



**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

Appeal number: A149/2016

In the matter between:

MZWANDILE SMOKO MATTHYS

Appellant

and

THE STATE

Respondent

CORAM: MBHELE, J *et* MOLITSOANE, AJ

HEARD ON: 17 OCTOBER 2016

JUDGMENT BY: MOLITSOANE, AJ

DELIVERED ON: 3 NOVEMBER 2016

[1] The appellant herein was convicted and was sentenced on the 14 November 2014 by the Regional Court at Welkom on the following charges:

- One count of murder;
- One count of assault with intent to cause grievous bodily harm;
- One count of robbery;
- Three counts of robbery with aggravating circumstances.

[2] He was sentenced to an effective imprisonment term of 20 years by the court *a quo*, he having been sentenced as follows:

- On a count of murder – 12 years imprisonment.
- On a count of assault with intent to cause grievous bodily harm
 - 6 months imprisonment which was suspended in whole for a period of five years on certain conditions.
- On a count of robbery he was sentenced to seven years imprisonment.
- The three counts of robbery where aggravating circumstances were present were taken together for the purpose of sentence and he was sentenced to 10 years imprisonment.

[3] The court further ordered that the sentence in count 5 should run concurrently with the sentence in count 1 and it further ordered that the two years of the sentences in counts 6, 7 and 8 should run concurrently with the sentence on count 2.

[4] The appellant felt aggrieved by the sentences imposed and has launched these appeal proceedings.

- [5] It is trite law that the imposition of a sentence remains the domain of the trial court and this involves the exercise of discretion by that sentencing court. A court exercising appellate jurisdiction is not free to interfere with the exercise of that discretion unless it is tainted by a material misdirection or the sentence is so disproportionate to the crime, the personal circumstances of the appellant and the interest of society. In the case of **S v Jiminez** 2003(1) SACR 507 at 512 the court said:

“However, even where a sentence does not seem shockingly inappropriate, a court on appeal is entitled to interfere or at least to consider the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion”

- [6] It is so that a mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with a sentence imposed by a trial court.

- [7] In the matter of **S v Pillay** 1997 (4) SA 531 (A) at 531 the court said the following:

“it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.”

- [8] Perusal of the record of appeal indicates that the appellant himself drafted the notice of appeal but having regard to the

application for leave to appeal as well as the notice of appeal itself, it appears that the main reason for the disgruntlement is that the sentences were shockingly inappropriate in that the court *a quo* failed to take the following into account:

- the age of the appellant
- the fact that the appellant was a first offender
- the fact that the appellant could be rehabilitated
- the period the appellant spent in custody awaiting trial.

[9] Section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 (the Act) provides as follows:

“Notwithstanding any other laws but subject to subsection (3) and (6) a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in Part II of schedule 2, in the case of a first offender to imprisonment for a period not less than 15 years ...”

[10] The court is obliged to deviate from imposing a minimum sentence of 15 years imprisonment if the court is satisfied that substantial and compelling circumstances exist which justifies the imposition of a lesser sentence than the sentence prescribed.

[11] At the onset, it must be noted that section 51(3) (a) of the Act obliges the court where it found that substantial and compelling circumstances are present, to “enter those circumstances in the record of the proceedings, and after that it must impose such a lesser sentence as it deems fit”.

[12] The court in this case did not record or enter the substantial and compelling circumstances it found to be present on record, and consequently it is difficult to discern from the record which factors the court *a quo* took into consideration in order to come to a conclusion that such substantial and compelling circumstances are present in this case.

[13] The question of what is meant by substantial and compelling circumstances was discussed in the matter of **Patrick Clive Bailay v The State**, case 454/2011 where the court said the following:

“The most difficult question to answer is always: what are substantial and compelling circumstances: the term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part of the sentencing court. I have, however, found the following definitions in **S v Malgas** to be both illuminating and helpful. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

- [14] The court a quo has set out in detail the factors both in mitigation and aggravation it took into consideration in order to come to the sentences it imposed.
- [15] Appellant is 29 years of age and in a relationship of five years with another woman. He has 3 children aged 9, 7 and 6 years with 3 different women. Before his arrest he did odd jobs, performing garden services and also sold perfumes. His average income was between R150 and R200 per day. He did grade 10 at school. He had been in custody for about two years awaiting trial. He has a previous conviction of contravention of section 5(1) of the Criminal Law (Sexual Offences Act 32 of 2007) in which he was sentenced to 5 years imprisonment which was suspended in whole for 5 years on certain conditions.
- [16] The accused has been convicted of a very serious violent offences, to wit, murder, assault with intent to cause grievous bodily harm, robbery and three counts of robbery where aggravating circumstances are present.
- [17] A golden thread in all these offences is the *modus operandi* of how those offences were committed. In all these matters the victims were attacked without provocation. In the count of murder, the deceased was walking peacefully with his wife when accused, unprovoked accosted him and asked the deceased about how he (the accused) looked. Unprovoked he went into a stabbing spree and killed the deceased.

