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**

Case no: A91//2023

In the matter between:

THABO THOSA MBELE Appellant

and

THE STATE Respondent

CORAM: **CHESIWE J *et* LEKHOABA AJ**

HEARD ON: **9 OCTOBER 2023**

DELIVERED ON: **22 FEBRUARY 2024**

JUDGMENT BY: **LEKHOABA AJ**

[1] This is an application for appeal against both conviction and sentence which was imposed by Regional Court on 27 November 2020.

[2] Appellant was charged in the Regional Court, Bethlehem on charges of murder, read with the provision section 51(2) of Act 105 of 1997, and sentenced to 20 (Twenty) year's imprisonment.

[3] An application for Leave to Appeal was brought, but dismissed by the Court a *quo.* Appellant however successfully petitioned this Court, with the Honourable Justice Reinders, J et Gusha, AJ granting the Appellant the required leave to Appeal on 17 April 2023.

[4] This court is grateful to Counsels in this matter for their oral arguments and written heads of arguments.

Grounds for Appeal

[5] Appellant's grounds for appeal against his convictions are that the *Court a quo* erred by finding that the guilt of Appellant was proved beyond reasonable doubt; and that the *Court a quo* disregarded the cautionary rules applicable to the evidence of a single - and child witness and factors that affected the witness reliability of the identification of the perpetrator. The factors are:

a) The attacker's clothing;

b) No identifying features other than having a dark complexion and a bad haircut;

c) Contradictions pertaining the illumination of the scene;

d) The inherent suggestibility of the witness, especially the history of animosity between her family and the Appellant;

e) Appellant's alibi; and

f) The wearing or not of a cap by the attacker.

[6] Appellant's grounds for appeal against his sentence are as follows:

a) The sentence is inappropriate and shocking;

b) The Court a quo not bestowing any mercy towards the Appellant, despite the matter being classified as one of Gender Based Violence (GBV);

c) The Court a quo overemphasized the retribution element and as such ordered an increased sentence;

d) Not finding that there were factors in mitigation that were substantial and compelling as the Appellant is a first time offender, the sole breadwinner of three (3) minor children left in the care of a life partner and without a social grant and has been in custody awaiting trial for 18 months.

Background

[7] The background on this matter is briefly as follows: According to the transcribed record, the Appellant was in a relationship with the deceased at the time of her demise. K[…] M[…] [sic] (name continued herein after as is), the deceased 9-year-old daughter, testified through an intermediary that: Earlier during the day on 13 May 2017, the Appellant arrived at the deceased house looking for the deceased. The deceased was not at home. In the evening of the same day, Appellant returned. There was a knocked at the door and the person entered the house. K[…] noticed that it was the Appellant. The Appellant then pulled the deceased outside. K[…] followed the Appellant and deceased outside. She saw the deceased fall under a tree and saw how the Appellant got on top of the deceased and started to stabbed the deceased several times. The Appellant then left the decease. An ambulance was called to collect the deceased. The deceased died in hospital.

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[8] The offence was committed at the place of residence of the deceased. A knife was used to inflict fatal wounds and/or injuries on the deceased.

[9] It is common cause that the identity of the deceased as it appears on the charge sheet is not in dispute and that she died on the 13th of March 2017. Further that the correctness of the post-mortem report, contents therefore as it relates to the deceased as well as the cause of death are not in dispute. Moreover, the chain of evidence regarding that the body of the deceased sustained no further injuries from the time of being moved from the scene, right up until the time the pots-mortem was concluded. And, there was a love relationship between the Appellant and the deceased at the time of her demise.

Issues for determination

[10] This Court is called upon to determine if the Court *a quo* erred in finding that the guilt of the Appellant was proved beyond reasonable doubt and if the Court *a quo* disregarded the cautionary rules applicable to the evidence of single – and child witness and factors that affected the witness' reliability of the identification of the perpetrator.

[11] The Court *a quo* accepted that K[…]'s evidence was contradicted by the evidence of the State's second witness, Mr Joseph Motaung regarding the aspect of whether the deceased had found employment in Cape Town or not. However, the Court *a quo* found it to be an immaterial contradiction. The Court *a quo* further mentioned that even though Mr Moklapule Joseph Motlahaung [sic] (surname continued herein after as is) testified that he was drunk, he corroborated K[…]'s testimony to the effect that there was an Apollo light that illuminates on that street.

[12] K[…]'s evidence was also corroborated by Doctor Van Schalkwyk who testified that the deceased was stabbed several times with a knife and

indeed 11 stab wounds were observed on the body of the deceased. The Court a *quo* in its judgment stated that K[…] answered to questions directly and was never evasive. It further stated that she was bold when testifying and her evidence was coherent and logical.

