IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR NO: AR 74/14

In the matter between:

MTHEMBENI RICHARD NCOBELA

and

THE STATE

Order:

'The appeal is dismissed'

APPEAL JUDGMENT

K PILLAY J (Vahed et Poyo Dlwati JJ concurring):

[1] On 22 December 2010, three men, Ncobela (appellant), Zulu and Bunting, turned an evening of enjoyment for 3 friends, *en route* home from a musical concert, into a night of tragedy, pain and terror.

[2] As they stood waiting for a lift, they were accosted by the appellant and the aforesaid Zulu and Bunting who stabbed them and took a cell phone, cash

and a pair of sandals. Zulu and Bunting were accused 2 and 3 respectively in the Court *a quo*. The appellant was accused 1. Charges were withdrawn against Zulu *in absentia* as he had died.

[3] Two of the friends, Nkosikhona and Mthandeni, survived the attack, however the third, Sabelo (deceased), succumbed to his injuries – a stab wound to the neck.

[4] According to Nkosikhona and Mthandeni, while they stood at a hiking spot in Margaret Road, with the deceased, the appellant and his two companions, the aforesaid Zulu and Bunting, approached. They were each grabbed by one of the three. The one who grabbed Nkosikhona demanded a cell phone and then stabbed him in the chest area, twice. He fought back, freed himself and ran to a nearby garage to seek help whilst his friends were being similarly attacked.

[5] His cell phone was removed from his pocket. He identified Exhibit 1 as the phone in question by the fact that his name was inscribed on it and that it contained his photographs. He was admitted to hospital for one night. Although he identified the appellant as his assailant, the identification was properly rejected by the trial court.

[6] The trial court however accepted the identification evidence of Mthandeni who corroborated Nkosikhona's version of the events. He was able to identify two of the assailants, namely the erstwhile accused 3 and one Sphamandla. He described the third assailant as being short and dark, which description, it was not disputed, fitted the appellant.

[7] A further witness, Mzikayise Hlongwa, testified that he saw the appellant, Zulu and Bunting walk towards the hiking spot on the night in question. A few minutes thereafter he saw the two witnesses run towards the garage with stab wounds. Later at about 1 am he went to the appellant's home where he found the appellant drinking with Sphamandla and others. An incident occurred where he was allegedly stabbed by the erstwhile accused 3

who was later acquitted of the charge. He did not see who stabbed the complainant.

[8] It was also common cause that Exhibit 1 was recovered from one Mnyamezeli Nzambe who acquired it from Mhleli Zulu. Zulu confirmed this evidence and averred that on 24 December 2010 he was asked to sell this phone by Sphamandla, which he did, for R400.00. He was given R50.00 for his effort.

[9] The appellant testified that he had attended the same musical event as the complainants but had left at 9 pm. He went home after escorting his girlfriend to her transport. He denied any involvement in the matter.

[10] The trial court critically assessed the evidence in its entirety and rejected the appellant's denial. The appellant and Bunting were convicted of the following offences:

Count 1:	Murder
Count 2:	Attempted Murder
Count 3:	Attempted Murder
Count 4:	Robbery with Aggravating Circumstances.

The following sentences were imposed on appellant:

> 'On Count 1 Accused No 1 is sentenced to Imprisonment for Life. On Counts 2 and 3 the accused is sentenced to Five (5) years imprisonment on each count. On Count 4 the accused is sentenced to Ten (10) years imprisonment. The sentences on Counts 2, 3 and 4 will run concurrently with the sentence on Count 1.'

The reasons furnished for the conviction amply support the verdict.

[11] With leave of the court *a quo*, the appellant appeals against the sentence of life imprisonment. He impugns the sentence on the basis that there were substantial and compelling circumstances justifying the imposition of a lesser sentence, that the sentence was excessive and disproportionate to

the crime, the criminal and the legitimate needs of society. There appears to be no challenge to the sentences imposed in respect of Counts 2, 3 and 4.

[12] It is well established that the discretion of a trial Court with regard to the imposition of sentence can only be interfered with on limited grounds. Thus, if the sentenced imposed is vitiated by irregularity, is startlingly inappropriate or induces a shock, interference would be warranted. This was crisply summed up in *S v Bogaards 2013(1) SACR 1 CC para 41* as follows:

> 'It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[13] In this case the trial court's assessment of sentence was thorough. Counsel for the appellant was hard pressed to point to any misdirection. His only argument was that the sentence imposed on Count 1 was unduly harsh. The learned trial Judge clearly balanced the proportionality of the crime to the offender and the interests of society before finding that life imprisonment was warranted. The question which thus arises is whether the sentence on Count 1 is unduly harsh.

[14] The acts of violence were perpetrated with no justifiable motivation. The extreme violence used was not warranted. As a result of the appellant and his cohorts' callous disregard for human life, an intelligent young man, as it emerges from the pre-sentence report, lost his life. The value of a cell phone was regarded as being higher than that of life and limb.

[15] One of the aggravating factors, as the trial court found, was the absence of remorse. In such instances it is well-known that rehabilitation would be difficult. There were no facts placed before the trial Court pointing to any reduction in appellant's moral blameworthiness.

[16] In addition, the appellant does not have an unblemished criminal record. His previous convictions which list housebreaking with intent to steal

and theft and robbery indicate that the previous sentences imposed had no salutary effect on him.

[17] I am therefore satisfied that the trial court's imposition of life imprisonment was manifestly correct.

[18] The appeal is dismissed.

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K Pillay J

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Vahed J

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Poyo Dlwati J

Appearances

For the Appellant:	Irshaad Khan c/o PMB Justice centre 183 Church Street Pietermaritzburg 3201
For the Respondent:	The Director of Public Prosecutions 3rd Floor High Court Building 301 Church Street Pietermaritzburg 3201
Date of Hearing:	26 January 2015
Date of Judgment:	2 February 2015