Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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: A147/2021

In the matter between:

TEBOGO MODISAESI Appellant

and

THE STATE Respondent

CORAM: LOUBSER, J *et* MPAMA, AJ

HEARD ON: 25 APRIL 2022

DELIVERED ON: 05 MAY 2022

JUDGMENT BY: LOUBSER, J

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[1] The Appellant aged 42 years, was found guilty in the Regional Court of Bloemfontein on a charge of murder, on a charge of the illegal possession of a semi-automatic pistol and on a charge of attempted murder. On the murder charge he was sentenced to life imprisonment, on the fire-arm charge he was sentenced to 15 years imprisonment, and on the charge of attempted murder also to 15 years imprisonment. The sentences were ordered to run concurrently.

[2] The Appellant now appeals against both his convictions and the sentences imposed. As for the convictions, he contends that there was no evidence linking him to the crimes. As far as the sentences are concerned, he submits that the life imprisonment imposed is too harsh.

[3] A reading of the record of proceedings in the Court *a quo* shows that the State called eye-witnesses in respect of each of the charges to testify. All of them gave direct evidence implicating the Appellant. In cross-examining those witnesses, the legal representative of the Appellant repeatedly stated that the accused will testify that it was not him, or that he will deny their version of the events when he testifies. However, this never happened. The Appellant never testified in his own defence, and his case was closed without calling any witnesses whatsoever.

[4] The evidence relating to the attempted murder, can be summarized as follows: The complainant B C was in a love relationship with the Appellant before. The relationship ended when she obtained a protection order against him. On the evening of 19 March 2016 she was at her parental home when the Appellant arrived in his blue Toyota Corolla. He called her outside, where an argument ensued between the two of them. The Appellant then drew a knife and stabbed her 12 times in the head and the neck, saying he was killing her. After the stabbing she spent some two months in the hospital. Her spine was injured in the attack, and she is limping since then. The J88 form handed in by the State confirmed the 12 stab wounds.

[5] The evidence of this complainant was supported by the testimony of another witness who was inside the house at the time. This witness confirmed that the complainant was called outside by the Appellant, and that he stabbed her a number of times with a knife.

[6] R R was called by the State as the main witness on the murder charge. The deceased, Nomthozanele Thobeka, was her friend. She testified that on 22 January 2017 she and the deceased went to visit the Biza tavern shortly

before midnight. After a while, the Appellant also arrived at the tavern in his blue Toyota Corolla. The witness knew him well since he was in a love relationship with the deceased before. When he arrived, one Palesa came running into the tavern to inform the deceased of the Applicant's arrival. The deceased then went to hide herself in one of the toilets of the premises. The Appellant entered the tavern wearing a green and white soccer T-shirt and he enquired where the deceased was. When he was told that she was not there, he went to the toilet to look for her.

[7] Later on the Appellant went outside again. Soon thereafter the deceased also went outside to take a call on her phone, and then she came back running. The Appellant was chasing her, and she fell down inside the tavern. The witness saw her begging the Appellant not to shoot her. The witness testified that the Appellant was holding a fire-arm in his hand, and he then shot the deceased and ran outside. The witness was some two metres away when she witnessed these events. In cross-examination, it was stated on the Appellant's behalf that he indeed went to the Biza tavern that night, but that he only bought two beers which he then consumed outside in his car.

[8] The abovementioned Palesa also testified. She knew both the deceased and the Appellant well. She testified that she was outside the tavern in a car when she suddenly heard a gunshot inside the tavern. When she looked up, she saw the Appellant leaving the tavern amongst other people.

[9] Sergeant Sechaba Mmatli was the last witness to testify for the State. He testified that he found the Appellant at his house some 3 days after the shooting incident at the Biza tavern. He interrogated the Appellant about his involvement in the shooting, whereafter the Appellant took him to the blue Corolla which was parked in the yard. Inside the vehicle the witness found a green and white t-shirt. He testified that the Appellant then told them to open the bonnet of the vehicle, and he directed the witness to open the air-intake attachment to the carburettor. The witness found a Baretta semi-automatic pistol concealed inside the air-intake, he testified. The pistol was sent for

ballistic investigation afterwards, together with a spent cartridge that was found on the scene of the shooting inside the Biza tavern. In cross-examination it was put to the witness that the Appellant was not in possession of the pistol when the police found it in his car.

[10] Before the State closed its case, the defence admitted the contents of the post mortem and ballistic reports in terms of Section 220 of the Criminal Procedure Act. The post mortem report indicated that the deceased had died of a gunshot wound of the trunk. The ballistic report indicated that the cartridge case mentioned above was fired in the pistol found by the police in the engine compartment of the Appellant's car.

[11] Upon a proper evaluation of the evidence presented by the State, it speaks for itself that a proper case has been established concerning all three the counts by means of direct and reliable evidence by eye-witnesses. The contention by the Appellant that there was no evidence linking him to the crimes, is therefore without any foundation, and must be rejected. His stance in this respect is further exacerbated by the fact that he chose not to testify and to remain silent in the face of all the damning evidence presented against him.

[12] It has already become trite law that, notwithstanding the fact that an accused person is under no obligation to testify, it does not mean that there are no consequences attaching to a decision to remain silent during the trial. "If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused."[1]

[13] It follows that the State has succeeded in proving the guilt of the accused beyond a reasonable doubt, and that the Court *a quo* was correct in convicting the Appellant on all three the counts. It is also clear from the evidence presented that the killing of the deceased was a planned or premeditated act by the Appellant.

[1] **S v Boesak 2001(1) SA 912 (CC) at 923 E – F. See also the more recent case of Hohne v Superstore (Pty) Ltd [2017] 1 All SA 681 (SCA) at par 49**

[14] Section 51(1) of the Criminal Law Amendment Act,[2] provides that a Regional Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life. Part 1 of Schedule 2 refers, inter alia, to Murder when it was planned or premeditated. In terms of Section 51(3) of the Act such a Court may impose a lesser sentence than life imprisonment if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[15] As mentioned earlier, the appeal against sentence is mainly directed against the life imprisonment. Before us it was contended that such imprisonment was too harsh in view of the fact that the Appellant was the primary caregiver to his children, and the fact that he had spent some two years in prison awaiting trial. The Court *a quo* should therefore have found the existence of substantial and compelling circumstances, so the argument went,

[16] As for the argument relating to the children of the Appellant, it is appropriate to quote the following remarks by the Supreme Court of Appeal in Vilakazi[3] at para 58: "In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves, largely immaterial to what that period should be...."

[17] The fact that the Appellant was incarcerated for some two years awaiting trial, also does not assist the Appellant in his contention that the Court *a quo* should have found substantial and compelling circumstances. Firstly, it is manifestly clear from a reading of the record that the delay in the proceedings was mainly, if not exclusively, caused by the Appellant himself. Secondly, there seem to be no rule of thumb in our law in determining to what extent the period awaiting trial should be a factor in assessing an appropriate sentence.[4]

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[2] **Act 105 of 1997**
[3] **2009(1) SACR 552 (SCA)**
[4] **See S v Radebe 2013(2) SACR 165 (SCA) at para 13**

[18] It then follows that the finding of the Court a quo to the effect that there were no substantial and compelling circumstances, cannot be faulted on appeal. In the premises, the following order is made:

1. The appeal against conviction and sentence is dismissed.

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P. J. LOUBSER, J

I concur:

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L. MPAMA, AJ

On behalf of Appellant:	Mr. J. D. Reyneke
Instructed by:	Legal Aid South Africa Bloemfontein
On behalf of respondent:	Adv. M Lencoe
Instructed by:	Office of the DPP Bloemfontein

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