IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE: 3 May 2024

SIGNATURE: [redacted]

Case No: A261/2023

In the matter between:

PIKI THABO SEOPELA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **Basson & Millar JJ *et* Cox AJ**

Heard on: 22 April 2024

Delivered: 3 May 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 3 May 2024.

ORDER

It is Ordered:

[1] The appeal against conviction on both counts 1 and 2 is dismissed;

[2] The appeal against sentence on count 1 is dismissed; and

[3] The appeal against sentence on count 2 is upheld and the sentence of the court *a quo* set aside and replaced with the following:

"The accused is sentenced to 10 (ten) years imprisonment."

JUDGMENT

COX AJ (BASSON & MILLAR JJ CONCURRING)

[1] The appellant was convicted and sentenced by the Gauteng Division of the High Court, Pretoria (the trial court) on one count of premeditated murder whilst acting in common purpose with others and a second count of attempted murder for which the court *a quo* sentenced him to life and 20 years imprisonment respectively. Following a petition he was granted leave to appeal to this Court by the Supreme Court of Appeal against both his conviction and sentence on both counts.

[2] The central issue in the appeal against conviction is the identification of the appellant as the key figure in a mob justice attack on the victims, and in respect of sentence, that these were harsh and disproportionate in the circumstances.

[3] In the late afternoon of 24 July 2019, a large group of people arrived at the home of Mr Innocent Thokozani Dlangamandla (Mr. Dlangamandla) in Ikageng, Mamelodi demanding to know the whereabouts of his friends.

[4] Mr. Dlangamandla accompanied the group from his home, to the home of the deceased, Mr. Sunnyboy Boykie Kgwedi, in Skierlik informal settlement. Members of the group forced entry onto the premises where they found the deceased's father, Mr. Samuel Moloko (Mr. Moloko) who directed them to the outside room of the deceased.

[5] The deceased was taken from his room and as he appeared by the door, a bottle thrown by the appellant struck him in his face and caused an injury. Members of the group alleged that the deceased and others had stolen new speakers from Ntjebe's Tavern.

[6] The appellant was in possession of a megaphone and used it to give the group instructions. He told them to bring the deceased and they left with him. They left the premises with both Mr. Dlangamandla and the deceased and headed towards a railway line. On the way to and at the railway line, both were assaulted with an assortment of objects, including sticks, bricks, and an iron rod. They were kicked too.

[7] Mr. Dlangamandla testified that the appellant assaulted him. He was hit with an iron rod on his upper arm, multiple times on his back when he fell to the ground and also on the left side of his head. Whilst he lay on the ground, he also saw the deceased being assaulted with the same rod. Whilst hitting the deceased the appellant said that "they were going to die". Mr. Dlangamandla subsequently lost consciousness and only regained this in hospital. He did not recognise anyone but the appellant in the group.

[8] Mr. Lethabo Kgwedi (Mr Kgwedi), the grandson to Mr. Moloko and the nephew of the deceased also testified. He saw a group of people and followed them to see what was going on. From a distance of about 4 meters, he observed the assault on the two victims. His evidence was that both were assaulted by the appellant who used a stick, which broke, while he was assaulting Mr. Dlangamandla.

[9] The beating of the deceased continued and the appellant announced over the megaphone that the deceased was going to be burnt at the dumping site and a tyre was placed around his neck.

[10] Mr. Kgwedi had gone to and fro from the scene to his home, three times as the events unfolded, urging his family to summon the police and thereafter to establish whether the police were on their way as he was concerned for the life of the deceased.

[11] Having returned the third time, he found that the tyre had been removed from the deceased and that he was unconscious. He was on his way home for a fourth time when he met the police accompanied by his mother. The police arrived on the scene and took control.

[12] The post mortem examination revealed that the body of the deceased had sustained numerous injuries and that his death was caused by the head injuries he had sustained.

[13] The appellant offered an alibi as his defence. It was put to the state witnesses that he was at his girlfriend's tuckshop, packing stock and that he could thus not have been part of the group that committed the offences, as alleged.

[14] There is no onus on the accused to prove his alibi. It is for the state to disprove it. It follows that the court must consider whether the identity of the accused, as a member of the group was proved beyond a reasonable doubt. These are two mutually destructive and irreconcilable versions.

