

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A221/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 19/05/2023

Signature:

In the matter between:

ELLENOR KHUMALO

Appellant

And

THE STATE

Respondent

JUDGMENT

SETHUSHA-SHONGWE AJ (BAQWA J et MOGOTSI AJ Concurring)

INTRODUCTION

[1] The Appellant was convicted of multiple charges. One of these was murder in terms of Sections 51(1) of the Criminal Law Amendment Act 105 of 1997 as amended. Another is conspiracy to commit Robbery with Aggravating Circumstances and Robbery with Aggravating Circumstances as intended in Section 51(3) of Act 105 of 1997. The matter is before us on appeal against sentences of life imprisonment imposed on the 17th August 2021 by the trial court. The Appellant pleaded guilty and was convicted on 20 counts. The trial court ordered all sentences to run concurrently with the sentence of life imprisonment.

BACKGROUND

[2] The Appellant stands convicted of offences that were committed from the 18th of May 2018 to the 29th of July 2019. The Appellant, together with Accused 2 (two) went to various Taverns/Pubs including Blue Room Pub and Rhapsody Club in Pretoria. They would identify male victims, approach them and start a conversation. They would drug them with Rivotil and lure them to accompany them home. They would meet up with Accused 3(three) at a secluded place after having incapacitated their victims and rob them of their valuables including a motor vehicle and cash. Accused 3 (three) would sell and dispose of the stolen vehicles. The Appellant would share the money with Accused 2 (two) and 3 (three). Accused 3 (three) provided the drugs. Amongst their victims was one Brigadier General Motlokamedi Kenneth Pitso based at Waterkloof Air Force who met his untimely death on the 2nd of June 2019 due to overdose of the drug administered to him by the Appellant and Accused 2(two) and 3 (three).

[3] The Appellant is 32 years old. At the time of the commission of the offences, she was 30 years old. She is a single mother of 2 (two) minor children aged 15 (fifteen) and 8 (eight). She completed grade 8 and has no previous convictions. The trial court granted leave to appeal on sentence as the Appellant has an automatic right of appeal.

[4] Counsel for the Appellant in his heads of argument submitted that there were factors, which cumulatively considered, amounted to substantial and compelling circumstances warranting a deviation from a life imprisonment sentence imposed on the following grounds:

- The Appellant has pleaded guilty;
- It was her desire from the time of her arrest to plead guilty;
- She has committed the crimes in order to make ends meet, having two children to support as she was unemployed; and
- She took the trial court into her confidence and disclosed her minimum degree of participation on the commission of the crimes, as opposed to the

participation of Accused 3 (three) who brought 50 pills of drugs to the deceased.

[5] It is submitted that her role was to identify the possible victims. Accused 3 provided the drugs that were administered to the victims and he also disposed of the vehicles. Accused 2 and 3 got the Appellant involved in the commission of the crimes. She has asked the family of the deceased for forgiveness in open court.

[6] Counsel for the Appellant further submitted that the trial court erred in failing to take into account that a sentence of life imprisonment is the ultimate sentence to impose on the Appellant and referred to *S v GN*¹ where the following was said:

“A court must bear in mind that it is the ultimate penalty that the courts in this country can impose. As such it must not be imposed lightly, even when it is a prescribed minimum sentence. It is axiomatic that, in order for it to arrive at a just sentence, a court must have a balanced regards to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interests of society. The result thereof is that justice demands that; even for similar crimes, different sentences must often be imposed.”

And further,

“It follows that, even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice. Where the prescribed minimum sentences are less than life imprisonment, such differentiation is possible either by imposing a heavier sentence than the prescribed minimum or, where there are substantial and compelling circumstances so to do, impose a lesser sentence. Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must be taken into account. Accordingly, in its quest to do justice, a court will more readily impose a lesser

¹ 2010(1) SACR 93 (T); *S v Rabie* 1975 (1) SA 855 (A); *S v Packere and Samm* 2009 (2) SACR 19 (SCA)

sentence where the prescribed minimum sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment.”

[7] The Respondent argued that the sentence imposed is appropriate and all relevant factors were considered. Further that there are no substantial and compelling circumstances to call for a deviation from the minimum prescribed sentences. The Appellant acted in common purpose with Accused 2 and 3. She waited for Accused 3 to go get extra drugs, she went to fetch water and was present when same was administered to the deceased.

[8] The Respondent further submitted that:

“sentencing is a matter pre-eminently for the discretion of the trial court. The court hearing on appeal should be careful not to erode that discretion and would be justified to interfere on and if the trial court’s discretion was not judicially and properly exercised which would be the case if the sentence imposed is vitiated by the irregularity or misdirection or is disturbing and in appropriate.”

