

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>05 March 2018</u>	
DATE	SIGNATURE

CASE NO: A250/2017

In the matter between:

AUBREY THABO MATJILA

Appellant

and

THE STATE

Respondent

Summary

An appeal against life imprisonment imposed by the Gauteng Local Division of the High Court for murder read with section 51 of Act 105 of 1997. Minimum sentence of life imprisonment not applicable where

murder was found not to have been planned or premeditated or where the death of the victim was not caused by the accused in committing or attempting to commit robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1997 (Act 51 of 1997). Trial Court imposing life imprisonment in the circumstances constituting a misdirection and on appeal the court will be at large to consider sentence afresh upon finding that a misdirection occurred.

Order

- 1. The appeal against sentence is upheld.**
- 2. The sentences imposed by the trial court are set aside and replaced with the following:**
 - (a) In respect of count 2 (murder) the accused is sentenced to 20 years' imprisonment.**
 - (b) In respect of count 3 (unlawful possession of a firearm) the accused is sentenced to 3 years' imprisonment.**
 - (c) In respect of count 4 (unlawful possession of ammunition) the accused is sentenced to 3 years' imprisonment.**
- 3. The sentences are antedated to 19 November 2004 in terms of section 282 of the Criminal Procedure Act 51 of 1977.**

JUDGMENT

**COLLIS J (MOKGOATLHENG J and VAN DER WESTHUIZEN
AJ concurring)**

[1] The appellant, Mr Aubrey Thabo Matjila appeared in the Gauteng Local Division of the High Court before Justice Van Oosten, on the following charges:

[1.1] Count 1: Attempted Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1997 and read together with section 51 of Act 105 of 1997;

[1.2] Count 2: Murder read with section 51 of Act 105 of 1997;

[1.3] Count 3: Contravention of section 2 read with sections 1 and 39 of Act 75 of 1969-Unlawful possession of an arm; and

[1.4] Count 4: Contravention of section 36 read with sections 1 and 39 of Act 75 of 1969-Unlawful possession of ammunition.

[2] The appellant who was legally represented pleaded not guilty to all the charges and gave a plea explanation. He was subsequently convicted on counts 2, 3 and 4 and acquitted on count 1.

[3] On the 19th of November 2004 he was sentenced as follows:

[3.1] Count 2: Life imprisonment.

[3.2] Count 3 and 4: Three years' imprisonment. The counts having been taken together for the purposes of sentence.

[4] The appellant applied for leave to appeal against conviction and sentence. Van Oosten J refused the application. The appellant subsequently approached the Supreme Court of Appeal in pursuance of his appeal. On 3 May 2017, Shongwe JA and Coppin AJA refused the appellant leave to appeal his conviction but granted him leave to appeal the sentence of life imprisonment imposed on him, to the Full Court of this Division.

[5] The genesis of the convictions and the sentences arose from events which occurred on 26 November 2003. The appellant, armed with a firearm had entered the shop of the deceased and without any further ado, jumped over the counter behind which the deceased was standing. The appellant pointed his firearm to the deceased without saying a word to the deceased. The deceased pulled the accused's arm aside and a fatal shot went off which struck the deceased in his arm.

[6] In sentencing the appellant, the trial court had found that the accused showed no remorse and had also found that the offence of murder was premeditated.¹ *Ex facie* the record it is apparent that the trial court took into account the personal circumstances of the accused albeit scanty, the nature and seriousness of the offences as well as the interests of society.

[7] For the purposes of judgement on sentence, the following personal circumstances of the appellant appear to have been placed on record:

[7.1] the appellant was 22 years old at the time when he was sentenced;

¹ Record Volume 2 page 73

[7.2] the appellant was unmarried, with no dependents;

[7.3] he attended school in Lesotho and only reached Grade 7;

[7.4] he was part-time employed and earned an income of between R45 to R 50 per day;

[7.5] the appellant was a first offender;

[8] The sum total of the mitigating factors placed before the sentencing court were his personal circumstances, his age and there being no previous convictions against him.²

[9] The appellant's attack against the sentence is effectively that the sentence is shockingly harsh and inappropriate and not justified in the circumstances.

[10] Counsel for the appellant submitted that the age of the appellant, his time spent in custody and him being a first offender cumulatively constituted substantial and compelling circumstances, justifying a deviation from the prescribed minimum sentence and warranting the imposition of a lesser sentence.³

[11] Counsel for the respondent on the other hand had submitted that the youthfulness of the offender will invariably be a mitigating factor unless it appears that the viciousness of his deeds rules out immaturity. The younger the offender, the clearer the evidence needs to be about his

² Record Volume 2 page 74

³ Appellant's Heads of Argument page 4 para 18

background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness.⁴

[12] Counsel further submitted that during the trial there was no evidence presented upon which it can be inferred that the accused's youthfulness and immaturity can operate as a compelling and substantial circumstance in order to deviate from the minimum prescribed sentence.

