IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **A157/2021**

In the matter between:

THAMSANQA PONGOMA Appellant

and

THE STATE Respondent

CORAM: DANISO, J *et* BOONZAAIER, AJ

HEARD ON: 06 MARCH 2023

SUPPLEMENTARY HEADS OF ARGUMENT DELIVERED ON 27 MARCH AND 19 APRIL 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 12 June 2023 at 10H00.

[1] On 3 December 2015, the body of a two (2) year old little boy named B was found discarded in the street some 3 to 5 minutes walking distance from his home. B died of multiple tramline and stab wounds.

[2] Following the recovering of B's body his biological father, the appellant was charged with his murder (count 1) including other four counts namely: assault with intent to cause grievous bodily harm on his other son, ten (10) year old K (count 2); assault on his partner who is also the mother of the children, Ms Kebuileng Thlakudi (count 3); assault on his neighbour Ms Dikeledi Kgalebane (count 4); and child abuse relating to B (count 5). On 7 November 2016, count 5 was withdrawn. The appellant pleaded not guilty to all the remaining charges. He was subsequently convicted on the murder charge and acquitted on the rest of the charges. The court *a quo* found no substantial and compelling circumstances warranting a deviation from the minimum sentence prescribed in terms of the Criminal Law Amendment Act 105 of 1997 (the CLAA) and sentenced him to fifteen (15) years imprisonment.

[3] This is an appeal against conviction and sentence and it is by leave of the court *a quo.* The appeal is opposed by the State.

[4] The principles applicable in appeals where the findings of a trial court are attacked, are now established: the appeal court will not interfere with or tamper with a trial court's judgment or decision regarding either conviction or sentence unless, it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law.[1]

[5] The record is incomplete in that the evidence of the third State witness Mr Itumeleng and that of the accused is missing despite the applicants' effort to trace the said record. However, the appellant is of the view that the available record is sufficient for the purpose of the hearing of the appeal.

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[1] *R v Dhlumayo & Another* **1948 (2) SA 677** (A). The principle was also restated in *AM & Another v MEC Health, Western Cape* **2021(3) SA 337** (SCA) at paragraph 8.

[6] The appellant was convicted on circumstantial evidence as the identity of the perpetrator of this heinous and gruesome crime was not known. The appellant was implicated by the fact that he was the last person who was with B. The State's case rested on evidence of the appellant's mother Ms Elizabeth Nomathemba Pongoma, Ms Thlakudi, Mr Itumeleng (Ms Thlakudi's cousin) and Dr John Mohai who conducted the post-mortem.

[7] The summary of the State's case is that: on the morning of 2 December 2015 Ms Thlakudi left the home she shared with the appellant in Botshabelo to go to work leaving B in the care of the appellant who was unemployed at that time. The appellant took B to his parental home where he left him with his (appellant's) mother and went to town with his sister. During the day at about 12h00 he returned from town and spent the afternoon at his parent's house with B. He left again to visit friends when he returned later in the evening at around 20h00 asking about the whereabouts of Ms Thlakudi. Upon being told that she was not there, he took B and left.

[8] Ms Thlakudi called the appellant at around 19h00 to find out where he was with B. The appellant explained that he was changing B's nappy then he will be coming home. About an hour later at 20h30 Ms Thlakudi was in bed when the appellant called and asked her to meet him half way. She refused which made the appellant to shout at her. She then asked her cousin Itumeleng to rather go and meet the appellant and to also call the police as she knew that there was bound to be an argument when the appellant arrive as she could tell that he had been drinking and she wanted to avoid the quarrel.

[9] Ms Thlakudi took their older child (Kagiso) and her cousin Lindiwe and sought refuge at the neighbours. They went to Lucas and Dikeledi's house where Ms Thlakudi went to hide in their bedroom. Whilst hiding the appellant arrived shouting and demanding to know where she was. She did not come out. She also told K not to tell the appellant where she was. She could also hear B crying. The appellant then left with the child and shortly thereafter there was a commotion and K told her that the police had arrived.

