

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

03/3/2015

CASE NO: A570/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

24/2/2015

A. G. Tolmay

DATE

SIGNATURE

IN THE MATTER B

HOSINE AMON NGOBENI

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

TOLMAY, J:

BACKGROUND

- [1] The appellant was found guilty of arson and murder and sentenced to 5 years and 20 years imprisonment respectively. The sentences were ordered to run concurrently.
- [2] The appellant was granted leave to appeal against the sentence by Kollapen J.
- [3] The incident that led to the charges being brought against the appellant was that it was alleged that the appellant on 31 July 2006 set alight the house in which the deceased was sleeping. She burnt to death as a result. From the record it would appear that the deceased and the appellant had a relationship which was terminated some time ago. On the day in question the accused and the appellant were at the same drinking place where they both apparently had a lot to drink. There was also evidence that they at one stage had an argument. The deceased returned to her house with her 8 year old granddaughter and went to sleep. During the night the child woke up and saw the appellant setting alight the curtain with a candle. She tried to wake the deceased up but failed to do so, she ran out of the house and the deceased died in the fire.
- [4] It was submitted by counsel for the appellant that the Court *a quo* misdirected itself in its application of the minimum sentencing regime and gave undue weight to the appellant's previous convictions. It was also argued that too little weight was given to the role that alcohol played. It was argued that it would be appropriate under these circumstances for this Court to interfere.

THE PRESCRIBED MINIMUM SENTENCE

[5] Section 51 of Act 105 of 1997 (as substituted by s 1 of Act 38 of 2007) prescribes life imprisonment when a person has been convicted of an offence referred to in Part I of Schedule 2, and Part II of Schedule 2 prescribes 15 years imprisonment for a first offender, 20 years for a second offender and 25 years for a subsequent offender. In the context of this case a murder conviction where there was premeditation would result in life imprisonment unless compelling circumstances exist which would allow for a deviation from the prescribed minimum sentence. In all other instances Part II of Schedule 2 would apply

[6] The Court found no premeditation, yet concluded that life imprisonment was prescribed in terms of the Act. That despite the Court's finding that "it is extremely difficult to conclude that there was premeditation." There was thus no definitive finding of premeditation¹. Consequently it would seem that the learned judge *a quo* erred in accepting that the prescribed minimum sentence was life imprisonment.

[7] Under the prevailing circumstances of this case the appropriate applicable minimum sentence was 15 years imprisonment.

PREVIOUS CONVICTIONS

[8] Section 271(4) of the Criminal Procedure Act, 1977 provides that the court must once previous convictions have been proven, take such into account when

¹ S v Jimenez 2003(1) SACR 507 (SCA) par 11

assessing sentence. However despite the fact that an accused may have a number of previous convictions a long period without any conviction should be taken into consideration and ought to be taken into account when assessing an appropriate sentence².

[9] The appellant had various previous convictions, one for rape, 3 of housebreaking and one of escape, the last namely the one of escape, was committed during 1997. As a result more than 10 years have passed since the last transgression. It would seem that the learned judge *a quo* did not pay any regard to the period of time and in my view he erred in not doing so.

[10] In his judgment the learned judge *a quo* inferred from the previous convictions that the appellant is a violent man and has no respect for the law. In my view the learned judge erred by placing too much emphasis on the appellant's previous convictions, especially in the light of the time that has transpired since the last transgression.

[11] In my view the previous convictions should under the circumstances play a minimal role.

PERSONAL CIRCUMSTANCES

[12] Although the personal circumstances were not transcribed counsel for the appellant argued that it would in any event have played a negligible role in

² S v Coetzer 1970(2) SA 228 (N), S v Mavinini 2009(1) SACR 523 (A)

sentencing. I agree with this submission.

[13] The important mitigating factor according to counsel is appellant's lack of sobriety when the incident occurred. According to the evidence he started drinking at 11 am on the morning preceding the incident. It can safely be accepted that the appellant's alcohol consumption must have played a part in his actions on that fateful day. The learned judge *a quo* correctly took this into consideration and decided on the basis of that to deviate from what he perceived the minimum sentence to be.

[14] The learned judge also placed a lot of emphasis on the fact that the appellant was drunk on the first day. In my view this is actually indicative of the appellant's problem with alcohol which contributed to this tragedy.

[15] The appellant didn't attend the trial after a postponement, the learned judge also drew inferences about his character from this incident, which was inappropriate considering that he accepted appellant's explanation for his absence.

CONCLUSION

[16] It is trite law that a court of appeal will not easily interfere with the discretion of the trial court and the test is whether there was a misdirection or that the

sentence is disturbingly inappropriate³.

[17] Due to the fact that the learned judge incorrectly assumed that the prescribed minimum sentence was imprisonment for life together with the fact that he placed too much emphasis on the previous convictions and the appellant's behaviour I am of the view that there was such a misdirection to allow for this Court to interfere with the sentencing.

[18] I accordingly make the following order:

18.1 The appeal succeeds;

18.2 the sentence on count 1 is confirmed;

**18.3 the sentence on count 2 is set aside and the appellant is sentenced
to 12 years imprisonment;**

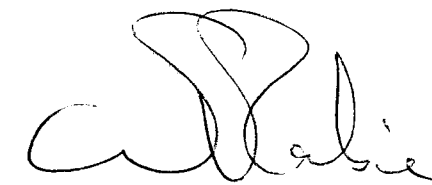
18.4 the sentences will run concurrently; and

18.5 the sentence is ante-dated to 9 December 2008


R G TOLMAY
JUDGE OF THE HIGH COURT

³ S v Rabie 1978(4) SA 855 (A)

I agree:



C P RABIE
JUDGE OF THE HIGH COURT

I agree:



M F LEGODI
JUDGE OF THE HIGH COURT

H A NGOBENI v THE STATE

A570/2014

DATE OF HEARING: 20 FEBRUARY 2015

DATE OF JUDGMENT: FEBRUARY 2015

FOR APPELLANT: PRETORIA JUSTICE CENTRE

ADVOCATE: MR L ALBERTS

FOR RESPONDENT: DPP

ADVOCATE: ADV P VORSTER