[18] With regard to the assault with intent to do grievous bodily harm, complainant said the accused wanted to stab him several times but he did not know why the deceased wanted to stab him. He did stab him however.

[19] All the victims of robbery, including robbery with aggravating circumstances met the accused and he took their cellophanes by force wielding a weapon. It is clear from the evidence that the appellant terrorised society.

[20] Violent crimes are not only prevalent within the division of this court but throughout the country.

[21] In **S v Mahlatsi** 2013 (2) SACR 625 (GNP) where the court was dealing with robbery said this on page 9:

“[9] Ordinary citizens cannot be blamed for constantly living in fear for their lives, never mind the safety of their possessions, so much so that they either spend thousands of rands to try and create safe havens to live in and vehicles to travel in; emigrate; take the law into their own hands; or simply cringe at the thought of venturing out onto the streets or even to stay at home, because it would appear that there is nowhere to hide and no way in which one can properly defend oneself.....”

[22] Although the appellant contends that the court *a quo* did not take into account, the period the appellant spent in custody awaiting trial, this assertion cannot be sustained. It is clear from the record that the said court was alive to the fact that the appellant had been in custody for about two years awaiting trial. I am therefore

satisfied that the court *a quo* took the period the appellant spent in custody while awaiting finalisation of his trial in consideration when it determined the appropriate sentence.

[23] It is my view that the court *a quo* in coming to the sentences it imposed, correctly balanced the personal circumstances of the appellant against the seriousness of the offences and the interest of society. It is also clear that the trial court deviated from imposing the prescribed sentence in all counts where the prescribed sentences were applicable.

[24] I cannot, therefore, find that the court *a quo* committed any misdirection in imposing the sentences herein or even still, that the sentences imposed were disproportionate to the crimes, the personal circumstances of the appellant and the interest of society.

[25] In conclusion, with regard to count 2, the appellant was sentenced to 6 months imprisonment which was suspended for 5 years on certain conditions. The court ordered that two years of the sentences on counts 6, 7 and 8 should run concurrently with the sentence in count 2 (the suspended sentence). This order appears to have been mistaken because in respect of count 2 appellant was sentenced as indicated in this paragraph.

[26] Further the operation of the sentence having been suspended, the court *a quo* was not empowered to order that a suspended sentence should run concurrently with the imprisonment terms. It must be borne in mind that in order to put such a suspended

sentence into operation, the condition(s) of the suspension must have been breached and the court must have proceeded with the procedure as laid down in section 297(9) of the CRIMINAL PROCEDURE ACT. In that regard the order of the court ordering that the sentences in counts 6, 7 and 8 shall run concurrently with the suspended sentence in count 2 is incompetent and must be set aside. In order to correct and give effect to the intention of the court *a quo* the following amendments will be made on the sentences imposed.

ORDER

[27] The appeal fails and the convictions and sentences are confirmed subject to paragraph [28] below.

[28] The sentence in count 2 is hereby set aside and it is substituted With the following:

“1. AD Count 2:

The accused is sentenced to 6 (six) months Imprisonment;

2. It is ordered that the sentences in counts 6, 7 and 8 shall run concurrently with the sentence imposed in respect of count 2;

3. It is further ordered that 2 years of the sentences imposed in counts 6, 7 and 8 shall run concurrently with the sentence imposed in counts 1 and 5.

4. The appellant shall serve an effective term of imprisonment of 20 years.”

[29] The order in terms of section 103(3) of the Firearms Control Act 60 of 2000 remains in place.

P MOLITSOANE, AJ

I concur

MBHELE, J

On behalf of appellant:
Instructed by: Mr P.L. Van der Merwe
Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent:
Instructed by: Adv. R Hoffman
Office of the Director: Public Prosecutions
Bloemfontein