[10] The police took Ms Thlakudi to the appellant's parental home in order to look for the appellant and B. They did not find them. After they left, the appellant arrived. He was alone this time and when his mother asked him where was B his response was that he was home. His mother told him that Ms Thlakudi came looking for B accompanied by the police, he then left his mother's house saying the was going to the police station to find why the police were looking for him. He returned later and spent the night at his mother's house.

[11] On the next morning Ms Thlakudi was in a taxi on her way to seek a protection order against the appellant when she heard the other commuters talking about a baby that had been found murdered. She went to the scene and that's when she discovered B's body.

[12] It was the State's case that the appellant was responsible for killing B because: he was the last person who was with him; he was clearly angry at B's mother for refusing his request to meet halfway; Ms Thlakudi's evidence that the appellant had a history of being aggressive when he was drunk and when he did not get his away was undisputed. It was the State's case that these are also the reasons why Ms Thlakudi not only did she refuse to meet him in the street at night, she also sought help from his cousin to call the police on her behalf and also sought refuge at the neighbours. In the morning when the appellant was still not back with B she decided to go and obtain a protection order against him. The court *a quo* agreed.

[13] The appellant is aggrieved by the court *a quo*'s reliance on the State's evidence in its conclusion that his guilt was proven beyond a reasonable doubt. The appellant also criticizes the court *a* quo's finding that there were no substantial and compelling circumstances warranting a deviation from the prescribed sentence.

[14] The appellant's notice of appeal and the heads of argument raise at least fifteen (15) grounds of appeal. To avoid prolixity, I will not to repeat them

here verbatim except to highlight that the appellant's gripe is essentially that due to the material contradictions in the evidence tendered by the State witnesses the court *a quo* should not relied on that evidence and should have rather accepted the appellant's version as the truth and acquitted him on the murder charge.

[15] The appellant points out to the discrepancies between the statement made by Ms Thlakudi to the police regarding the incidents. In her statement she detailed how the appellant assaulted her, their other son K and their neighbour Ms Dikeledi whereas in her testimony no such allegations were proffered. It is the appellant's case that these contradictions are material therefore cast doubt on the guilt of the appellant.

[16] As correctly pointed out by the appellant this evidence relates to the other charges the appellant was charged with, assault with intent to cause grievous bodily harm and two counts of assault (counts 2 to 4 respectively). The appellant was acquitted on those charges correctly so, as the State conceded that based on the evidence proffered no case was made out to sustain the allegations pertaining to those charges.

[17] It is important to note that at no stage did Ms Thlakudi identify the appellant as the perpetrator of this crime. She was specifically asked in her direct evidence whether she knew who killed her son and she said no, she even went further and testified about how the appellant loved their son. Her version that the last time she heard the sounds of her B he was with the appellant was undisputed. Based on the reasons I fail to understand how the acceptance of this witness' evidence by the court *a quo* prejudiced the appellant in the conduct of his defence.

[18] The appellant's criticism of the court *a quo's* acceptance of the State's version despite the fact that the State did not disprove his version that he left B in the care of Kgomotso, is in my view unsound. Much as there is no obligation on

an accused person to prove his defence, where he provides a version of his defence he would be entitled to an acquittal if his version is reasonably possibly true in the light of the totality of the evidence.[2] All evidence should be tested or corroborated.

[19] In rejecting the appellant's version the court *a quo* took into account that the appellant presented conflicting versions regarding where he left B and concluded that his version was false beyond a reasonable doubt. The appellant had initially told his own mother that B was at home. In his plea explanation as contemplated in section 115 of the Criminal Procedure Act (The Act) he had the opportunity of explaining that he left B with Kgomotso he did not instead, he merely denied killing him. It does not end there, the version that was put to Ms Thlakudi was that B was left outside with Kgomotso and other tenants, the other version was that he did not leave him with Kgomotso he left him outside as Kgomotso was also there. I am in agreement with the trial court's conclusions, the State is only expected to verify a sound and distinct defence and not to embark on a wild goose chase.

[20] On the accepted State's version, it is indisputable that immediately before B met his untimely death the appellant was drunk, angry and shouting at the complainant because she refused to comply with his request to meet him halfway. He was also livid that when he finally arrived home he was told she was not there and he had a history of acting out in that manner whenever he had been drinking and did not get his way. It is equally undisputed that due to the tender age of B the appellant had never left him unattended let alone at night.

