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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Coram: Henney, J et Loots, AJ)**

**Appeal No: 06/2017
Lower Court Appeal No: HS24/2013
DPP Ref No: 10/2/5/1/3-30/18**

In the matter between:

SIBUSISO NAMZI

Appellant

and

THE STATE

Respondent

Heard: 7 September 2018
Delivered: 9 October 2018

JUDGMENT

Henney, J et Loots, AJ

INTRODUCTION

[1] The appellant was charged in the Strand Regional Court with having committed the offences of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act No. 51 of 1977 (“**the CPA**”), as count 1, and murder (read with the provisions of Section 51(2), 52(2) and 52B of the Criminal Law Amendment Act 105 of 1997 (“**the CLAA**”), as count 2.

[2] The appellant, who was legally represented throughout the proceedings, pleaded not guilty to the charges.

[3] Following an extended trial in which he participated fully, the appellant was convicted on both counts, following which he was sentenced to 15 years direct imprisonment in respect of count 1, and life imprisonment in respect of count 2.

[4] The appellant has exercised his rights granted in terms of section 10 of the Judicial Matters amendment Act, No 42 of 2013, and has prosecuted an appeal against both his conviction and sentence.

AD CONVICTION

[5] The particulars in respect of count 1 (as reflected on the charge sheet) are that on or about 11 September 2012, at or near [..], Hermanus, in the regional division of the Western Cape, the appellant unlawfully and intentionally assaulted the 72 year old Hendrika Maria Maree (“**the deceased**”), with violence, taking a safe containing R700.00 in cash, a cheque book, and an identity document, all owned by the deceased, or in the lawful possession of the deceased. The aggravating circumstances in respect

of the robbery are recorded to be that the appellant strangled and suffocated the deceased.

[6] The particulars contained in the charge sheet in respect of count 2 are that, on or about 11 September 2012, at or near [...], Hermanus, in the regional division of the Western Cape, the appellant unlawfully and intentionally killed the deceased by strangling and suffocating her.

[7] Given the formulation of the charges in respect of the commission of the offences, and the fact that (on a proper construction of the charge sheet) the commission of the murder was alleged to have occurred *pari passu* with the robbery, the appeal in respect of the conviction on both counts 1 and 2 were dealt with together.

[8] Thus, the grounds of appeal advanced in respect of the conviction in respect of both counts 1 and 2 were, therefore, that:

- a. The Regional Magistrate erred in holding that the State had discharged the onus of proving beyond a reasonable doubt that the appellant was the perpetrator of the offences.
- b. The Regional Magistrate, in holding that the State had discharge the onus resting on it, erred:
 - i. In that she had failed to properly evaluate the evidence tendered;

- ii. In that she had concluded that the evidence tendered justified reaching the conclusion (as the only reasonable conclusion) that the appellant was the perpetrator of the crimes with which he was charged;
- iii. In that she found the appellant's version to be so improbable that it could be rejected beyond a reasonable doubt;
- iv. In that she concluded that the evidence tendered was sufficient to justify the finding that the appellant's confession statement regarding his commission of the robbery and the murder of the deceased, was made freely and voluntarily.

Evaluation of the evidence tendered in light of the grounds of appeal

Formal Admissions

[9] The conviction of the accused was based on the totality of the evidence presented to the Regional Magistrate; which was mostly circumstantial in nature. These included admissions made by the accused in terms of Section 115 (2) (b) read with Section 220 of the CPA, which admissions related to the usual chain evidence, as well as including an admission that the appellant's fingerprints were lifted from the scene of the crime (however, contending that have been placed there under different circumstances than those alleged by the State).

[10] In addition to the admissions referred to above, on 16 October 2012 (the day following his arrest), the appellant had confessed to the murder of the deceased before

Captain DJ Rautenbach of the South African Police Service (“**SAPS**”). Captain DJ Rautenbach is the branch commander of the Gansbaai detective branch and a commissioned officer in the SAPS.

[11] The process of making the statement containing the appellant’s confession was recorded on video, and the statement itself was reduced to writing. The appellant’s statement, furthermore, indeed amounts to a confession of the murder of the deceased at the time of the commission of the robbery with which he was also charged.

