REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES

Case number: A287/2017

1/8/2018

In the matter between:

VELILE WILLIAM BALIKWE

and

THE STATE

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] The appellant stood trial, together with other four co-accuseds, on one count of murder, one count of robbery with aggravating circumstances and one count of possession of an unlicensed firearm in the regional court for the regional division of North West held in Foucheville. The appellant was arraigned as accused 1 during the trial.

[2] The appellant pleaded not guilty to the three charges. He was convicted on one count of murder and one count of robbery with aggravating circumstances

and found not guilty on one count of possession of a firearm . He was as a result sentenced to fifteen (15) years imprisonment on each of the convictions. The trial court ordered that five (5) years of the sentence imposed on the conviction of robbery with aggravating circumstances run concurrently with the sentence imposed for murder . The appellant was sentenced to an effective term of twenty-five (25) years imprisonment .

[4] The appellant's application for leave to appeal the conviction and sentence was refused by the trial court . He is, however, before us leave to appeal the conviction and sentence having been granted on petition by this court.

BACKGROUND

[5] The deceased, Anele Bennet Adonis, was shot and killed during a hijacking. His motor vehicle a Volkswagen City Golf ("the City Golf") was stolen. Five persons were arrested and charged with the murder, robbery with aggravating circumstances and the possession of an unlicensed firearm. There was no direct evidence linking any of the accused persons to the commission of the offences. The appellant was, however, linked to the offences of murder and robbery with aggravating circumstances by the evidence of two state witnesses, namely Mr B N ("Mr N") and Ms M S H ("Ms H").

[6] Mr N saw the appellant in the company of the deceased around 7:00 on the day in question. The police report accompanying the body to the mortuary and the post mortem report confirmed the date and time of death as 17 April 2009 at 7:00. These documents were accepted into evidence with the consent of the appellant. This time was undisputed. It can therefore be assumed that Mr N is possibly the last person to see the deceased alive shortly before he was killed .

[7] Ms H is said to have seen the appellant driving the City Golf a day after the crimes were committed. She also found the City Golf parked at her house and was told by accused 3, her son, that it belonged to the appellant. The police came the following Wednesday and confiscated it.

THE EVIDENCE

[8] Mr N's evidence is that on the morning of 17 April 2009 at around 4:00 he

was on his way home from the hospital in Carletonville. He went to the taxi rank and waited for the taxi to fill up with passengers. A scuffle ensued amongst some passengers and a man with dreadlocks, who appeared to be looking for someone in the taxi. Mr N who was a police reservist at the time was able to stop the scuffle. After the scuff le, the man with dreadlocks asked for directions to Mponi Mines. The man was driving a City Golf and Mr N asked the man to give him a lift because he was going in the direction of Mponi Mines. He boarded the City Golf and three other persons came in as well. Amongst those persons who boarded the City Golf was the appellant. He knew the appellant very well as they had once worked together at SPAR. He did not know the other two persons. He did, however, notice that one of these persons had dreadlocks. Mr N occupied the front passenger seat and the three persons, including the appellant, sat in the back. One of the passengers at the back alighted first at 007 garage. The next person to get off the City Golf was Mr N who alighted at Blyvoor around 7:00. When he alighted, he· left the appellant and the man with dreadlocks in the City Golf in the presence of the deceased. During his evidence he was shown pictures of the deceased and he confirmed the deceased as the same man who was driving the City Golf.

[9] Under cross examination when it was put to him that the appellant would testify that there were six persons in the City Golf , Mr N appeared not to be certain but intimated that it was possible that there were six persons in the City Golf and that he forgot their faces. He was, however, adamant that there were three persons in the back which meant there were five persons in the motor vehicle. He did not know any of the accused persons before court except the appellant and could not say for certain that the two persons who sat with the appellant at the back of the City Golf were some of the accused persons before court .

