

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A442/2013

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

23 July 2014

Date

Signature

In the matter between:

MONAMODI ERIC NGALE

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

RATSHIBVUMO AJ:

1. Mr. Ngale, the appellant, was sentenced to life imprisonment on 21 October 2009 following a conviction by the Tembisa Regional Court on a charge of murder. He was legally represented throughout the

trial. On 24 March 2011, an application for leave to appeal was brought before the trial court. The trial court was mindful of the provisions of sec 309 (1) (a) (ii) of Act 51 of 1977 which provides for the automatic right to appeal in cases where life imprisonment is imposed by the Regional Court when it granted the application. Sec 309 (1) (a) (ii) of Act 51 of 1977 provides,

“309. Appeal from lower court by person convicted.—(1) (a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).”
[own emphasis].

Although this legislation was only passed in 2013, it is deemed to have come into operation on 01 April 2010 (see sec 43 (2) of Act 42 of 2013). The appeal is therefore against the sentence of life imprisonment.

2. It was submitted on behalf of the appellant that the appeal should succeed in that the charge sheet did not allege that the murder was planned or premeditated or that it attracted the sentence of life imprisonment; although this was the finding made by the trial court. It

was further argued that the reference made to section 51 of Act 105 of 1997 was ambiguous since the said section contains the minimum sentence of 15 years imprisonment and life imprisonment under certain circumstances.

3. It is necessary to consider the facts that gave rise to the conviction and a finding to the effect that the murder was premeditated or planned before considering the reference to Act 105 of 1997 (the Act) in the charge sheet. The facts that gave rise to the conviction are the following; on 28 February 2006, the deceased realised that the money she had left in her place of abode (in Ivory Park) was missing. According to her, the appellant was the only person who knew about the presence of such money in the house. It appears as if the appellant may have been close to the deceased's husband who was arrested at that stage since he had attended to his court proceedings earlier on that day in the company of the deceased and other family members.
4. Upon realising that money was missing, the deceased confronted the appellant about it demanding that he should return it. Eventually the appellant promised that he would return the money back to the deceased in the evening of the same day, but he did not. The next morning around 6 am, the deceased was shot and died on the spot by the appellant at her home. This was after she left the house to attend to laundry outside. The only altercation that her relatives who were still in the house heard between her and the appellant were her pleas to be spared her life. By the time they went out the deceased was already dead and the appellant was running away.

5. This was the version of the State which, though challenged during trial, no appeal was noted against the finding by the trial court which accepted it. Counsel for the appellant conceded that this was unchallenged on appeal because the trial court correctly accepted the State's version.

6. It is now common cause that the reason the deceased was murdered was over her accusations of the appellant that he stole her money. It was however submitted on behalf of the appellant that that such was the confrontation that took place on the day she was killed. The State contends that such was the confrontation that took place a day before. A finding as to when the confrontation took place has a bearing on the ultimate finding by the *court a quo* that the murder was premeditated. Whereas the appeal was noted only in respect of the sentence, the conviction was also challenged in as far as the finding by the trial court was made to the effect that that the appellant was guilty of premeditated murder.

7. In *S v Ndlovu* case no. A593/2013 handed down on 06 June 2014 by the this court, Wright J held the following:

“In my view it is clear that the appellant enjoys an automatic right to appeal his sentence. It seems to me that the words **such an appeal** include an appeal against conviction, a sentence of life imprisonment imposed by a regional magistrate and an order. They are not limited to an appeal against a life sentence. Absent the imposition of a life sentence, leave is needed for any appeal. The words **sentence to imprisonment for life** are descriptive of the person seeking to appeal. They do not qualify what is sought to be appealed.”

And in *S v Bangala* (A412/2013) [2014] ZAGPJHC 86 (17 April 2014), this court held *per Mashile J* that;

“In terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977, the Appellant became entitled to an automatic right to appeal against both his conviction and sentence. This appeal accordingly concerns his conviction and sentence.”

I agree with the views by my learned brothers above. It is therefore within the rights of the appellant to challenge both the conviction and the sentence as he deems appropriate.

8. It was argued that the appellant had a firearm with him for the purpose of undergoing an interview for a position as a security officer. This version was rejected by the court *a quo* and in my view, rightly so. Even if it could be assumed in favour of the appellant that a licence for a firearm might not have been sufficient proof that he owned a firearm for job interview purposes; he had no business to do at the deceased's place of abode that morning. From the record of proceedings, it appears that the accused "...thought that because of the deceased has been phoning me the previous day demanding some money, I thought that it was wise to go pass them and see them (sic).” He then proceeded to describe how he was fought by the deceased's in laws who were present there.
9. This version was rejected because, *inter alia*, the witnesses who were there testified that they did not see the actual shooting. They also disputed that any altercation might have taken place in their presence saying the only words uttered by the deceased were to the effect that “Eric, do not kill me.” I cannot find any misdirection on the trial court in accepting the State version in this regard.