[13] The Court a *quo* further stated in its judgment that Mr Motlahaung was upfront and frank with the Court from the onset that he was drunk. He was honest with the Court that he saw a person whose physique and walk resembled that of the Appellant. He however, could not commit himself to confirming if the Appellant was the person that he saw. There was nothing more that could be said regarding Mr Motlahaung's evidence since he arrived after the murder of his sister.

[14] The Appellant testified that he lived with the deceased and the children would visit. No plea explanation was given on behalf of Appellant. It was however during cross-examination of a witness that his version of having an alibi was put to him. Court *a quo* found the Appellant's defence of an alibi that he was in Vereeniging was not reasonably possibly true and was therefore rejected.

Ad Conviction

[15] It has long been our law that the trier of fact should not consider the evidence implicating the accused and evidence exculpating the accused in a compartmentalised manner. The court must evaluate the evidence before it in its totality and judge the probabilities in light of all the evidence. [1]

[16] **In *S v Sauls and Others 1981 (3) SA 172 (A)*** at 180E-G, the Court said the following:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness… . The trial Judge will

[1]R v Difford 1937 AD 373, S v Van der Meyden 1999(1) SACR 447 (W) and S v Toubie 2004(1) SACR 530 (W)

> weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded.'

[17] It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

[18] In ***R v Mokoena 1932 OPD 79*** at 80 in which it was stated that

> "The uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by sec 284 of Act 31 of 1917, but in my opinion that section should be relied on where the evidence of the single witness is clear and satisfactory in every material respect".

[19] In ***S v Francis 1991 (1) SACR 198 (A)*** at p 204 C – E the Court remarked:

> "This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited. …The advantage a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with the trial Court's evaluation of oral testimony."

[20] Adv. Lencoe, on behalf of the Respondent, contended that it is undisputed that K[…] M[…] knew the Appellant very well as the Appellant was involved in a love affair with her mother and they even stayed together. And it is also the testimony of the Appellant that he stayed with the deceased for approximately a year and few months and that the children would visit.

[21] It is trite that in this case where single –and child witness has a prior knowledge of the Appellant, questions identifying marks, facial characteristics or clothing plays a lesser role, but what is important is prior

knowledge. I agree with Counsel for the Respondent that the issue of mistaken identity is neither here nor there.

[22] Having considered the above, I am of the view that illumination was sufficient for K[…] to see the Appellant from inside the house and outside the house with the help of Apollo light. K[…] was able again to see that the assailant was indeed the Appellant.

[23] On the issue of cautionary rule applicable to the evidence of a minor and single witness, the Court a *quo* in its judgement pointed out that K[…] had prior knowledge of the Appellant as the Appellant was in in a love relationship with her mother, further that the Appellant knocked and entered the and she saw that it was the Appellant and the Appellant dragged the deceased and when falling down, the Appellant pinned the deceased down and then proceeded to stab the deceased several times with a knife. Moreover, K[…] watched uninterrupted and testified that there was illumination from an Apollo light.

[24] Section 208 [2] provides that an accused may be convicted of any offence on the single evidence of any competent witness. However, this section must be read with the case of **Mokoena *Supra*** where it was stated that the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory is very material aspect. In this case K[…]'s evidence was found by the trial court to be sufficiently reliable to sustain a conviction.

[25] The appellant brutally killed the deceased. The appellant used a dangerous weapon to kill a defenceless woman at her own place of residence. Stabbed her eight times and in the presence of the deceased minor child. That in

[2]Criminal Procedure Act 51 of 1977

itself is remorseless. Furthermore, the post-mortem report gives a gruesome detail report on the injuries the deceased sustained.

[26] After careful consideration of the evidence, I cannot fault the trial court. The evidence against the Appellant is strong and the manner in which the trial Court adjudicated the conspectus of evidence is legally sound.

[27] The appeal court will only tamper with the trial court's findings where it is clearly wrong. Furthermore, an appeal court's powers to interfere with the findings of the trial court on credibility are limited. When consideration is paid to all consistencies, improbabilities and contradictions, there is no reason to doubt the correctness of the credibility findings made by the trial court. In my view, the trial court correctly convicted the appellant and there is no reason to tamper with its findings on conviction. And the appeal on conviction ought to fail.

Ad Sentence

[28] Life imprisonment is the ultimate penalty that courts can impose and should not be imposed lightly. In saying this, I am fully aware of and acquainted with the judgments in ***S v PB,***[3] and ***S v Matyityi,***[4] wherein the Supreme Court of Appeal in both judgments warned courts not to depart from prescribed minimum sentences for flimsy reasons.

