IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **A5/2023**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED

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SIGNATURE **DATE**

In the matter between:

BENNY MANGENGWA Appellant

and

THE STATE Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 8th November 2023.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This appeal is brought by way of the appellant's automatic right of appeal against his conviction and sentence which was handed down in the Regional Court, Benoni [Court *a quo*]. The Court *a quo* imposed a minimum sentence of life imprisonment.

[2] The appellant, a Zimbabwean citizen, was charged with two counts, the first count was for the pre-meditated murder of Tebogo Albert Moletswane [the deceased] in terms of section 51(1) read with part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 [murder charge] and the second count for the contravention of section 49(1)(A) of the Immigration Act 13 of 2002 for wrongfully entering and remaining in the Republic of South Africa [immigration contravention].

[3] The appellant pleaded guilty to the immigration contravention but not guilty to the murder charge.

[4] During the trial, the State abandoned the prosecution of the immigration contravention as the appellant had already been convicted on that offence in another court. The Court *a quo* in consequence, and notwithstanding the appellant's plea of guilt, acquitted the appellant on count 2. The decision to acquit the appellant considering his plea of guilt is not before this Court on appeal.

[5] The appellant, however, was found guilty of the murder charge and duly convicted and sentenced. In consequence, this appeal traverses the grounds raised on appeal in respect of the conviction and sentence in respect of the murder charge only.

[6] Before dealing with the grounds raised and argued, a brief overview of the evidence before the Court a *quo* is required.

CONSIDERED EVIDENCE

[7] On 25 February 2019 [incident date] the deceased was accosted and brutally and repeatedly stabbed at his home in Marikana. The deceased died from a penetrating stab wound to his heart.

[8] Two days prior to the incident date and on 23 February 2019, Ms Prudence Numsa Radebe [Radebe], alleged to have witnessed two altercations at Thandelele's Place, a local tavern. The first altercation was allegedly between the appellant and Pardon, his brother (meaning from the same area in Zimbabwe). The first altercation was over a young lady and the second altercation was a fight which ensued between the appellant and the deceased. The second altercation with the deceased purportedly drove the appellant to vengeance on the incident date.

[9] A Mr Given Moyo [Moyo] who stayed on the same premises as the deceased and Radebe, testified that on the incident date, and at approximately 07h30 in the morning, he witnessed the appellant in the company of two other males, a one Matamba and Pardon. The three men entered the yard. Matamba then allegedly confronted Moyo, enquiring whether he was the individual who liked to go around hitting people. Moyo replied that it was not him. At which time the deceased then appeared from his room and the three men turned their attention to the deceased, confronting him regarding the second altercation which occurred on 23 February 2023 at the tavern.

[10] Moyo testified that the mood was confrontational and that when he was about to re-enter his house, he observed the appellant whom he identified as Ben, grabbing the deceased by his collar. At that time, the appellant had a knife in his hand. Moyo retreated into his house. When Moyo came out of his house again, he noticed for the first time that the deceased was bleeding and decided to run away to get assistance.

[11] Just before Moyo ran for assistance, he testified that he saw Pardon looking for something in the rubble and testified that: "*I noticed Pardon rummaging through the litter, I think for a bottle because he wanted to help his friend. I heard a bottle break when I fled looking for neighbours*". Moyo did not witness the deceased being stabbed nor a bottle in Pardon's hand.

[12] Daphney Baloyi [Baloyi], testified that she lived in the same yard as Moyo and the deceased. She testified that on the morning of the incident she heard a knock at her door. On her way to enquire who was there, she found the deceased lying on her kitchen floor. She testified that the deceased asked her not to open the door as the people at the door wanted to kill him. She, however, did go to the door. She testified that of three men were at the door, she only knew Matamba. The other two men were not known to her, but she identified the appellant in court as the man who spoke to her that morning and the man who had a facial injury (cheek area) at the material time.

[13] Baloyi testified further that when the appellant spoke to her, he confirmed that they were not looking for her but the deceased. At that time, she witnessed the appellant holding a knife in his hand and saw blood on his arm. She chased them out of her yard. On her return the deceased had passed away and she called the ambulance. She went outside to inform the three men who were still waiting for the deceased that the deceased had died, they then ran away.