[12] The admissibility of confessions is governed by the provisions of section 217 of the CPA. In terms of section 217 the primary and indispensable requirement for the admission of a confession is that it be made freely and voluntarily by a person in sound and sober senses who was not unduly influenced into making it. Should the State wish to rely on a confession, the *onus* is it to show that there has been compliance with the prescripts of section 217.

[13] The appellant attacked the admissibility of the confession, alleging that he was assaulted by members of the SAPS, and coerced into making the confession against his will, the content of which was dictated to him.

[14] In support of his case that the confession was not made freely and voluntarily the appellant alleged that, prior to making the confession, he was taken to a beach by the investigating officer and two other members of the SAPS, one of which was a woman. There, *inter alia*, he was carried by his testicles and had a plastic bag put over his head to cut off his supply of oxygen. He was allegedly also threatened.

[15] Against the allegations of the appellant are juxtaposed the evidence of the investigating officer, as corroborated by Warrant Officer Coetzee, as well as the process Captain Rautenbach followed in respect of the appellant's confession.

[16] Captain Rautenbach, who was in no way connected to the investigation (even being from a different police station and town) testified that, prior to him agreeing to receive the appellant's confession, he insisted that the appellant be medically examined and that a so-called J88 medical examination form be submitted to him following the examination. The appellant was duly examined by a medical practitioner, who found no signs of assault. Captain Rautenbach then insisted that a videographer be present during the proceedings and that the proceedings be recorded. Again, nothing untoward is found in the process, including that the appellant made no mention of any assault or coercion. It would therefore appear that Captain Rautenbach was acutely aware of the duties resting on him in respect of recording the confession, and that he was studious in following these duties.

[17] To the manner in which the confession was recorded must be added the fact that the details provided by the appellant during the confession would not ordinarily be details provided by someone who had been coerced into making a confession in respect of a crime he did not commit.

[18] Having regard to what is stated above, we are satisfied that the State has discharged the *onus* resting on it prescribed by the provisions of section 217 of the

CPA, and that there has been compliance with the *dicta* in **S v Mofokeng** 1986 (4) SA 852(W), **S v Dhlamini** 1971 (1) SA 807 (A) and **S v Mpetha** 1983 (1) SA 576 (C).

[19] We are therefore also satisfied that the court *a quo* was correct in accepting into evidence the appellant's confession to having committed the crimes reflected in the charge sheet.

Further evidence

[20] The other circumstantial evidence the Regional Magistrate relied on was the evidence of the deceased's daughter-in-law, Ms Maree, and of the deceased's sister, Ms Marx. Ms Marx stated that she had regular telephonic contact with the deceased, including on the morning of 11 September 2012. On this morning the deceased could not speak to Ms Marx because she had to dish some food for "Simon". Ms Maree confirmed that the appellant was known as "Simon", and that he worked for her and her husband before working for the deceased. Ms Maree's evidence, furthermore, corroborated the evidence of Ms Marx to the extent that she testified that there were two plates and a cup on the table in the house of the deceased. One plate still contained part of a meal. The evidence of the telephonic contact between the deceased, Ms Maree, and Ms Marx was confirmed by the production of relevant telephone records;

[21] The destruction of the appellant's alibi (that he was already working in the Strand as from 26 August 2012) by the evidence of Ms Moshi, his life partner, and Mr Lingawuthu, his former landlord (to both of whom, according to their testimony, he had

also admitted the commission of the offences with which he had been charged (although, during the trial, the appellant disputed having done so).

[22] Considering the evidence as a whole we are satisfied that the trial court was correct in finding that, not only based on the appellant's confession, but also based on the surrounding circumstantial evidence, it was proven beyond reasonable doubt that the appellant had committed the offences in question.

AD SENTENCE

Consideration of the question regarding the competency of the Regional Court to have imposed the sentence of life imprisonment

[23] As regards sentence, the first question to consider in this appeal is whether it was competent for the Regional Court to sentence the appellant to life imprisonment in respect of count 2.

[24] Regardless of the narrative thereof, the charge sheet (incorrectly, it was submitted during the argument of the appeal) only referred to section 51(2) of the CLAA.

