

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

[Not Reportable]

CASE NO: CA80/18

Heard on: 11/02/19

Delivered on: 26/02/19

In the matter between:

THOBILE MGWADLANYANA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

CORAM : Nhlangulela DJP, Dawood J et Mbabane AJ

NHLANGULELA DJP

[1] This matter concerns an appeal against sentence. The issue for decision is crisp, namely whether the Judge *a quo* (the sentencing court) *erred* in imposing a sentence of life imprisonment upon convicting the Appellant for murder.

[2] The provisions of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (the Act) give two routes to be followed by a court in sentencing for murder. In terms of Part 1 of Schedule 2, read with s 51 (1) of the Act, an accused is sentenced to undergo imprisonment for life upon conviction for: (i) murder that was planned or premeditated (ii) killing a law enforcement officer; (iii) killing a witness or potential witness; (iv) killing in the course of committing rape; (v) killing in the course of committing robbery with aggravating circumstances (vi) killing in furtherance of a common purpose or conspiracy (vii) killing involving unlawful removal of any body part of the victim; and (viii) killing that is motivated by witchcraft. However, in terms of Part II of the same Schedule 2, read with s 51 (2) of the Act, murder committed in the circumstances other than those referred to in Part 1 is punished by a sentence of 15 years imprisonment if the accused is a first offender; 20 years if the accused is a second offender; and 25 years if the accused is a third or subsequent offender. The sentences prescribed in ss 51 (1) and 51 (2) are mandatory. In terms of s 51 (3) of the Act, a lesser sentence is imposed if substantial and compelling circumstances exist which justify the imposition of such sentence. Whereas the Act makes the discretionary power of the sentencing court a lever to be used in deciding upon a lesser and appropriate sentence to impose, such lever of control is absent where it is found that substantial and compelling circumstances do not exist. The classical case of *S v Malgas* 2001 (1) SACR 469 (SCA) is a point of references in this regard.

[3] In this case the Appellant was indicted on four counts of attempted murder, murder, rape and robbery with aggravating circumstances; it being

alleged that during the night of 19 May 2015 and at Mkhuthukeni Locality, Mqanduli, the victims in count 1 (attempted murder), a man, and a victim in count 2 (murder), a woman, met the Appellant who shone a torch in their faces and struck the victim in count 1 with a knife in the chest. Thereafter, the Appellant pursued the victim in count 2 who had fled the scene. The victim in count 1 later on ascertained that his companion had been raped, robbed of her belongings and stabbed to death by the Appellant. The victim in count 1 survived. He testified at the trial.

[4] At the end of the State's case the Appellant was discharged in respect of the counts of rape and robbery in terms of s 174 of the Criminal Procedure Act 51 of 1977. As at that point the dropping of the offences of rape and robbery, which had all along defined the crime of murder under Part 1 of Schedule 2 to the Act, changed the definition of murder to become the offence as defined in Part II. At the conclusion of the trial the commission of murder as defined in Part II, read with s 51 (2) of the Act, was proved by the evidence whereafter the trial court returned a verdict of guilty accordingly. However, in sentencing the Appellant the court mistakenly imposed a sentence of life imprisonment in terms of s 51 (1) of the Act. Before this Court, counsel for both parties were in agreement that the sentence of life imprisonment was imposed in error. To the extent of the error being a misdirection on the part of the sentencing court, which was conceded even during the application for leave to appeal, interference with the sentence of life imprisonment imposed is warranted – see: *S v Malgas supra*, at page 478 d-h.

[5] Based on the agreement as aforementioned, counsel for the Appellant took the stance that it was not necessary to pursue the ground of appeal that since substantial and compelling circumstances were present, thus a deviation from imposition of a mandatory sentence of 15 years imprisonment as provided in s 51 (2) (a)(i) of the Act was warranted. That stance was well taken due to

the findings by the sentencing court that: the accused is 29 years of age, he is single but has two children, he was employed and earned R1 400,00 per month, he had to maintain his children and his four younger siblings, and he had been in custody for approximately thirty-two months awaiting trial. The sentencing court did not take into account that the Appellant killed the deceased out of jealousy as the deceased, his girlfriend, had been in the company of another man. Since the Appellant failed to testify in mitigation of sentences, the sentencing court found that the offence of murder has not been proved to be a crime of passion. The Appellant did not show remorse for his criminal conduct. The Appellant had a previous conviction of culpable homicide, which was committed just one year before he committed the offences in this matter in 2015. The brutal manner in which the Appellant committed the offences in this matter was taken into account. I am in agreement with the concluding remarks of the sentencing court, which read:

“In all these circumstances, I am compelled to find that there are no substantial and compelling circumstances as regards the murder count. As regards the fact that the accused has spent almost three years in custody awaiting trial, this must be taken into account at the time when the accused is considered for parole.”

[6] The Court was urged by counsel for the Appellant to cause the sentence of 10 years imprisonment imposed for the attempted murder conviction to run concurrently with the sentence of 15 years imprisonment simply because the sentencing court had done the same when it imposed a sentence of life imprisonment. Counsel for the State argued otherwise, contending that the two offences are separate and that each was proved during trial to be extremely violent and egregious such as to warrant imposition of severe sentences; more particularly in that the Appellant, stabbed with a knife the male victim on the

count of attempted murder to subdue and prevent him from protecting the female victim. Thereafter, the Appellant chased after the female victim as she was running away to a place of safety, accosted and stabbed her to death. Both victims were defenceless at the time when they were attacked and stabbed by the Appellant. The medical evidence shows that the female victim, aged 28 years, was stabbed in the neck, the blow that penetrated and injured the carotid vessels and causing severe blood loss and massive haemothorax. The male victim was struck on the chest, not so far away from the heart, but he survived death by a stroke of luck. In my view those are the aggravating factors of the crimes that do not deserve mercy. The aggravated circumstances of the offences far out-weigh the mitigating circumstances of the Appellant. For those reasons justice will be served by sentences that run consecutively.

[7] In the result the sentences imposed by the sentencing court are set aside and replaced with the following new sentences:

- 1. In Count 1 (attempted murder): the Appellant to undergo imprisonment for a period of 10 (ten) years.**
- 2. In Count 2 (murder): the Appellant to undergo imprisonment for a period of 15 (fifteen) years.**
- 3. The sentences of 10 and 15 years imprisonment shall run consecutively.**
- 4. Effectively, the Appellant to undergo 25 (twenty-five) years imprisonment; which is ante-dated to 10 March 2018.**

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
MTHATHA

I agree:

F.B.A. DAWOOD
JUDGE OF THE HIGH COURT

I agree:

S.M. MBABANE
ACTING JUDGE OF THE HIGH COURT

Attorney for the appellant : Mr A.A. Nohiya

c/o Legal Aid South Africa

MTHATHA.

Counsel the respondent : Adv. A. Govender

: Director of Public Prosecutions

MTHATHA.