[13] In determining this appeal and as a result of the trial court having concluded that the murder was premeditated and planned the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 needs mentioning. It provides as follows:

“(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 Schedule 2 to imprisonment for life.

Murder, when-

(a) it was planned or premeditated;

(b);

(c) The death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i)

(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

⁴ S v Matyityi 2011(1) SACR 40 SCA [para14] / Respondent's Heads of Argument page 6 para 13

(d) The offence was committed by a person or group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy;”

[14] The trial court had rejected the version of the accused as improbable when he alleged that other assailants on the day in question had entered the shop of the deceased and indeed that they were the people that engaged in the shooting of the deceased. The trial court had found this version to be improbable having regard to the positioning of the bullet wounds which the appellant had sustained in his lower abdominal area below the counter height, which could not have been sustained whilst he was on the customer side of the counter.⁵

[15] Support for this finding made by the trial court, is found in the evidence of Mr Leon Verster, the son of the deceased, who testified that on the day in question, the appellant ran into his father's shop from the street, jumped the counter in front of the shop and without saying a word shoved a gun into his father's lower chest area and a shot went off.⁶

[16] The evidence of Mr. William Jarett on this aspect was that as he was standing in front of the counter and whilst talking to the deceased he then noticed the appellant towards his right pointing them with a firearm and next to the appellant was another person.⁷ As he then ducked below the counter he then heard a shot rang out. He never saw this other person again.

⁵ Volume 1 page 67 Lines 15-16

⁶ Volume 1 page 13 Lines 24 & 25 and page 14 Lines 6-10

⁷ Volume 1 page 26 Lines 12 -22

[17] Having regard to the judgment of the trial court it is clear that the court made a factual finding that the appellant on the day in question had acted alone and that the murder was premeditated and planned.⁸ Albeit that section 51(1) as quoted above, provides for the murder to have been *either* planned or premeditated, the trial court had found that the murder was *both* planned and premeditated.

[18] This finding so made by the trial court was not based on facts borne out by the evidence but rather on an assumption reached by the trial court. During evidence-in-chief of Mr. Leon Verster the following testimony is of relevance:⁹

'Now when he got into the shop, did he, this person, did he say anything?---He did not say a word.

He got on top of the counter, then what happened further?---He shoved a gun in my dad's lower chest area.

Court: He did what?---Showed the gun in my dad's lower chest area.

Mr. Mohlala: You say the gun shot your father in the chest. Where did this guy...---He shoved the gun, shoved.

Oh, sorry M'Lord, he shoved. Then from there what happened? --- My dad recoiled by pushing his arm aside. A shot went off and he shot my dad in the arm.

Just before that, where did this man get the gun from? ---He had it out already."

[19] The trial court in reaching its decision had placed reliance on the evidence that the appellant had entered the shop of the deceased carrying

⁸ Record Volume 2 page 73 Lines 20-25

⁹ Record Volume 1 page 14 Lines 5-18

a firearm and nothing more. However, an evaluation of the evidence presented before the trial court clearly demonstrates that the shot went off when the deceased was pushing aside the arm of the appellant. Therefore the trial court erroneously concluded that the appellant entered the shop of the deceased with the singular intention to kill the deceased (*dolus directus*). On the objective facts the evidence rather proves that the appellant's actions have resulted in the death of the deceased (*dolus eventualis*) and consequently a finding that the murder was planned or premeditated could not have been made by the court.

[20] This I further conclude in light of the trial court's own finding that the appellant should be acquitted on the attempted robbery charge proffered against him. In my view the court correctly concluded that the intention to rob the shop on the part of the appellant was not the only possible inference that can be drawn from his conduct on the day in question.

[21] The trial court having erroneously concluded that the murder was premeditated and planned, could not have imposed the minimum sentence of life imprisonment as prescribed in Section 51(1) Part 1 Schedule 2, but should have concluded that the murder of the deceased fell within the ambit of Section 51(2) Part II of Schedule 2, which carried imprisonment for a period of not less than 15 years where the appellant was a first offender.

[22] Albeit, that sentencing is inherently within the discretion of the trial court, the powers of an Appeal Court to interfere with the trial court's discretion in imposing sentence are limited unless the trial court's discretion was exercised improperly. The essential inquiry in an appeal

against sentence is not whether the sentence was right or wrong, but whether the trial court exercised its discretion properly and judicially. If the discretion was exercised improperly, the Appeal Court will interfere with the sentence imposed.

[23] It is my view that a material misdirection by the trial Court occurred, when the trial Court sentenced the appellant to life imprisonment when the murder was neither planned nor premeditated.

[24] Apart from the personal circumstances of the appellant as mentioned in paragraph 7 *supra*, this court also has to consider the nature of the offences and the interest of society.

[25] Murder is in my view the most serious offence as the deceased cannot be replaced and his life cannot be substituted. Section 11 of our Constitution protects life by providing that-

"Everyone has the right to life." As already mentioned the murder of the deceased was not planned or premeditated.

