



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A189/2016

In the matter between:

MALEFANE ZACHARIA MOLOI

Appellant 1

NAPO MOLOI

Appellant 2

and

THE STATE

Respondent

HEARD ON: 13 February 2017

CORAM: MATHEBULA, J *et* MOTIMELE, AJ

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 15 June 2017

- [1] This is an appeal against both conviction and sentence imposed by the Regional Court, Phuthaditjhaba. The appellants (who are brothers) were arraigned before the court on a charge of murder **(read with provisions of Section 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997).**
- [2] The appellants, who were legally represented, tendered a plea of not guilty. The first appellant denied all allegations against him and no admissions were recorded on his behalf. The basis of the defence for the second appellant was an alibi and his counsel made admissions which were recorded in terms of section 220 of the Criminal Procedure Act 51 of 1977 (amended). These related to the date, time and place of the incident; identity of the deceased; jurisdiction of the court; the findings of the medical practitioner who conducted the post mortem; the transportation of the body from the scene of crime to the mortuary and that the deceased suffered no injuries from the date of death until the autopsy was conducted. These were not confirmed by the appellant and neither did the court request him for such confirmation. However they were unchallenged throughout the proceedings.
- [3] At the conclusion of the trial they were both sentenced to life imprisonment in terms of section 51 (1) Part 1 of Schedule 2 of Act 105 of 1977. They are aggrieved by both conviction and sentence. The respondent supported the conviction and sentence.
- [4] On the 23rd August 2008 between 13H00 pm – 14H00 pm Tsholedi Reginald Twala (deceased), Thabiso Carpet Ntjebe, Mathapelo

Mokoena and Elizabeth Moloi were enjoying alcoholic beverages at a tavern in Sehlabaneng Village, Qwa-Qwa. Their peace was interrupted by the arrival of the appellants and Gediboni. The deceased looked uneasy and scared by their presence at the venue. It transpired that the deceased had a tiff with the first appellant on a previous occasion. Further that the appellants were looking for him on the day in question. The two ladies urged him to remain behind and hike a lift from one Snake who was also a patron at the venue. They all left the deceased behind inside the tavern.

- [5] They were hardly at the gate when the deceased emerged running with the appellants in hot pursuit. The second appellant tripped him and this enabled the first appellant to stab him on his body. Thereafter the first appellant handed the knife to the second appellant who joined in the frenzy of stabbing the deceased. The deceased stood no chance of defending himself and he was not a threat at all to his assailants. On seeing such brutality, the other people fled the scene on foot.
- [6] The first appellant took to the stand and testified that they did have a quarrel with the deceased about a month prior to the fateful day of the 23rd August 2008. It was caused by the deceased spilling beer on him at Noah's Tavern. On that day they got engaged in an exchange of blows in order to settle their squabble. The second appellant intervened to stop the fight.
- [7] On the 23rd August 2008 he was sitting outside on the stoep at Dienies Tavern drinking alcoholic beverages with Gediboni and Thabo. He stood up to go to the bathroom to pass water. He noticed out of the corner of his eye that he was being followed. As he stood

at the urinary relieving himself, he was struck on the head with an object and he fell down. He probably lost his consciousness for few minutes. On regaining it, he noticed Gediboni and Thabo in possession of blood stained knives. They assured him not to pursue anybody because they have already avenged his assault. At that time the deceased was lying on the ground. It was his testimony that the second appellant was also at the tavern on the day in question.

- [8] The second appellant testified that he was contacted by Gediboni that the first appellant was engaged in a fight at the tavern. He arrived at the tavern and pulled his knife wielding brother (first appellant) from the deceased. He did not participate in any activity that resulted in the death of the deceased. It was his evidence that the witnesses were falsely implicating him in the commission of the offence.
- [9] The trial court correctly rejected the version of the appellants and found them guilty on a charge of murder. On behalf of the appellants, Ms Kruger conceded that the evidence against the appellants was unimpeachable and that the conviction was in order. I agree with the concession that the appeal against conviction ought to fail. The trial court proceeded to impose a sentence of life imprisonment on both appellants.
- [10] Ms Kruger submitted on behalf of the appellants that the trial court misdirected itself in imposing a sentence of life imprisonment. The appellants were not afforded a fair trial in that they were not informed with sufficient detail of the charge they were required to answer. In essence they were subjected to a trial by ambush. Further that the

trial court erred by not finding the existence of substantial and compelling circumstances enabling it to impose a lesser sentence of below fifteen (15) years imprisonment.

[11] Mr Simpson conceded that the appellants had a right which was breached. It was his view that the appellants were not explained their rights and everybody was taken aback by the judgement of the trial court when the offence which they thought carried a minimum sentence of fifteen (15) years suddenly attracted life imprisonment. I agree with that submission. He submitted that he support the sentence of eighteen (18) years imprisonment.

