

REPUBLIC OF SOUTH AFRICA



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

Case No: A347/2015

Date of Appeal: 31 January 2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
2 May 2017	
DATE	SIGNATURE

Revised Judgment
2/5/2017

In the matter between

NKOSI, SABELO
MYENI, WANDILE

First Appellant
Second Appellant

and

THE STATE

Respondent

JUDGMENT

MADIMA, AJ

[1] The First Appellant was convicted in the Benoni Regional Court on 4 February 2014, on the following counts: Count 1 - robbery with aggravating circumstances. Count 2 - murder. Count 3 - pointing of a firearm. Count 4 - unlawful possession of

a firearm; alternative to Count 4 - unlawful possession of a prohibited firearm. Count 5 - unlawful possession of ammunition.

[2] The First Appellant was sentenced to 15 years imprisonment with respect to Count 1. Life imprisonment with respect to Count 2. 6 months imprisonment with respect to Count 3, which was to run concurrently with the sentence imposed with respect to Count 2. 5 years imprisonment with respect to Count 4, 2 years of which was to run concurrently with the sentence imposed with respect to Count 2, and 6 months imprisonment with respect to Count 5, which was to run concurrently with the sentence imposed with respect to Count 4.

[3] The Second Appellant was convicted in the same trial on the following counts: Count 2, relating to murder. Count 3, relating to the pointing of a firearm; alternative to Count 4, relating to unlawful possession of a prohibited firearm. Count 5, relating to unlawful possession of ammunition.

[4] The Second Appellant was sentenced to 18 years imprisonment with respect to Count 1. 6 months imprisonment with respect to Count 3, which was to run concurrently with the sentence imposed with respect to Count 2. 5 years with respect to alternative to Count 4, 2 years of which was to run concurrently with the sentence imposed with respect to Count 2, and 6 months with respect to Count 5, which was to run concurrently with the sentence imposed with respect to Count 4.

[5] The First and Second Appellants are to serve an effective sentence of life and 21 years in prison respectively. Both the First and Third Appellants were represented

at the hearing. The appellants were represented at the trial. They are both appealing their conviction and sentence with leave of the court *a quo*.

[6] The appellants submit that Mr. Virk, the store-owner, was not able to identify the person that allegedly robbed him of 17 cell phones from his store. The only link between the First Appellant and the cell phone stand in the shop is the presence of his fingerprints thereon. The First Appellant offered two explanations – first, he stated that he did not know how his fingerprints ended up where they were found; second, he stated that the fingerprints were not his.

[7] A further explanation was that the First Appellant resided in the area of Mr. Virk's store. He often visited the store when he wanted to buy appliances or a cell phone. Buyers were not allowed to touch the cell phones, and could only touch the cell phone stands. Mr. Virk's evidence was that cell phones are indeed handed over to customers who wished to purchase them. There can be no other credible explanation how the First Appellant's prints came to be present on the phones. The three different versions that the First Appellant offers in this regard point in one direction only – that he is the culprit.

[8] Regarding the charge of pointing a firearm and murder charge, the Magistrate is said to have erred by finding that Mr. Zwane and Mr. Gwebu had had ample opportunity to see the perpetrators. The issue in this instance is again one of identity. The evidence tendered is that the incident happened around 18.00. There was ample light and therefore visibility was good. Mr. Zwane and Mr. Gwebu had more than enough opportunity to observe the First and Second Appellants run away after Mr.

Zwane had witnessed the First Appellant shooting the deceased. Mr. Zwane was able to point out the First and Second Appellants at an identification parade.

[9] The guidelines regarding whether the issue of identity has been proven beyond a reasonable doubt are set out in *S. v. Mthetwa*, 1972 (3) SA 766 (A), where the Court held that *"...because of fallibility of human observation, evidence of identification is approached by the court with caution. It is not enough for the identifying witness to be honest: the reliability of this observation must also be tested. This depends on various factors such as lighting, visibility, eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation, mobility of the scene, corroboration evidence by or on behalf of the accused."*

[10] The Magistrate is further said to have erred by convicting the Appellants on the evidence of a single witness. The arresting officer stated in his evidence that he was not alone when he effected the arrest. However, no other person was called to corroborate that testimony. Thus the evidence of the arresting officer was unreliable, so the argument went.