[25] Before sentencing, the appellant's legal representative however conceded that, despite the charge sheet referring to section 51(2) of the CLAA, the provisions of section 51(1) thereof apply in *casu*.

[26] Notwithstanding the apparent concession by the appellant's counsel, we are of the view that, if it is found that the Regional Court could not have sentenced the appellant in terms of section 51(1) of the CLAA in the circumstances, the sentence of

life imprisonment imposed falls to be set aside, and is to be replaced by a sentence which falls in Part 2 Schedule 2, read with Section 57 (2) of the CLAA.

[27] In **S v Mashinini** 2012 (1) SACR 582 (SCA) Mhlantla JA (for the majority), having, *inter alia*, considered the *dicta* in **S v Legoa** 2003 (1) SACR 13 (SCA), **S v Ndlovu** 2003 (1) SACR 582 (SCA) and **S v Makatu** 2006 (2) SCAR 582 (SCA), the following is stated in paragraph 28 of the judgment:

“There is one aspect that I am constrained to address. In my view this is a type of case where imprisonment for life would have been appropriate but for the careless manner in which the staff in the office of the National Director of Public Prosecutions handled the matter. The relevant officials did not approach the matter with the requisite degree of diligence and seriousness. They were aware of the facts - having obtained a statement from the complainant and had DNA evidence. The four suspects had been arrested – clearly indicating that this was an allegation of a gang rape. Had they applied their minds properly, it would have been clear to them that the accused persons ought to be charged either in terms of s 51 or s 51(1) of the Act if they desired to be specific. The outcome of the case is unjust to the complainant and society at large but that is as a result of the State failing to perform its duties properly. This is made even more reprehensible by the fact that starting from Legoa and ending with Makatu, this court has sounded a salutary warning that care be exercised in drafting and preparing charge-sheet(s) and indictment(s) to ensure that they correctly and adequately reflect all the necessary averments. A situation of this nature cannot be countenanced.”

[28] Relying on this *dictum* the State’s counsel conceded that the State had erred in charging the appellant in terms of section 51(2) of the CLAA and submitted that, because of the error, the regional court was limited to imposing a sentence of 20 years imprisonment in respect of count 2. Interestingly, counsel for the appellant did not advance this argument.

[29] Following **Mashinini** the Supreme Court of Appeal, in **S v Mhlongo** 2016(2) SACR 611 (SCA) and **Tshoga v S** 2017 (1) SACR 420 (SCA), again considered the question of similar incorrect statutory references in charge sheets.

[30] In **Mhlongo** the SCA found that substance is to trump form when considering whether or not an accused's right to a fair trial had been infringed by the failure of the prosecuting authority to formulate the charge sheet in such a way that it refers to the correct subsection 51 of the CLAA, or (at the outset of the trial) to have been informed of the relevant provisions of the CLAA. The court again emphasised that every case must be treated and judged on its own facts before any decision to set aside the proceedings can be taken. On the facts serving before the SCA in **Mhlongo** the court held that, upon reading the record as a whole, it could not be said that the accused had been deprived of his right to a fair trial despite reference incorrectly having been made to Part 2 of Schedule 2 to section 51 of the CLAA. The substance was that the charge the accused pleaded to unambiguously fell within the ambit of section 51(1) of the CLAA, the accused was made aware of his rights within the purview of the CLAA at the commencement of the trial, the accused was aware of the seriousness of the charge (seeking a postponement of the trial to consult his parents in this regard), and the accused was legally represented throughout the proceedings. In any event the SCA, at paragraph 17 of the judgment reaffirmed that:

"It will not be essential to inform [the accused person] that he is facing the possibility of a substantial prison sentence or a sentence which may be 'materially prejudicial' if he can reasonably be expected to be aware of this'."

[31] The SCA's analysis in **Tshoga** also finds application in the present instance; where, at paragraphs [22] and [23] of the judgment, the court reaffirmed that, in considering prejudice to the accused due to irregularities in the charge sheet relating to the applicability of a minimum sentence regime, substance overrides form. The court, furthermore, reiterated that every case is to be approached on its own facts and that it can only be decided whether an accused had a fair trial or not after a diligent examination of all the facts. We mention that, on the facts governing **Tshoga**, the court found that the accused's right to a fair trial had not been prejudiced by the failure to have mentioned the relevant provisions of the CLAA in the charge sheet.