10. Even if it was to be accepted that the appellant was on his way for the job interview when he diverted to go see his accuser, the deceased; I do not see how this would alter the fact that the reason he decided to divert from his way to go meet the deceased was over the previous day's confrontation. He obviously was not going there to refund her the stolen money, for he did not do that and does not even make such allegation. He did not go there to make a verbal confrontation, for there was none heard by the witnesses. He obviously was there to do what he did which, given the time that lapsed from the time of what he now describes as a provocation (accusation of theft of money a day earlier) until the murder, points to premeditation and planning. In *S v Mgibelo* 2013 (2) SACR 559 (GSJ) this court held that 16 hours that lapsed from the incident that could be said to be the provocation of the accused (finding her lover with another woman in bed) to the time she committed the murder was enough time to conclude premeditation and planning on her part. The court also found life imprisonment was the only appropriate sentence.

11. The next aspect is the omission in the charge sheet to indicate if the applicable prescribed sentence would be in terms of section 51 (1) or 52 (2) of the Act. The need for the State to stipulate clearly the legislation it intends relying on for sentencing purpose has been stated in several decisions of this court and by the Supreme Court of Appeal. In *S v Makatu* 2006 (2) SACR 582 (SCA) the court set aside the sentence of life imprisonment imposed by the trial court after considering, *inter alia*, that the charge sheet did not stipulate that the State would seek life imprisonment in case of conviction. The charge sheet instead referred to section 51 (2) of the Act which provides for

prescribed sentence of 15 years imprisonment. Upon conviction the accused was surprised to find that he was sentenced to life which is provided under section 51 (1) of the Act. (See also *S v Mashinini and another* 2012 (1) SACR 604 (SCA) where a similar misdirection on the part of trial court was pointed out on appeal.).

12. This case is however distinguishable from *Makatu* and *Mashinini* decisions. Unlike in *Makatu* and *Mashinini*, the accused was not misled to believe that the court would be bound to sentence him in accordance with the provisions of sec 51 (2) of the Act. Instead, the charge sheet referred to sec 51 of the Act which contains both 15 years imprisonment in certain circumstances and life imprisonment in others.
13. Whereas in *S v Ndlovu* 2003 (1) SACR 331 (SCA), Mpati JA emphasised the need of the accused, in particular the unrepresented accused, to be forewarned of the prescribed sentences applicable at the beginning of the trial. But when the accused is legally represented, it can be reasonably accepted that the legal representative informed the client of all the rights and the provisions in the penalty clause. In *S v Mvelase* 2004 (2) SACR 531 (W) Borchers J held that;

“These matters do not have to be explained to an accused who is represented, for the simple reason that a legal representative is a legally qualified person who is expected to know the law. It would, in my view, be a sad day indeed if a presiding officer were to be required to assume the incompetence of legal representatives and was thus required to treat the accused as if he were unrepresented.”

14. While the charge sheet made reference to section 51 of the Act, there is no suggestion that the appellant's legal representative chose to advise the appellant of just a portion of the provisions therein and if so, why he chose that portion over another. Had the appellant been unrepresented, it would have been the trial court's responsibility to explain all those penalty provisions to the appellant. Resultantly, this argument also has to fail.
15. It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. The mere reason that the sentence imposed is not what the appeal court would have imposed does not justify interfering with this discretion. See generally: *S v Petkar* 1988 (3) SA 571 (A), *S v Snyder* 1982 (2) SA 694 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA) and *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10.
16. It appears from the record that the trial court took into consideration all factors expected of it in accordance with *S v Zinn* 1969 (2) SA 537 (A) in that personal circumstances of the offender, the interests of the society and the crime convicted of appear from the record to have been given due weight. It is also clear that the appellant lacks remorse for the crime he was convicted of, having protested his innocence to the end – see *S v Matyityi* 2011 (1) SACR 40 (SCA). I do not see any misdirection on the part of the trial court in not

finding substantial and compelling circumstances justifying a lesser sentence than the prescribed one.

17. In the result I propose making the following order:

The appeal is dismissed.

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

H MAYAT
JUDGE OF THE HIGH COURT

FOR THE APPELLANT	: ADV EA GUARNERI
INSTRUCTED BY	: LEGAL AID SOUTH AFRICA JOHANNESBURG JUSTICE CENTRE
FOR THE RESPONDENT	: ADV RG MUVHULAWA
INTRUSCTED BY	: DIRECTOR OF PUBLIC PROSECUTIONS JOHANNESBURG
DATE HEARD	: 22 JULY 2014

JUDGMENT DELIVERED

: 23 JULY 2014