

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A185/2014

In the matter between:-

IZAK LEBOGANG MOLEFE

Appellant

And

THE STATE

Respondent

CORAM: EBRAHIM, MOCUMIE *et* NAIDOO, JJJ

HEARD ON: 23 FEBRUARY 2015

DELIVERED ON: 5 MARCH 2015

MOCUMIE, J

- [1] This is an appeal from the Free State High Court (Rampai J sitting as a court of first instance). The appellant was tried in the court *a quo* on three counts. Count one: housebreaking with intent to rob and robbery read with section 51(2) Act 105 of 1997, count two: murder read with section 51(1) Act 105 of 1997 and, count three: contravention of section 3 Firearms Control Act 60 of 2000 (possession of a semi-automatic rifle) read with section 51(2)(A) Act 105 of 1997. Despite his plea of not guilty on all three counts, he

was convicted as charged and sentenced to ten years imprisonment on count one. On count two, twenty years imprisonment and on count three, fifteen years imprisonment, of which ten years was ordered to run concurrently with the ten years imprisonment imposed in count one. Thus the appellant was sentenced to an effective forty years imprisonment. The appellant unsuccessfully appealed against the severity of his sentences. The appeal is with leave of the Supreme Court of Appeal.

- [2] There is no doubt that all the offences were committed out of greed and regardless of the consequences that might ensue from attacking a defenceless and old man of the deceased's age, seventy two years. After the appellant and his cohort had broken into the deceased's home during the night, the appellant assaulted the deceased with a blunt object several times over his head. The two then ransacked his home, stole valuable goods including a collection of rare knives and a firearm, a semi-automatic pistol. The two then left the deceased injured and bleeding for the whole night until he was discovered the next day and taken to hospital where he succumbed to the head injuries inflicted as depicted in the post mortem report.
- [3] Although the offences were clearly not planned or premeditated, resistance was overcome by use of a blunt object to the deceased's head. The deceased sustained severe head injuries which later led to his death. It hardly needs to be emphasised that armed robberies and I must add murders are a plague in this country and a bane of

society.¹ By their very nature, they are severe offences deserving of heavy punishment.² These offences were committed in March 2010. The Criminal Law Amendment Act 105 of 1997 was already in force. It is not without significance that the legislature ordained that offences of this nature attract prescribed minimum sentences ranging from life imprisonment to 25 years.

[4] The appellant's attorney initially relied on certain misdirections including that the court *a quo* should have found that compelling and substantial circumstances existed in respect of both count one and three as it found in respect of count two. But ultimately narrowed her argument to the contention that the cumulative effect of the three sentences was shockingly inappropriate.

[5] Recently in *Muller and Another v S*³ the Supreme Court of Appeal made this appeal:

'When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy and not a sledgehammer is the concomitant of justice and while a judicial officer must not hesitate to be firm when necessary 'he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.'

¹ *Muller and Another v S* 2012(2) SACR 545 (SCA) para 7.

² *S v Mhlakaza* 1997 (1) SACR 515 (SCA) 518a-f.

³ *Muller and Another* above para 9.

- [6] As the Supreme Court of Appeal aptly observed in *Itani Thomas Mudau v S*⁴: '[it] is generally accepted that inordinately long terms of imprisonment do not contribute to the reform of an accused person. On the contrary they have negative effect of denuding the accused of all hope of rehabilitation.' 'Wrong doers must not be visited with punishment to the point of being broken.'⁵
- [7] Accepting as the appellant's attorney did, that the sentences in respect of counts one and two were appropriate what remains is the sentence in respect of count three. It is common cause between the state and the defence that although the appellant was found in possession of a semi-automatic pistol, the firearm was not used during the commission of the offences. The deceased was hit several times over his head with a blunt object until he lost consciousness. He died from his injuries he sustained in hospital the next day.
- [8] This factor alone together with the appellant's other personal circumstances including the fact that he was relatively young at the time he committed these offences; he spent at least nine months in custody awaiting trial⁶ amount to compelling and substantial circumstances which justifies a deviation from the prescribed minimum sentence. In cases of similar nature and circumstances that have come before our courts five years imprisonment has been

⁴ *Itani Thomas Mudau v S* (419/12) [2011] (ZASCA) 191 para 5.

⁵ *S v Sparks and Another* 1972 (3) SA 396 (A) 410G.

⁶ See *S v Vilakazi* 2009 1) SACR 552 (SCA) para 60.

imposed as the most appropriate sentence.⁷The state readily conceded this point from the onset.

[9] Despite not showing any remorse as the court *a quo* lamented, as already indicated the appellant was relatively young, a factor which points to a possibility of rehabilitation; particularly with the rehabilitation programs currently available in correctional facilities across the country. The appellant was for all intents and purposes regarded by the court *a quo*, correctly so, as a first offender. Not a hardened criminal who had been given opportunities to rehabilitate in the past but misused such opportunities. Over and above all these factors, there is nothing that shows that a lengthy period of imprisonment will not bring home the error of his ways. It would be unjust to impose a sentence the effect of which is more likely to destroy than reform. It is for that reason why we consider that forty years imprisonment is excessively long and rules out any chance of rehabilitation, and ought to be set aside.

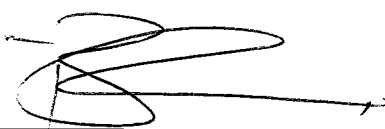
[10] In the result, I make the following order.

ORDER

1. The appeal succeeds only to the extent indicated in paragraph 2 below.
2. The order of the court *a quo* in respect of count three is set aside and substituted as follows:

⁷ *S v Mhlokaja and Another* 1997 (1) SACR 515 (SCA) 523f-g and 524g.

- '(a) Five (5) years imprisonment.
- (b) In terms of section 280 (2) of the Criminal Procedure Act 51 of 1977 it is ordered that the five years imprisonment imposed in respect of count three should run concurrently with the sentence imposed in respect of count one.'
3. The sentences (ie in respect of counts one and two) are otherwise confirmed.


B. C. MOCUMIE, J

I concur


EBRAHIM, J

I concur


NAIDOO, J

On behalf of Appellant: MS. S Kruger

Instructed by:

Justice Centre

Bloemfontein

On behalf of the Respondent: Adv. J Botha

Instructed by:

The Director of Public
Prosecution, Free State
Division