[32] Subsequent to **Mhlongo** and **Tshoga**, the Constitutional Court, in **Ndlovu v S** 2017 (2) SACR 305 (CC), considered the question of whether the regional courts sentencing jurisdiction was curtailed by the reference to the incorrect section of the CLAA in the charge sheet when formulating the charge. In **Ndlovu** the appellant had been charged with rape, as read with section 51(2) of the CLAA. In the circumstances of that matter the Constitutional Court found that the Regional Court had overstepped the boundaries of its statutory competence because the accused was found "guilty as charged", having simply been charged with rape read with section 51(2) of the "Minimum Sentencing Act". The charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so.

[33] A comparison between the formulation of the charges in the present matter, and the facts of **Ndlovu**, readily confirms the distinction between the two cases, as well showing why **Ndlovu** is to be distinguished from **Mahlongo** and **Tshoga**.

[34] Whereas in the case of **Ndlovu** the appellant was charged only with rape *simpliciter*, being rape as read with section 51(2) of the CLAA with no nothing added, it appears, to bring the offence within the ambit of section 51(1) of the CLAA, the appellant in the present instance was charged with robbery with aggravated circumstances and murder where, upon a reading of the narrative of the count 2 in the context of the narrative of count 1, the death of the deceased was caused by the accused in committing, or after having committed robbery with aggravated circumstances. In fact the aggravating circumstances in respect of count 1 are the strangulation and suffocation (thus the murder) of the deceased.

[35] Furthermore, in the matter before us, as in **Mhlongo** and **Tshoga**, the appellant was charged with and pleaded to offences which clearly fall within the ambit of section 51(1) of the CLAA.

[36] There is also no doubt that the appellant, who was legally represented throughout the trial, was acutely aware of the seriousness of the offences with which he had been charged, actively participating in the trial proceedings.

[37] In addition the facts satisfying the definitional requirements for the imposition of a life sentence in terms of section 51(1) of the CLAA are established by the evidence as a whole, as well as forming part of the appellant's very confession admitted into evidence.

[38] We are thus satisfied that, despite the fact that the charge sheet in respect of count 2 provides for the provisions of a sentence to be imposed in terms of section 51(2) of the CLAA, the appellant as well as his legal representative, were at all times aware that a conviction on count 2 would attract the imposition of a sentence in terms of the provisions of section 51(1) of the CLAA.

[39] Notwithstanding the above finding, and before finally disposing of this issue, it would be prudent for this court to comment about the continuous carelessness of prosecutors in drafting charge sheets and indictments in matters where the provisions of the CLAA finds application.

[40] As can be seen from the various cases cited, and cases which have gone through our courts, it has become a regular occurrence that Regional Courts as well as the High Court are confronted with the situation where prosecutors, through negligence or some oversight in drafting charge sheets or indictments (as the case may be), fail to refer to the proper statutory provision of the CLAA on which the State wishes to rely in respect of sentencing of an accused.

[41] This may result in unfairness to an unsuspecting accused, even if he or she is legally represented. As happened in *Mashinini*, it may also result in a person being sentenced to a lesser term of imprisonment even though, on the facts of the case, such a person has been proven to have committed an offence to which the provisions of section 51(1) (which calls for a higher sentence) are applicable, instead of the

provisions of section 51(2). Such a situation would be untenable and not be in the interests of justice and should be avoided at all costs.

[42] It would therefore be a sound practise for prosecutors, in terms of the provisions of section 150 of the CPA, at the outset of the proceedings, to inform the court whether the State would, upon conviction of an accused, rely on either the provisions of section 51(1) or the provisions of 51(2) of the CLAA. The court should then briefly confirm with the accused that the provisions of the CLAA had been brought to his or her attention, and explained.