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[2] *R v Difford* **1937 AD 37**0 at 373 and 383; *S v Van der Meyden 1999 (1***) SACR 447** *(W); S v Combrink* **2012 (1)**

SACR 93 (SCA).

[21] It is also quiet peculiar that despite his admission that his mother did tell him that Ms Thlakudi and the police were looking for B, except to go to the police station to find out the reason why the police were looking for him he did not call Ms Thlakudi to inform her about B's whereabouts. He did not even go home that night he slept at his mother's house. This behaviour also puts paid to his defence that he did not leave home with B. Based on these reasons, I am satisfied that the appellant was correctly convicted of the murder of his son.

[22] As regards sentence, Section 51(2) of the *CLAA* prescribes a minimum sentence of fifteen years' imprisonment for murder unless there are substantial and compelling circumstances warranting a deviation from the prescribed sentence.

[23] The trial court is criticized for not warning the appellant about the applicability of the provisions of section 51 (2) of the CLAA at the commencement of the trial. It is the appellant's case that he only found out at the sentencing stage when his attorney addressed the court in mitigation that section 51(2) was applicable. It is argued that the appellant was as a result prejudiced in the conduct of his defence and this constitutes an infringement of constitutional rights to a fair trial. The appellant also complains that at the time of sentencing the trial court was not in possession of a pre-sentencing report to have properly assessed his situation.

[24] The appellant's contentions have no merit. The charge sheet clearly States that the appellant was charged with "...*the crime of MURDER (read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997)*" therefore, it is thus disingenuous for the appellant to aver that he only discovered at the sentencing stage that section 51(2) was applicable. An accused pleads to a charge not a sentencing legislation in that, the provisions

of the CLAA are relevant to sentence not to a defence to the charge.[3] The sentencing court has a discretion to exercise whether to call for a pre-sentence report or not. It is desirable for a pre-sentencing report to be called for where a court feels that not enough information has been proffered to enable it to exercise its sentencing discretion properly and reasonably. In this matter the appellant testified in mitigation and it is clear from the record of the proceedings[4] that the learned magistrate when sentencing the appellant he also took into account the appellant's testimony in that regard.

[25] I am also not persuaded that the sentence imposed by the court *a quo* is excessive or imbalanced. The mitigating factors in this case namely; the appellant's personal circumstances, that he was a first offender, aged 30 at the time sentence, that he was a bread winner and employed as a security guard including that he had a medical condition are far outweighed by the nature and the gravity of the offence he was convicted of. They do not constitute substantial and compelling reasons warranting a deviation from the prescribed sentence.

[26] B died in the hands of his own father who owed him a duty of care and protection for no other reason except that he was angry at his partner, the mother of this child. The injuries sustained by this child as detailed in the post-mortem report are horrific (Exhibit "A"). The appellant testified in mitigation but elected not to take the court into his confidence and explain the motive behind his horrendous actions. It is accordingly my view that the sentence imposed by the court *a quo* fits the appellant, the crime he was convicted of and also addresses the plight of the society. The sentence was also blended with mercy[5] in that the State had argued that the court *a quo* could impose a sentence which was more than the prescribed sentence but the court decided not to.

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[3] *S v Kekana* **2019 (1) SACR 1** SCA at para 22.
[4] Record page 165 to 167.
[5] *S v Rabie* **1975 (4) SA 855** (AD) at 862 G-H

[27] In conclusion, the facts of this matter do not justify the interference with either the conviction or the sentence imposed by the trial court. The appeal against conviction and sentence fails.

[28] In the result, the following order is made:

1. The conviction and sentence is confirmed.

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N.S. DANISO, J

I concur,

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A.S. BOONZAAIER, AJ

On behalf of the Appellant:	Mr P. Peyper
Instructed by:	Peyper Attorneys
	BLOEMFONTEIN
On behalf of the Respondent:	Adv S. Tunzi
Instructed by:	Office of the DPP, Free State
	BLOEMFONTEIN