[15] Whenever identity is in issue, the cautionary rules applicable thereto must be applied to the evidence of the identifying witness. This means that the court must consider the evidence to establish whether the circumstances under which the identification was made, was sufficiently reliable for the witness to have made that identification[1] of the perpetrator.

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[1] *S v Mthethwa* 1972 (3) SA 766 (A).

[16] Mr. Moloko, Mr. Kgwedi and Mr. Dlangamandla were all identifying witnesses who placed the appellant in the group and identified him as the leader thereof. Both Mr. Kgwedi and Mr. Dlangamandla in addition testified that they had witnessed the appellant assaulting both the deceased and Mr. Dlangamandla.

[17] Counsel for the appellant did not seriously place in issue the identification of the appellant by Mr. Kgwedi and Mr. Dlangamandla and had some difficulty explaining why it was never put to either Mr. Moloko that the appellant would deny his presence in the group on the day or to Mr. Dlangamandla that the appellant would testify about an alleged motive on his part for testifying to falsely implicate the appellant.

[18] From the evidence it is apparent that both Mr. Kgwedi and Mr. Dlangamandla knew the accused before the incident. It is common cause that the time span of the incident was several hours, having commenced at approximately 16h00 and ending at about 20h30. Visibility was not an issue as there was some hours of daylight before nightfall and neither of the two nor Mr. Moloko had any motive to falsely implicate the appellant.

[19] In *R v Dladla*[2], Holmes JA, stated that: *'one of the factors which in our view is of greatest importance in a case of id*entification, *is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased ... In a case where the witness has known the person previously, questions of identification ..., of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made".*

[20] Mr. Kgwedi's uncontested evidence was that he knew the appellant by sight as they lived in the same street and that he had seen him when he visited Ntjebe's Tavern whereas Mr. Dlangamandla stated that he would regularly

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[2] 1962 (1) SA 307 (A) at 310C-E.

see the appellant at an office in the street where he stays. His evidence was that the appellant worked at the office. They referred the court to the fact that the appellant would usually wear sunglasses as he had a problem with his right eye, a fact corroborated by Mr. Moloko.

[21] The appellant was critical of the trial court for taking into account, what is termed the '*dock identification*', of the appellant by Mr. Moloko. In his heads of argument, counsel for the appellant, argued that it ought not to have been admissible. A dock identification is admissible into evidence. It is the reliability and evidentiary value thereof that must be determined. Dock identification must be approached with caution and generally carries little weight unless there was an independent preceding identification.[3] At the time of the identification in court Mr. Moloko did not summarily point out the appellant, but also had a look at other people in the gallery negating the danger of identifying the appellant just because he was in the dock. His identification of the appellant was corroborated by both Mr. Kgwedi and Mr. Dlangamandla and is beyond reproach.

[22] Mr. Moloko also testified that he may have been able to identify other members of the group, should he have seen them subsequently. On the day of the incident, his attention was drawn to the appellant, by virtue of him having the megaphone in his possession. Furthermore, it is noteworthy that his evidence that he knew the appellant by sight, was never contested. Similarly, it was common cause that the appellant had a problem with his right eye, a feature about which the other witnesses also testified.

[23] The inability of the witnesses to give a description of the appellant's clothing that he wore during the incident is no reason to question the veracity of the identification of the appellant. '*This type of detail takes on far less significance once the appellant was a person well known,*'[4] as was established in the matter before us.

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[3] *S v Tandwa & Others* 2008 (1) SACR) 613 (SCA).
[4] *Abdullah v The State* [2022] ZASCA 33 (31 March 2022).

[24] In my view, there was no misdirection on the part of the trial court in accepting the evidence identifying the appellant as both a member of the group as well as a perpetrator of the assaults on the day in question.

[25] In *Machi v The State*[5] the approach adopted in *R v Dladla* was confirmed and in that case, similar to the present (for the reasons set out above) the court found that there was no room for error as far as the identity of the perpetrator was concerned.