[29] No doubt, due to the seriousness of the offences in *casu*, it is required that the elements of retribution and deterrence should come to the fore and that the rehabilitation of the Appellant should be accorded a smaller part as emphasised by the Supreme Court of Appeal in ***S v Kekana.***[5] The appellant's personal circumstances have to bow to the interest of society.

[3] 2013 (2) SACR 533 (SCA) para 20.
[4] 2011 (1) SACR 40 (SCA) para 23.
[5]2019 (1) SACR 1 (SCA) at paras 39 & 40.

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[30] ***In S v De Beer,***[6] the Supreme Court of Appeal held as follows:

> "This court has pointed out on many occasions that injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, in other words, including all the circumstances of not only the offence itself, but also the circumstances of the parties involved."

[31] The sentence of life imprisonment must be imposed unless, as subsections (3) and (6) provide that there are substantial and compelling circumstances which justify the imposition of a lesser sentence.[7] The test of what constitutes substantial and compelling circumstances was articulated in ***S v Malgas.***[8] The trite triad of factors as set out in ***S v Zinn,***[9] also prevails.

[32] The trial court took into consideration the Appellant's personal circumstances that he was 38 years old in love relationship with the deceased. He is not married but has a life partner with whom they are blessed with the three children, the first born being 14 years old and the other two are 11 years old twins. Prior to his arrest, the Appellant was working as a builder in a construction company earning R800 per fortnight. He cannot read or write. He has been in custody since May 2019, and that constitutes about a year and a half awaiting the finalisation of this case.

[33] Both Mr Reyneke and Adv. Lencoe correctly submitted that this offence is very serious. The victim lost her life, what also aggravates matters is that the accused has not shown any remorse nor did he tender an apology to the deceased family through his legal representative.

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[6] 2018 (1) SACR 229 (SCA) at para 17.
[7] Section 51 (3) of Act 105 of 1997 provides that in the absence of any physical injuries that shall not constitute substantial and compelling circumstances.
[8] 2001 (1) SACR 469 (SCA) at 482 c.
[9] 1969 (2) SA 537 (A).

[34] The Court when sentencing, correctly ruled that no compelling and substantial circumstances exist. The argument in mitigation that the Appellant was incarcerated awaiting trial for a substantial period of time does not hold water as compelling and substantial. He was the architect of his own fate here. It is also a reality that the Appellant is the father of three minor children. There is however, no other evidence that he was the primary caregiver nor the primary breadwinner of these children. This factor may also not be elevated to compelling and substantial on the evidence before Court.

[35] In every appeal against sentence, the Judges hearing the appeal should be guided by certain appellate principles. The first is that punishment of an offender is primarily for the discretion of the trial court. The second is that such judges should be careful not to erode such discretion. The third is that the sentence should only be altered, on appeal, if the discretion has not been judicially and properly exercised.[10]

[36] It is indeed so that the first principle that the sentencing courts should not readily depart, for flimsy reasons, from the Prescribed Minimum Sentence ordained as an ordinarily appropriate punishment. The Prescribed Minimum Sentence of life imprisonment is the harshest a court can impose on an offender. It is the ultimate punishment in our Criminal Law system. The sentencing court always has that choice dictated by the peculiar circumstances of a particular case. To say that the court has no choice boiled down to some kind of neglect to exercise the sentencing discretion judicially and constitute a material misdirection.

[37] I therefore see no reason for this court to interfere with the sentence of the trial court.

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[10] S v Rabie 1975 (4) SA 855 (A) as per Holmes JA.

Conclusion

[38] From the evidence adduced in the court below and the factors pointed out in the appeal, there is nothing that indicates that the presiding magistrate did not apply his mind judiciously and with due care. He did not misdirect himself. The convictions and sentences are in accordance with the prevailing legislation and law. There is no other issue that dictates for the interference of this Court.

[39] I am convinced that Court a *quo* applied double caution based on few pointers that I have cited above.

[40] The Court a *quo* was alive to the fact that K[…] was a minor and a key witness and it had applied cautionary rules when dealing with her evidence.

[41] Therefore, there is no reason to interfere with the findings of the Court a *quo.*

[42] In the premises the following order is made:

1. The appeal against conviction and sentence is dismissed.

2. The conviction and sentence imposed by the court *a quo* are confirmed.

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LEKHOABA, AJ

I CONCUR

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CHESIWE, J

On behalf of the Appellant:	Mr. D Reyneke
Instructed by:	Legal Aid South Africa
	BLOEMFONTEIN
On behalf of the Defendant:	Adv. M Lencoe
Instructed by:	Director Public Prosecution
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