[14] Radebe, Moyo and Baloyi were all State witnesses. Other than their testimony, the State called Dr Beccia Fortunato [Dr Fortunato], a medical doctor in the employ of the State and working at the government mortuary. He testified that he performed the post-mortem and authored the post-mortem report. According to his findings, the deceased suffered multiple stab wounds and lacerations. Of the multiple stab wounds, the wound described at number 8, under paragraph 4 of the post-mortem report was the wound which penetrated the deceased's heart and left lung. This stab wound he testified, caused the deceased's demise. He testified that such a penetrating wound was caused by a sharp object like a knife, or something similar. He also testified that the stab wounds described at number 3 under paragraph 4 could have been caused by a broken bottle. His evidence was not disturbed in cross-examination.

[15] The appellant testified and no further witnesses were called. Matamba had apparently been murdered and Pardon was in hiding and could not be located. The appellant testified that he was at the tavern on 23 February 2019, but was not involved in any altercation with Pardon, but with a young lady who had bumped into him at the tavern when, without any apparent reason he was hit from behind with an unemptied beer bottle. This caused the injury to his right eye. As a result of the blow to the back of his head, he fainted and possessed no further recollection of that evening.

[16] On the date of the incident the appellant testified that he was simply on his way to work, when, passing by the deceased's house, he saw his brother Pardon and Matamba. He witnessed Matamba becoming confrontational with the deceased. Matamba grabbed the deceased by his clothes and Pardon had a spoon in his hand. He attempted to diffuse the situation between the men and then left. He did not see Baloyi nor did he enter the deceased's yard. It was only when the community attacked him later that morning that he learnt the deceased had been stabbed during an attack and died.

[17] Against this backdrop the grounds raised by the appellant.

GROUNDS OF APPEAL

Ad conviction:

The appellant in his notice of appeal lists six grounds of appeal. However, the thrust of the attack, and as duly amplified in argument, can be condensed in the following grounds for determination:

1. The Trial Court misdirected itself in finding that the appellant's version could not reasonably possibly be true.

2. That the Court erred in accepting the evidence of Radebe with regard to the issue of the appellant's identity in respect of incident 1 on 23 February 2023.

3. The Court erred in concluding that the State provided its case against the applicant beyond reasonable doubt.

Ad sentence:

4. The Court misdirected itself in not finding substantial and compelling circumstances to deviate from the prescribed minimum life sentence and that the sentence was shockingly inappropriate in that it induces a sense of shock.

5. The Court erred by relying on the evidence of Radebe with regard to the identity of the accused in finding that the defence was premeditated, warranting imposition of the minimum sentence of life imprisonment.

DISCUSSION OF THE GROUNDS OF APPEAL

AD CONVICTION

The determination of all three of the appellant's grounds raised as against his conviction.

[18] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. The accused's version cannot be rejected only on the basis that it is improbable, but only once the Trial Court has found, on credible evidence, that the explanation is false beyond a reasonable doubt.[1] The collar is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. This is the thrust of the appellant's attack on the Court *a quo*'s finding of his guilt.

[19] Equally trite, is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false.

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1 ***S v V*** 2000 (1) SACR 453 (SCA) at 455B.

[20] Moving from the above premise, the evidence is considered to assess whether the evidence by the State was cogent, plausible, and consistent as the Court *a quo* according to the record found it could rely on the evidence of the State witnesses to come to its finding.

[21] In the assessment of the State witnesses' evidence, unlike as advanced by the appellant's Counsel in argument, a materially consistent version does emerge. The common cause material facts together with the consistent material facts support a credible version and facts from which the necessary inferences can and were drawn. This is demonstrated by having regard to the following:

21.1 Radebe's version is consistent with the appellant's version in so far as on 23 February 2019 the appellant was at the tavern and was involved in the first altercation involving a woman.

21.2 The appellant eventually conceded that on 23 February 2019 he found out it was the deceased who had hit him during the second altercation at the tavern.