[10] Ms H on the other hand saw the appellant driving the City Golf the day after the deceased was killed. Her testimony is that she knew all the accused before court . The appellant and accused 2 are her relatives, accused 3 is her son and accused 4 and 5 are accused 3's friends. On 18 April 2009 the appellant, who was in the company of accused 2, came to her house driving a City Golf. She identified the deceased's City Golf on the photos shown to her as

the same City Golf the appellant was driving . It was the first time she saw the appellant and accused 2. The two were introduced to her by accused 3. After greeting her, the three got into the City Golf and drove off. The appellant was driving. Accused 3 later came back without the appellant and accused 2. The following day when she came back from church the City Golf was parked in her yard. She did not know who brought it there. Accused 3 later told her that the City Golf belongs to the appellant and that he will come to fetch it. On Tuesday accused 3 left and did not come back. On Wednesday the police came and confiscated the City Golf. She never saw accused 4 and 5 in the City Golf.

[11] The appellant testified and confirmed that he met Mr N in the early hours of 17 April 2009. Mr N was from the hospital and he (t he appellant) was from a night club where his friend accused 2 is a DJ. He also conceded that he caught a lift together with Mr N in the deceased's City Golf. However, according to him there were six persons in the City Golf and not five as Mr N said. He said he was in the company of accused 2, accused 3 and accused 5 when they were offered a lift by the deceased. Mr N sat in the front passenger seat and the four of them sat at the back. The first to alight from the City Golf was Mr N at Blyvoor. There was no one who alighted at 007 garage as testified by Mr N. Accused 2 and himself alighted later at Wedela leaving accused 3 and 5 in the City Golf . He denied driving the City Golf as he was never in Jouberton and did not even have a driver's licence as he could not drive. He was not with accused 3 on 18 April 2009 but on 17 April 2009. His testimony was that he never went to Ms H's house. The last time he saw Ms H was at a funeral in 2008. He denied ever driving the City Golf.

AD CONVICTION

[12] The contention by the appellant is that the trial court erred in relying in its conviction of the appellant on the evidence of Mr N and Ms H as the evidence was not clear and satisfactory in every material respect and was not corroborated . Such evidence, according to the appellant was not conclusive for the test of circumstantial evidence.

[13] It is not in dispute that the evidence of the respondent is circumstantial in

nature as no one saw the deceased being murdered and robbed of his motor vehicle. The approach to be followed when a court is faced with circumstantial evidence has been enunciated in *R v Blom,*[1] wherein the two cardinal rules of reasoning by inference were determined as

13.1 The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

13.2 The proved facts must be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct .

All circumstantial evidence is said to depend ultimately upon facts which are proved by direct evidence.[2]

[14] In trying to prove the facts by direct evidence, the respondent relied on the evidence of Mr N and Ms H. Both the appellant and the respondent are agreed that Mr N and Ms H are single witnesses in as far as their evidence connects the appellant to the commission of the offence. Although the respondent's heads of argument denied this, the respondent's counsel conceded same in his submissions.

[15] It is trite that an accused may be convicted by the evidence of a competent single witness.[3] Such evidence must, however, be treated with the necessary caution required in law. In the normal course of events, the evidence of a single witness will only be accepted if it is in every material respect satisfactory or if there is corroboration for that evidence.[4] The corroboration required should be confirmatory evidential material outside the evidence that is

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[11] 1939 AD 188 at 202-3.
[2] See Zeffert et al, The South African Law Of Evidence p 93.
[3] See section 208 of the Criminal Procedure Act 51 of 1977.
[4] See S v Sauls and Others 1981(3) SA 172 (A) at 180E- G and S v Miggie 2007 (1) SACR 675 (C).

being corroborated.[5]

[16] A court that evaluates the evidence of a single witness can find corroboration in the evidence of other witnesses or accused persons, or in circumstantial witnesses other than the witnesses who are involved.[6]

[17] The trial court, correctly so in my view, made a finding that the appellant is one of the persons who murdered the deceased and stole his motor vehicle. The evidence of Mr N is crucial in this regard. Mr N is a single witness in respect of the fact that when he alighted from the City Golf he left the deceased with the appellant and another man with dreadlocks. According to Mr N at the time he alighted from the City Golf it was around 7:00. This evidence of Mr N ties up with the documentary evidence in Annexure "A" of the record. Annexure "A" consists of a report accompanying the body to the mortuary and post mortem report. The date and time of the deceased's death is recorded therein as 17 April 2009 at 7:00. The objective recordal of this evidence corroborates the evidence of Mr N. It is also indicative of the truthfulness of his evidence. The appellant's own evidence, by placing himself as a passenger in the City Golf at the same time when Mr N was in the City Golf corroborates Mr N's evidence as well.