[26] In imposing an appropriate sentence the interest of society also needs to be protected. Our courts must send a strong message that crime will not be tolerated. The sentence to be imposed by the court ought to be balanced without over-emphasising one part of the triad over another. The object of punishment, namely retribution, rehabilitation and deterrence also ought to be balanced.

[27] As mentioned in paragraph 10 *supra*, counsel for the appellant had strongly argued that the age of the appellant, his time spent awaiting trial and him having been a first offender cumulatively constituted substantive

and compelling circumstances calling for a deviation of the imposition of the minimum sentence of life.

[28] In *S v Mabuza and Others* 2009 (2) SACR 435 (SCA) Cachalia JA held at paragraph 23:

“So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption.”

[29] Although the appellant is young, his youthfulness in my view, is far outweighed by the seriousness of the offence and the interest of society. I have indeed borne in mind the words of Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA) at 477D-E, where he says:

“The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, personal doubts as to the

efficacy of the policy implicit in the amending legislation and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.”

[30] *In casu*, it is so, that the appellant is a first offender and that should indeed count in his favour. Unfortunately for the appellant his personal circumstances are not the only consideration. Counsel appearing for the appellant contended that the relative youthfulness of the appellant and his time spent in custody cumulatively constituted substantial and compelling circumstances. No evidence was presented before the trial court to point to the appellant's intelligence and mental capacity in order to have enabled the trial court to have determined his level of maturity and his moral blameworthiness.¹⁰

[31] Thus, whilst under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult..... a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a compelling and substantial circumstance in order to deviate from a prescribed sentence.

¹⁰ S v Matyityi 2011 (1) SACR 40 (SCA)

[32] The trial Court in its judgment remarked that the deceased was shot execution style whilst he was providing a service to the public and that he lost his life in a brutal and senseless way. The trial Court described his conduct as callous and showing no respect for human life nor any remorse.¹¹

[33] In the present matter this court is of the opinion that the disparity between the sentence of the trial court and the sentence which this court would have imposed had it been the trial court is so marked that this court can describe the sentence imposed as “*disturbingly inappropriate*”, in the absence of premeditation or planning of the murder having been borne out by the evidence.

[34] In the result and consequently the following order is made:

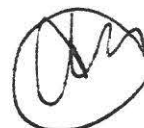
34.1 The appeal in respect of sentence is upheld.

34.2 On count 2 (*murder*) the appellant is sentenced to imprisonment for a period of 20 years;

34.3 On counts 3 and 4 the appellant is sentenced to three years’ imprisonment taking together for the purposes of sentence.

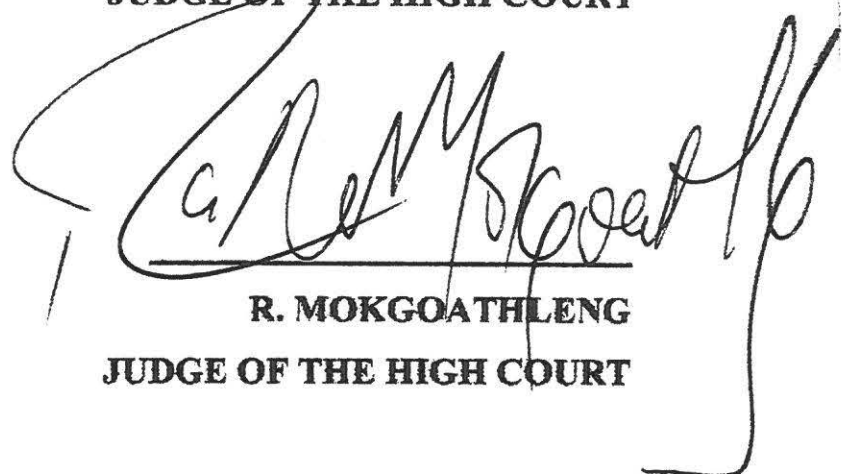
34.4 The sentences are antedated to 19 November 2004 in terms of section 282 of the Criminal Procedure Act, 51 of 1977.

¹¹ Record Volume 2 page 73 Lines 20 - 25



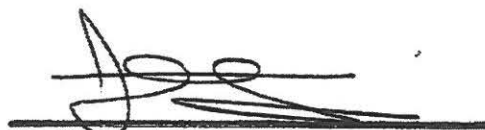
C.J COLLIS
JUDGE OF THE HIGH COURT

I agree



R. MOKGOATHLENG
JUDGE OF THE HIGH COURT

I agree



J. VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

Appearances:

For the Appellant : Adv. S. Hlazo

Instructed by : Legal Aid South Africa

For the Respondent : Adv. M.L. Gcaba

Instructed by : Director of Public Prosecutions
Pretoria

Date of Hearing : 2 February 2018

Date of Judgement : 5 March 2018