn and how they were confronted by the robbers. They did not witness how Mr Patel was shot and killed. Therefore, on that aspect, their evidence is circumstantial. But as regard the attempted murder they tendered direct evidence. In my view, the trial court approached their evidence properly and there is no misdirection in that regard. Therefore the conviction on the basis of *dolus eventualis* is well founded.

[13] In its judgment the trial court criticised certain aspect of Captain Mngomezulu's conduct during the process of the handling of the gun. This is a gun which nwas found in the flat of the appellant. This gun is subject matter of count 6. Notwithstanding the said criticism, the trial court was correct to find that there is no reason to reject the evidence[5]. This criticism was not material. In any event, not every criticism renders evidence inadmissible. The trial court was always conscious that the appellant had to receive a fair trial.

[5] S v Mkhohle 1990(1) SACR 96 (A) at 98F

[14] In my view the conviction is proper on all counts.

[15] I now turn to the appeal on sentence. It is trite that with regard to sentence, the appeal court may only interfere with the imposed sentence on limited grounds. It will only interfere where there is material misdirection or where the sentence is vitiated by irregularity or is disturbingly inappropriate (**S v Rabie** 1975 (4) SA 855 (A) at 857 D –F). First, the trial court found the existence of the substantial and compelling circumstances which enabled it to deviate from the prescribed sentences in terms of the Amendment Act as regards the murder of Mr Patel. The court considered the personal circumstances and mitigatory factors. The appellant is a first offender and had responsibilities. He was employed and supported his mother and two children. By the same token it also assessed the aggravating circumstances. The murder of Mr Patel was both heinous and brutal. The shooting took place during the day in a busy and crowded street. The gravity of the offences that the accused have been convicted of cannot be over emphasised. The illegal guns are used daily to commit serious crimes. The culprits must be appropriately punished. The society demands protection from our courts. The sentence of 22 years is, in my view appropriate and so is the sentence in respect of counts 3 and 4.

[16] However, during the sentencing process the trial court materially misdirected. Firstly, the offences in Counts 2 (attempted robbery with aggravating circumstances) and 5 (attempted murder) falls within Part 4 of Schedule 2 of the Amendment Act. This Act prescribes 5 years' imprisonment in respect of a first offender, of which the appellant is. The sentences of 18 and 12 years respectively are not sanctioned, and could therefore not competently be imposed.

[17] Where an accused person is convicted of more than one offence, it is salutary practise for a sentencing court to consider the cumulative effect of the respective sentences. In this regard, an order that the sentences should run concurrently may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment (**S v Whitehead** 1970 (4) SA 424 (A)).

[18] An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent' (**S v Mokela** 2012 (1) SACR 431 (SCA) paragraph [11]. Put differently, where there is a close link between offences, and where the element of one are closely bound up with the elements of another, the concurrence of sentences in particular should be considered (**S v Mate** 2000 (1) SACR 552 (T).

[19] In the present case, there was indeed an inextricable link between the murder and attempted murder in terms of the locality, time and the protagonists. There was also substantial overlap in the overall intent in respect of both crime of rape. In my view, the failure of the trial court to take these factors into consideration resulted in the cumulative effect of sentence being disturbingly inappropriate. These factors justified an order of occurrence in the sentences. In the light of this, we are at large to interfere with the sentence and impose what we consider to be an appropriate sentence in the circumstances.

[20] As regards count 6 it was committed under different circumstances, and is unrelated to events of September 2007. Accordingly, I find no misdirection justifying interference. This court is only entitled to interfere in respect of count 2 and 5. The trial court has already ordered a portion to run concurrently in respect of count 5. In my view, the sentence of five years in respect of each count is more appropriate. However, the sentence in count 5 should be ordered to run concurrently with the sentence in count 1.The sentence in count 1 is, in my view, sufficient punishment which fits the crimes, the personal circumstances of the appellant and the interest of society.

[21] In the circumstances I make the following order: The appeal against the sentence is upheld to the extent reflected in this order: The sentence of the trial court is set aside and the following is substituted for it:

'The accused is sentence as follows:

21.1 Count 1- 22 years imprisonment;

21.2 Count 2 – 5 years imprisonment;

21.3 Count 3- 3 years imprisonment;

21.4 Count4 – 6 months imprisonment;

21.5 Count 5- 5 years imprisonment

21.6 Count 6 – 3 years imprisonment,

21.7 The sentence imposed in counts 2, 3, 4 and 5 are ordered to run concurrently with the sentence in count 1;

21.8 The effective period of imprisonment is 25 years; and

21.9 The sentences are antedated to 25 May 2010

[22] In terms of Section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentences are antedated to 25 May 2010, being the date on which the appellant was sentenced.

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RE MONAMA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur

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T M MAKGOKA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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T D VILAKAZI

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Appellant:	Adv. E Tlake
Instructed by:	Justice Center, Johannesburg
Counsel for the State:	Adv. L Ngodwana
Instructed by:	Director of Public Prosecutions, Johannesburg
Date of hearing:	17 October 2013
Date of judgment:	28 March 2014