[18] Of importance is that the appellant testified that Mr N was the first to alight from the City Golf at Blyvoor and that no one got off at 007 garage as Mr N testified. This, however, was not put to Mr N. The first time this was heard of was when the appellant testified. This piece of evidence further corroborates Mr N's testimony that he alighted from the City Golf before the appellant and the man with dreadlocks sitting at the back. The evidence supports Mr N's evidence that he left the appellant and the man with dreadlocks (sitting at the back) in the motor vehicle when he (Mr N) alighted. It is also worthy to note Mr N's testimony that he left the appellant with a man with dreadlocks in the City Golf and it transpires that the man with dreadlocks is accused 2, the appellant's friend. Accused 2 conceded that at the time of this incident he had dreadlocks and the appellant confirmed this in his evidence as well.

[19] From the perusal of the record, I have satisfied myself that Mr N was a credible and reliable witness. His evidence was straight forward and clear and

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[5] See S v Khumalo Ben Andere 1991(4) SA 310 (A) at 328A - B.

there were no material discrepancies or contradictions. That under cross examination he hesitated to say that there could have been six persons, instead of five, in the City Golf, is to me not a contradiction as such. He was adamant at all times that there were only five persons in the City Golf.

[20] There appears no evidence on record to indicate that Mr N had any reason to implicate the appellant in the commission of these offences. His version of events is, to me, acceptable as the truth of what happened on the day in question.

[21] Ms H is a single witness in regard to her evidence that she saw the appellant driving the deceased's City Golf a day after the commission of the offences. I found her evidence satisfactory in all respects. Her evidence that she saw the appellant driving the City Golf was not vehemently challenged during cross examination. Ms H was steadfast and unshaken in her insistence that she saw the appellant driving the City Golf on 18 April 2009. The contradictions raised by the appellant before us as to when the City Golf was confiscated by the police and who the City Golf belonged to, are, in my view, not material in that they do not pertain to Ms H's evidence that she saw the appellant driving the City Golf.

[22] The issue raised by the appellant in regard to the identity of the City Golf was never an issue before the trial court. It was never put to Ms H that it might be that the City Golf she saw the appellant driving was not the same she found parked at her premises. It was, also, not argued before the trial court that the respondent failed to prove the distinguishing features between the motor vehicle driven by the appellant on 18 April 2009 when Ms H saw him and the City Golf that was parked on her premises.

[23] The evidence of witnesses whose evidence must be approached with caution should not be evaluated in isolation, but in the light of all the evidence before court.[7]

[24] Even though there is no evidence corroborating the evidence of Ms H, but when the evidence before us is evaluated in its totality I have to conclude that her evidence is reliable and trustworthy. It forms part of the chain of events in the

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[6] 1959 (1) SA 434 (A); 1990 (1) SACR 95 (A) at 99d.

respondent' s version. Mr N left the appellant with the deceased around 7:00 on 17 April 2009 in the City Golf. The deceased was still alive at that time. The evidence is that the deceased was murdered and his motor vehicle stolen at 7:00 on 17 April 2009. The following day the appellant is seen by Ms H driving the deceased's City Golf. These are the proven facts on which it can be reasonably inferred that the appellant was one of the persons who murdered the deceased and stole his motor vehicle.

[25] The conviction should stand.

AD SENTENCE

[26] The appellant's ground of appeal on sentence is that the trial court erred in not making a finding that there are substantial and compelling circumstances. But before us it was argued that the sentence of 25 years imprisonment is disturbingly inappropriate and harsh. The submission is that the trial court should have made a finding that there are substantial and compelling circumstances and ordered both sentences of 15 years imprisonment to run concurrently. The appellant contends further that the trial court did not consider whether there are substantial and compelling circumstances. According to the appellant' s counsel, the following factors amount to substantial and compelling circumstances: the age of the appellant, the time of almost a year spent in custody awaiting trial, his medical condition and the fact that he has a three year old son.

[27] The charges of murder and robbery with aggravating circumstances against the appellant were both read with s 51 (2) of the Criminal Law Amendment Act No. 105 of 1997 ("the Act"). The said section provides for the imposition of a minimum sentence of fifteen (15) year's imprisonment in respect of both offences unless there are substantial and compelling circumstances warranting deviation from such a sentence.