21.3 The appellant's face was injured on 23 February 2019. Radebe testified about the appellant being hit in the face during the first altercation. The appellant's facial injury is consistent with how Baloyi identified the appellant and what he did, namely: he was the man who was at her front door, who spoke to her, who had a knife in his hand, who had blood on his arm and who was looking for the deceased. Moyo who knew the appellant and called him by name, corroborated Baloyi's testimony by placing the appellant in the deceased's yard, by placing a knife in his hand and by noting the presence of blood from the deceased's abdomen.

21.4 Both Moyo, Baloyi and the appellant himself testified that the mood between the men in the yard whilst they were interacting with the deceased was confrontational.

21.5 Moyo's testimony that the appellant pulled the deceased's collar during the confrontation was corroborated by the testimony of the appellant in so far as he too stated the deceased was pulled on the clothes.

21.6 Moyo's testimony that the reason Matamba, Pardon and the appellant were in his yard was that they were looking for the person who "*-likes going around hitting people*". This testimony is consistent with Baloyi's testimony that the appellant said they were not looking for her when they knocked at her door but for the deceased.

21.7 Baloyi's uncontested evidence that the deceased said the men at her door wanted to kill him establishes the appellant's motive and the reason for him being there at the material time.

21.8 Moyo and Baloyi's testimony is consistent in placing a knife in the appellant's hands at the material time. Conversely, the appellant did not testify that Pardon nor Matamba were in possession of a knife nor for that matter a broken glass bottle.

21.9 Dr Fortunato's evidence that the penetrating stab wound at point 8 of the post-mortem report, is consistent with the use of a sharp weapon like a knife. No other sharp penetrating object was identified.

21.10 Under cross-examination, Dr Fortunata was referred to the description of a wound at point 3 of the post-mortem report which was a 4cm x 2cm penetrating wound inferior and anterior to the deceased's right ear. This wound, he conceded could have been caused by glass. This wound did not cause the deceased's death but is consistent with Moyo's testimony that he saw Pardon looking for something and that he heard glass break when he ran for help.

[22] The consistent, uncontested and common cause facts from the assessment of the evidence demonstrated above, justified the Court *a quo* to draw the necessary reasonable inference that the appellant was the one who stabbed the deceased with

a knife causing his death. As for the appellant's own version that he knew the deceased hit him at the tavern together with all the evidence duly amplified that Moyo's testimony of the reason given to him by Matlambs, justifies the Court *a quo* drawing the conclusion that the attack on the deceased was premeditated. In consequence, the appellant's version is false and rightfully stood to be rejected.

[23] This Court will therefore not disturb the Court *a quo's* decision to convict the appellant on count 1 and these grounds must fail.

AD SENTENCE:

The Court misdirected itself in not finding substantial and compelling circumstances to deviate from the prescribed minimum life sentence.

[24] The appellant being convicted of a premeditated murder, the applicable sentence falls under the ambit of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law (Sentencing) Amendment Act, Act 105 of 1997 in that the Court *a quo* concluded that it was premediated since the appellant sought out the deceased to exact vengeance on him. The prescribed minimum sentence of life imprisonment was applied in the absence of substantial and compelling circumstances being presented to the Court *a quo* at all to justify a deviation from the prescribed sentence.[2] In light of the concession by the legal representative before the Court *a quo* acting for the appellant that there were no substantial and compelling circumstances to justify a deviation of the prescribed sentence can in itself then not constitute a misdirection. The enquiry is whether the Court *a quo* in such absence, nonetheless enquired. No argument was advanced in this regard.

[25] Notwithstanding the Court *a quo* did have regard to, *inter alia*, the pre-sentence report. The Court *a quo* not only considered the report, but from the record the personal particulars and circumstances of the accused were taken into account. The Court *a quo* stating: "*The accused is a first offender. That will be reflected in the sentence*".

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2 See ***S v Malgas*** 2001 (1) SACR 496 (SCA).