[12] Sentencing is pre-eminently in the discretion of the trial court. A court of appeal will only interfere with any sentence in limited circumstances. The court of appeal may interfere if the trial court misdirected itself or committed an irregularity or the sentence is shockingly inappropriate. Such a misdirection must not be a mere misdirection but the one that vitiates the decision of the court on sentence. These principles were stated clearly in **S v Pieters 1987 (3) SA 717 (A) at 728 B – C** and **S v Pillay 1997 (4) SA 531 A at 535 E-G**.

[13] The cornerstone of every criminal case is that the accused person must be subjected to a fair trial. This right recognised in the common law finds more expression in the current constitutional dispensation. This was emphatically expressed by the court as follows in **S v Legoa 2003 (1) SACR 13 (SCA) at paragraph 20**.

“Under the common law it was therefore 'desirable' that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced

sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force'. The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet."

- [14] In this matter it was not pertinently brought to the attention of the appellants that the State intended to rely on the provisions of section 51(1) Act 105 of 1997 calling for the ultimate sentence. The trial court on **page 1 lines 19 and 20** of the record made reference to whether it was explained to the appellants **"the question relating to minimum sentences"**. Their response was an emphatic **"No"**. What follows thereafter is the confirmation that they have been provided with the explanation. This is patently inadequate and vague because it is unclear which specific provision(s) were indeed dealt with by the defence counsel. It stands to reason that this had a direct bearing on the accused mounting a proper defence. It appears that **"not everybody knew what it was all about"**. The confusion that ensued regarding the sentence of fifteen (15) years or life imprisonment after conviction between the presiding officer

and the defence counsel is illustrative of the prejudice suffered by the appellants.

- [15] It is the obligation of the presiding magistrate to satisfy himself that the accused before him fully understand that he stands to be sentenced to the applicable prescribed minimum sentence unless there are substantial and compelling circumstances. The difference between fifteen (15) years and the imposed sentence is definitively a huge one. Undoubtedly this resulted in an irregularity which rendered the trial unfair in the circumstances. They were charged under section 51(2) of Act 105 of 1997 but sentenced under section 51(1). Obviously the state was aware of all the facts of the matter and after careful consideration pursued the matter in the manner they did. They were not seeking the ultimate penalty but a lesser sentence.
- [16] The trial court did not find any substantial and compelling circumstances and imposed the ultimate sentence of life imprisonment. The principles of what constitutes substantial and compelling circumstances were articulated in **S v Malgas 2001 (2) SA 1222 (SCA)**. The test as laid down for the existence of substantial and compelling circumstances justifying deviation from the prescribed minimum sentence is whether or not the cumulative effect of mitigating circumstances on the gravity of the offence and the interest of the society rendered the prescribed sentence unjust. It has been held that the court should not deviate from the minimum sentence for flimsy or unconvincing considerations. **See: S v Matyityi 2011 (1) SACR 40 (SCA)**.

- [17] The first appellant was thirty one (31) years old at the time of sentencing. He was married with two (2) children aged thirteen (13) and nine (9) years respectively. He was employed at a construction company earning R3 200,00 per month. This was the only income that was utilised to maintain his family. He had two (2) previous convictions of assault with intent to do grievous bodily harm committed in 2005.
- [18] The second appellant was 28 years old at the time of sentencing. He was married with one (1) child aged seven (7) years. It is not recorded whether he was employed or not. Further it appears that he had no previous convictions
- [19] The appellants attacked a defenceless deceased in a brutal and predatory manner. They inflicted multiple stab wounds on his back which clearly indicates that he was attempting to escape the relentless attack. The taking away of a life of another person is a matter which is serious in nature. The right to life is a right that must be jealously guarded and this must reflect in the sentences that are meted out by the court.
- [20] The trial court found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence. I agree on that aspect although the court applied the principle on the incorrect provision. There are no jurisdictional facts to justify the imposition of the life imprisonment. The deceased was murdered for the sake of it and mercilessly so. Murder is abhorrent in the democratic society. Sentence must achieve its objective which is retribution, rehabilitation, deterrence and the prevention of the crime.

[21] In this matter, the prescribed minimum sentence for murder in terms of section 51(1) read with Part 2 of Schedule 2 is fifteen (15) years imprisonment. I apportion the blame equally on them and that they deserve to be punished the same way. I am convinced that the trial court exercised its discretion wrongly and that I am at the liberty to interfere. The sentence imposed in this matter must be set aside.

[22] Accordingly, I make the following order:

22.1 The appeal against conviction is dismissed.

22.2 The conviction is confirmed

22.3 The appeal against sentence is upheld.

22.4 The sentence of life imprisonment imposed on each of the appellants is set aside and substituted with one of eighteen (18) years imprisonment.

22.5 The sentence is ante-dated to 22 February 2012.

MATHEBULA, J

I concur

MOTIMELE, AJ

On behalf of applicant:

Adv. S Kruger

Instructed by:

Bloemfontein Justice Centre

On behalf of respondents:

Adv. A Simpson

Instructed by:

The Director of Public Prosecutions