[28] When imposing sentence, a court must try and balance the nature and circumstances of the offences, the circumstances of the offender and the impact that the crime had on the community. It must ensure that all the purposes of

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[7] S v Kubeka 1982 (1) SA 534 {W) at 537H; S v Radebe 1991 (2) SACR 166 (T) at 182h - 183d.

punishment are furthered.[8]

[29] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. Marais AJ in the matter of *S v Malgas*[9] at para 12 observed t hat:

> " A court exercising appellate jurisdiction cannot , in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In so doing, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appropriate court may yet be Justified in interfering with the sentence imposed by the court. It may do so only where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasized that in the latter situation the appellate court is large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned."

[30] When sentencing the appellant, the trial court took the following personal circumstances into account : the appellant was a first offender, he was born in 1985 - making him 27 years at the time of sentencing; he attended Primary School in Wadela and went to high school where he reached grade 11; he is the

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[8] S v Zinn 1969 (2) SA 537 (A).
[9] 2001 (1) SACR 469 (SCA).

youngest of four children, both his parents are alive but separated; he spent most of his childhood in the absence of his father which resulted in the absence of a disciplinary figure for him; his family experienced severe financial constraints which hampered his education; he studied boiler making and blasting at Vuzilela College; he served as a cashier at SPAR for two years and as a pipe fitter for a year in Elandsfontein mine; he was never married but had a girlfriend with whom he has a three year old child who lived with his mot her; he spent almost a year in custody awaiting trial; and he was diagnosed with brain tumor which cannot be removed without serious risk to life.

[31] In aggravation of sentence the trial court took into the account the nature and seriousness of the offences; that the crimes were planned and as such should be viewed in a more serious light; the crimes were commit ted in a merciless, cold blooded and callous manner; the appellant and his co-accused took advantage of the kindness of the deceased when he gave them a lift; the appellant and co-accused showed no remorse as they took the motor vehicle and went partying the same day of the murder; the interest of society demands severe sentences where violence is involved. The trial court concluded that the aggravating factors outweigh the appellant' s personal circumstances and imposed the sentence it did.

[32] Before the trial court, the appellant's legal representative submitted that the above mitigating factors coupled with his relatively low level of education, medical situation, and the fact that he had a minor child to support and lack of previous convictions should be considered to amount to substantial and compelling circumstances. Section 51 *(3) (a)* of the Act, enjoins the sentencing court to consider whether there are substantial and compelling circumstances warranting deviation from imposing the prescribed minimum sentence before imposing sentence. From the perusal of the record it does not appear as if the trial court considered whether substantial and compelling circumstances exist before it imposed the sentence it did. As such, the trial court having failed to comply with the requirements of this section erred. It means that this court must look at sentence afresh.

[33] I am of the view that the sentence imposed by the trial court is disturbingly inappropriate and harsh. The crimes of murder and robbery with aggravating

circumstances occurred in the same incident. The trial court should have ordered the sentences in respect thereof to run concurrently. I find therefore that an appropriate sentence herein should be for the two sentences to run concurrently.

[34] In the circumstances I make the following order:

1. The appeal on conviction is dismissed.
2. The convictions of murder and robbery with aggravating circumstances are confirmed.
3. The appeal on sentence is upheld .
4. The sentence imposed by the trial court is set aside and substituted by the following:

   "a. Count 1 (murder) the accused is sentenced to 15 years imprisonment.

   b. Count 2 (robbery with aggravating circumstances) the accused is sentenced to 15 years imprisonment .

   c. Both sentences are ordered to run concurrently, the effective period is 15 years imprisonment.

   d. The accused is declared in terms of section 103 of the Firearms Control Act 60 of 2000 unfit to possess a firearm ."
5. The sentence is, in terms of section 282 of the Criminal Procedure Act 51 of 1977, ante-dated to 27 September 2012.

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E.M . KUBUSHI

JUDGE OF THE HIGH COURT

I concur

S.N.I MOKOSE

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Adv R Gissing Instructed by: **PRETORIA JUSTICE CENTRE** 2nd Floor FNB Building 206 Church Street PRETORIA 0001
On behalf of the respondent:	Adv ME Mnguni Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001