[26] The appellant contends that the witnesses fabricated evidence against him by placing him on the scene of the incident. He also argued that the contradiction between Mr. Kgwedi and Mr. Dlangamandla about the object used by the appellant to assault the victims rendered their evidence unreliable. I cannot agree with that proposition. Not all contradictions in the evidence of witnesses in a case are material. In the present matter, Mr. Kgwedi testified that he was standing some 4 meters away from where the assaults were taking place. His evidence as to the appearance of what was being used for purposes of the assault must be viewed in that light. The evidence of Mr. Dlangamandla, who was in much closer proximity, and was assaulted, carries greater weight for that very reason.

[27] The powers of an appeal court are limited when it comes to findings of fact. In *S v Bailey*[6] the power to interfere was set out as follows:

> *"In order to succeed on appeal the appellant must therefore convince us on adequate grounds that the trial court was wrong in accepting the evidence of the State witnesses - a reasonable doubt will not suffice to justify interference with their findings."*

[28] The court *a quo* was cognisant of the contradiction that was pointed out and was satisfied that it did not taint the reliability of the state witnesses. They, in fact corroborated each other in all material respects. In my view, the

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5 [2021] ZASCA 106 para 27.
6 2007 (2) SACR 1 (C).

consideration, evaluation and acceptance of the evidence led on behalf of the state by the trial court, cannot be faulted and for this reason, the appeal against conviction on both counts 1 and 2 are without merit.

[29] The imposition of sentence lies within the discretion of the court. Courts of appeal are therefore reluctant to interfere with a sentence unless the trial court misdirected itself or imposed a sentence that is shockingly inappropriate in the circumstances.

[30] In respect of the count of murder, the appellant was sentenced to life imprisonment.[7] For the count of attempted murder, the appellant was sentenced to 20 years imprisonment.

[31] The murder of the deceased was a heinous one. The deceased was continuously assaulted by a group of people with an assortment of objects over a prolonged period of time. It was also suggested that he should be burnt alive and a tyre was placed around his neck. The amount of pain and suffering of the deceased must have been tremendous and is immeasurable.

[32] Incidents of mob justice in any form must be discouraged at all levels.

[33] The assault of Mr. Dlangamandla was just as serious. However, he was fortunate enough to have survived.

[34] It was argued for the appellant that the sentences were too harsh but as stated previously, this is not the test. The trial court considered the purpose of sentence which includes retribution for the crimes committed, deterrence of the appellant and would be offenders from committing similar offences and the prevention of further criminalisation of the appellant together with the prospects of his rehabilitation.

[35] The court *a quo*, also took into account the personal circumstances of the appellant as well as the nature and seriousness of the offences and the interests of the community.

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[7] In terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997.

[36] I find that there was no misdirection by the trial court in concluding that that no substantial and compelling reasons existed which permitted a departure from imposing the prescribed minimum sentence of life imprisonment for the murder.

[37] I am however of the view, that despite the serious nature of the assault on Mr. Dlangamandla, that the imposed sentence, while correctly warranting incarceration, induces a sense of shock and warrants interference insofar as the length of time of such incarceration is concerned. In my view, the court *a quo* ought more appropriately to have imposed a sentence on the conviction of attempted murder on imprisonment for 10 years.

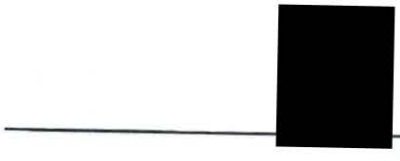
[38] I therefore propose the following order:

[38.1] The appeal against conviction on both counts 1 and 2 is dismissed;

[38.2] The appeal against sentence on count 1 is dismissed; and

[38.3] The appeal against sentence on count 2 is upheld and the sentence of the court *a quo* set aside and replaced with the following:

"The accused is sentenced to 10 (ten) years imprisonment."



I COX

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

[redacted]

A BASSON

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE

[redacted]

A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	22 APRIL 2024
JUDGMENT DELIVERED ON:	3 MAY 2024
COUNSEL FOR THE APPELLANT:	ADV. P MABILO
INSTRUCTED BY:	PH NKOSI ATTORNEYS
REFERENCE:	PHN/PTS/2020
COUNSEL FOR THE RESPONDENT:	ADV. C PRUIS
INSTRUCTED BY:	THE STATE ATTORNEY, PRETORIA
REFERENCE:	NOT FURNISHED