[43] The reason for recommending the practice set out in the immediately preceding paragraph is that it is doubted whether the charge sheet or indictment would invariably be capable of amendment or rectification at a later stage in terms of the provisions of section 86 or 88 of the CPA. The *obiter* reference in **Mhlongo** (at paragraph [17] of the judgment) that the fact that the charge sheet had a defect which was never rectified in terms of s 86(1) of the CPA, did not of its own vitiating the sentencing proceedings, must be seen in the context of the factual matrix applicable to that case. It does not confer a blanket power to, without more, “amend” a defective charge sheet. If such a situation were to be permitted it could result, not in the amendment of charge sheets, but in the substitution of charges.

[44] In **Ndlovu** (as did the SCA in **Mashinini**) the Constitutional Court, therefore, declined to allow the appellant to be sentenced as if he had been charged under section 51(1) of the CLAA when he had been charged under section 51(2) thereof.

Appropriateness of the sentences imposed

[45] The next question to consider is whether the sentence imposed in respect of each of the charges was appropriate. In dealing with this issue, there has to be a consideration as to whether the court *a quo* was correct in coming to the conclusion that there were no substantial and compelling circumstances to deviate from the prescribed sentences. Therefore, having regard to the totality of the evidence in this case, this court must, satisfy itself whether or not such circumstances are present.

[46] During his address in mitigation of sentence the appellant's legal representative acknowledged and submitted that the offences of which the appellant had been convicted are very serious and gruesome offences affecting the safety and security of ordinary citizens, making them scared to stay in their own homes and in their own country. He continued to state that the offences affect, not only individuals, but also the country as it affects international trade.

[47] Notwithstanding, the foregoing, and the fact that he faced life imprisonment, the appellant did not himself testify in mitigation of sentence, nor was any witness called to testify on his behalf.

[48] The following personal circumstances were, however, placed on record by the appellant's legal representative on his behalf:

- a. The appellant was born on [...] 1983 (and was thus 29 years old at the time of the commission of the crimes).

- b. He has a life partner and two children (born in 2006 and 2011 respectively) with whom he was still in contact at the time of sentencing;
- c. He was not the primary caregiver although he maintained the children when he was working.
- d. He attained a grade 9 education and attended the Zion church in Zwelihle in Hermanus.

[49] The appellant has one previous conviction for housebreaking and theft committed on 10 June 2002.

[50] At the time of the sentencing the accused had been in custody since 15 October 2012, a period of roughly 2 years and 8 months.

[51] As was recently reaffirmed by the SCA in **DPP v Booysen** (580/2017) [2018] ZASCA 07 (23 February 2018) at paragraph [13]; where minimum sentence regimes apply the court must impose the minimum sentence unless there are substantial and compelling reasons for imposing a lesser sentence.

[52] Not only was the trial court alive thereto that substantial and compelling reasons for a deviation from the statutory prescribed sentences had to exist before a lesser sentence than such a sentence could be imposed, on several occasions she reminded the appellant's legal representative that substantial and compelling reasons had to be advanced should he wish to argue for a lesser sentence.

[53] It was not disputed that the mode of the robbery rendered the appellant liable for conviction of robbery with aggravating circumstances.

[54] In respect of the murder of the deceased, the appellant callously murdered an elderly lady, living alone, in her home, under circumstances where he was employed by her and therefore stood in a relationship of trust with her. He accomplished this by strangling and suffocating her when she had refused to open the safe. The appellant murdered the deceased so that he could complete his theft of the safe (containing, as he himself stated in his confession: R 700.00, a cheque book, and the deceased's identity document).

[55] Considering the principles set out above in the context of the factual matrix applicable in this case, and against the background of the well-known triad identified in **S v Zinn** 1969 (2) SA 537 (SA), together with the fact that there appears to be no substantial or compelling reason that was put forward as to why the minimum sentences should not be imposed, I am of the view that the sentence imposed, although on the face of it harsh, was appropriate given the circumstances of the case.

[56] Accordingly, the appeal in respect of both conviction and sentence is dismissed.

[57] **ORDER**

1. The appeal against conviction and sentence is dismissed.
2. That a copy of this judgment be distributed to the Offices of the Regional Court President and the D.P.P. Western Cape.

I agree.

JH LOOTS
Acting Judge of the High Court

RCA HENNEY
Judge of the High Court