[26] Therefore, the ground of appeal advanced in argument challenging the fact that the Court *a quo* did not consider the appellant as a first offender, his age (32 years), was a self-employed mechanic earning approximately R150 per day, that he left school at grade 10 due to financial difficulties, was in a relationship and had a 7-year-old child, and, was severely assaulted by a mob that apprehended him [factors] stands to be rejected. The Court *a quo* did take the factors into consideration and found that none warranted a deviation from the minimum sentence prescribed.

[27] The enquiry which should then follow is if the Court *a quo* erred by not considering the factors weighty enough to justify the deviation of the minimum sentence of life imprisonment, as life in imprisonment is the harshest sentence possible in our law. A balanced approach between the factors and the aggravating circumstances requires careful consideration. The appellant's Counsel in argument invited this Court to consider a number of matters.[3] In consequence, in ***S v SMM***[4] the following principle was emphasised by Judge Majiedt AJ:

"[13] … I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society …

[14] … There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives

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3 ***S v Dodo*** 2001 (1) SACR 301 at 319 G-H; ***S v Tshilo*** 2000 (2) SACR 443 9CC0 para 30.
4 ***S v SMM*** 2013 (2) SACR 292 (SCA) para 19.

of sentencing. It is also trite that in certain cases, retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation, can never be discarded all together, in order to attain a balanced, effective sentence."

[28] The deceased was stabbed repeatedly (approximately 14 times). This was indeed a vicious and brutal attack for an altercation which occurred at a tavern two nights prior where the appellant, at worst, suffered, on his version, a swollen eye and one which did not prevent him from walking to work on the date of the incident.

[29] The multiple stab wounds inflicted did not appear enough and notwithstanding the deceased's condition after the attack the appellant pursued him relentlessly, following him to Baloyi's home. An indication that he wanted to finish what he had started and that the 14 stab wounds already inflicted was not enough retribution.

[30] The appellant showed no remorse for his actions and fabricated improbable versions to absolve himself from taking any responsibility whatsoever. He too showed a flagrant disregard for South Africa's immigration policies and laws by being found guilty of count 2 by another Court, although acquitted by the Court *a quo*, a factor for consideration.

[31] The deceased on the other hand according to his father was, as quoted: "*My son was a shining star in my family.*" Supporting and maintaining his parents and assisting with the renovations of his parents' home.

[32] The brutality and the intended outcome were serious and senseless. Nothing can justify this callous and cold-blooded revenge attack on the deceased.

[33] The personal factors raised by the appellant do not avail him: at best this is a neutral factor. Secondly, the fact that the appellant is a first offender is a mitigating factor for consideration but having regard to all the evidence it does not appear to override all the other factors considered.

[34] Lastly, the appellant's counsel in argument to advance a factor not considered by the Court *a quo* in finding substantial and compelling circumstances invited this Court to consider the reasons argued in ***S v Vilakazi***[5] regarding provocation as a factor, inferring that the accused was acting as a result of provocation and was not a career criminal who commits time and resources to committing an assassination over a period of time, is not the same as a particular person who as a result of provocation plans a revenge attack, as in this case. By provocation, this Court accepts that Counsel was advancing that the appellant was provoked by the revenge attack of 23 February 2019. The difficulty with this argument is that there is no evidence on the record nor argument proffered at any stage, that the accused testified that he was provoked nor that the attack was one of vengeance. His defence was simply a denial. In consequence, this matter must be distinguishable and does not advance the appellant's argument.

[35] This Court does not wish to disturb the sentence imposed by the Court *a quo.*

In consequence, the following order follows:

1. The appeal is dismissed.

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L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

I concur,

Ntlama-Makhanya
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N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT

5 ***S v Vilakazi*** 2009 (1) SACR 552 (SCA).

GAUTENG DIVISION, PRETORIA

Appearances:

For the appellant:	Adv H.L. Albers Cell: 073 752 1170 Email: hermana@legal-aid.co.za
For the respondent:	Adv P.C.B. Luyt Cell: 084 294 9070 Email: pcbluyt@npa.gov.za
Matter heard:	3 October 2023
Date of judgment:	8 November 2023