[9] The Respondent further submitted that the Appellant’s plea of guilt was not a genuine show of remorse in that remorse in that the evidence against the Appellant was overwhelming and uncontestable.²

[10] The Respondent further submitted that the Appellant had in fact admitted that the state case was overwhelming against her. Further that the court should find that the Appellant was attracted by the lifestyle of accused no 2, it was not that she wanted to make ends meet.

Reference was made to: *S v Malgas*³, in which the SCA held as follows:

² *S v Mokoena* 2009 (2) SACR 309 (SCA) at para 9.

³ 2001 (1) SACR 469(SCA)

“The courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment as the sentence that should ordinarily in the absence of weighty jurisdiction be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a serves standardized and consistent approach from the courts. These sentences are not to be departed from lightly and for flimsy reasons.”

In *S v Matyityi*⁴ the court held that:

“There was all too frequently a willingness on the part of the courts to deviate from the sentences prescribed by the Legislature for the flimsiest of reasons. Courts had a duty, despite any personal doubts about the efficacy of the policy, or aversions to it to implement those sentences..”

“Parliament had ordained minimum sentences for certain specified offences, and they were to be imposed unless there were truly convincing reasons for departing from them. Courts were not free to subvert the will of the Legislature by resort to vague, ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appeared to fit the sentencing officer’s notion of fairness.”

[11] The Respondent submitted further that factors in mitigation should not be elevated to a standard of substantial and compelling circumstances. The crimes committed by the Appellant are very serious and extremely prevalent throughout the country. Appellant played a major part in the crimes committed by luring the victims to Accused 2 and 3 continued to commit crimes.⁵

DISCUSSION

[12] This court has to consider whether the sentence imposed by the trial court is strikingly shocking or that the court has misdirected itself by not finding any compelling and substantial factors to deviate from life imprisonment.

⁴ 2011(1) SACR 40 (SCA) at page 41(g)

⁵ *S v Makwanyane and Another* 1995 (2) SACR (CC) at 48G and I.

[13] It is trite that issue of sentence is predominantly in the discretion of the trial court. The power of the appeal court is circumscribed to this extent and the crux of the appeal against sentences is not whether the sentences is right or wrong.⁶

“An appeal court will thus not interfere with that discretion unless there is a clear misdirection or the sentence is manifestly and disproportionate to the extent that no reasonable court would have imposed it.”

[14] The Appellant has been convicted of several counts of which are serious in nature and which involve a high degree of violence. The offences were well planned and carried out over along period of time. The role that the appellant played should not be considered in isolation to that of accused 2 and 3 considering that the planning and commission of the crimes were done together, including murder on count 4.

[15] The Appellant was convicted of 18 counts of which 11 counts thereof each carriers 15 year prison sentence. The trial court held that all the sentences imposed should run concurrently with the sentence on count 4 murder – Life Imprisonment.

[16] I have considered that the murder was premediated, very gruesome and committed during the robbery with the Appellant acting in common purpose with Accused 2 and 3. The deceased, Brigadier Pitso, overdosed on 50 pills administered to him by the Appellant with her co-accused even after he was robbed of his valuables. His two finger nails were cut off and he was left to die in the veld. Appellant did not stop these evil deeds, she carried on the Accused 2 and 3 even after the killing of Brigadier Pitso until she was arrested.

[17] The State’s case was overwhelming against her, she was seen in videos at the Pubs/Taverns and she was first to be arrested.

⁶ *S v Pillay* 1977 (4) ALL SA 713 (A), 1977 (O) SA 531 (A) at 535(E)

[18] Her actions are not commensurate with that of a person who wanted to make ends meet. Being unemployed is not a licence to commit crime. In my view she committed these crimes as she admired the high lifestyle of accused 2. Threats imposed on her by Accused 3 about hurting her pregnant sister if she disclosed his name, do not amount to compelling and substantial factors.

[19] In my considered view, the aggravating circumstances far outweigh the appellant's personal circumstances which are not out of the ordinary. I find no compelling and substantial factors. In the circumstances of this matter the sentence of life imprisonment is appropriate. I am unable to find any misdirection on the part of the court *a quo*.

[20] Consequently, I proposed that the following order be made.

[20.1] The appeal is dismissed.

N.C SETHUSHA-SHONGWE
Acting Judge of the High Court

I agree

J.MOGOTSI
Acting Judge of the High Court

S.A.M BAQWA
Judge of the High Court

I agree and it is so ordered.

Appearances

Counsel for the Appellant	: Adv. L.A van Wyk
Instructed by	: Pretoria Legal Aid
Counsel for the Respondent	: Adv. S.D Ngobeni
Instructed by	: Director of Public Prosecutions: Pretoria

Date of the hearing :17 April 2023

Date of judgment: 19 May 2023

Judgment transmitted electronically