[11] The Respondent's version is that the Appellants and one other person were inside a Quantum motor vehicle when they were arrested. The evidence of Constable Sibeko was that indeed the three accused were in the vehicle. This, despite the fact that the Second Appellant denies it.

[12] Regarding sentence, the Magistrate is said to have erred when he did not find that there were compelling circumstances to deviate from imposing life imprisonment with respect to the First Appellant. These circumstances are that the First Appellant was 27 years old at the time of the incident. He has two minor children. He has been in custody awaiting trial for 22 months. He was employed by the Taxi Association as part of the patrol crew. He earned R250,00 per week.

[13] The Respondent's case on sentence is that the Court took all of the personal circumstances of the Appellants, the nature of the crimes, the seriousness and prevalence of the offences, as well as the interests of society, into account when considering an appropriate sentence. The First Appellant, for his part, has a long list of previous convictions, some of which indicate his propensity for violence.

[14] It is trite that issues of sentence are best left to the sentencing Court. A Court on appeal should only interfere where the Court *a quo*'s discretion was not exercised judicially. A misdirection by the Court *a quo* should not be *de minimis*, but should be of a particular degree of seriousness that it shows that the Court did not exercise its discretion at all, or it exercised it improperly or unreasonably: *S. v. Barnard*, 200 (1) SACR 191 (SCA) at 194 C-D.

[15] The Court *a quo* considered the personal circumstances of the Appellants, as well as the prevalence of this type of crime within the community. Our Courts have also considered the question of mercy in sentencing. In *State v. V*, 1972 (3) SA at page 614, the Court held that:

"The element of mercy, a hallmark of civilized and enlightened administration, should not be overlooked lest the court be in danger of reducing itself to the plane of the criminal."

[16] In *State v. Van Westhuizen*, 1974 (4) SA at page 66 D-E, the Court stated that:

"What we mean when we talk of a criminal court extending mercy is really this, that justice must be done but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weaknesses of human beings and their propensity for succumbing to temptation."

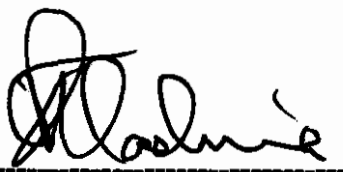
[17] The death of any human being in the hands of violent criminals should attract a fitting sentence. The accused needs to demonstrate substantial and compelling circumstances in mitigation if he is to escape a sentence of life in prison. In this case, the First Appellant shot to death an innocent person without regard to the very same considerations that he seeks this Court to afford him, namely, that he has children to look after. The deceased was shot eight times. It does not get more violent and barbaric than that.

[18] There is little doubt that the community at-large is sick-and-tired of the criminal behaviour of people like the Appellants. The Magistrate cannot be faulted for the sentence that he imposed on the Appellants.

[19] The Second Appellant is equally a violent man. Although he did not pull the trigger, he acted in common purpose with the First Appellant. 18 years is a fair sanction with regard to him. The Court *a quo* cannot be criticized for the sentence. I see no misdirection on the part of the trial court in the imposition of the sentence imposed on the Second Appellant. It is similarly my view as the court held in *S v Khumalo* 1973 (3) Sa 697 (A) at 698A, that "*Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.*"

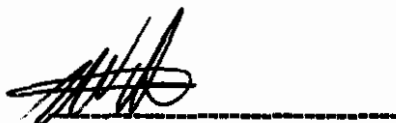
[20] The Court *a quo* cannot be faulted in any way in its findings and sentence. In the circumstances, I make the following Order:

1. The appeal on conviction is dismissed;
2. The appeal on sentence is dismissed.



T. S. MADIMA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur



N. V. KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of the Appellants: **Adv. M.C. Ndalane**
Instructed by: **Legal Aid South Africa**

On behalf of the Respondent: **Adv. J.P. Van der Westhuizen**
Date of Hearing: **31 May, 2016**
Date of Judgment: **31 May, 2016**
Date of Request for
Revised Judgment **13 March 2017**
Date of Revised Judgment **2 May 2017**