

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

Case No.: A258/2014

In the matter between:

XOLILE JACOB LUDADA

Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA JP, *et* MOLOI J *et* MOHALE AJ

HEARD ON: 30 NOVEMBER 2015

JUDGEMENT BY: MOLOI, J

DELIVERED ON: 3 DECEMBER 2015

[1] This is an appeal against the sentence imposed by my brother Daffue J, in which he gave leave to appeal against the sentence only. The Appellant and two others were convicted on charges of Armed Robbery with Aggravating Circumstances and Murder. Both charges were subject to the provisions of Section 51 of Act 105 of 1997 and sentences of fifteen (15) years imprisonment and life imprisonment, respectively, were imposed.

[2] In the heads of argument already the appeal against the fifteen (15) years imprisonment on count 1, the aggravated robbery was

abandoned. The gist of the appeal against the life imprisonment was based on the finding of the *court a quo* that there were no substantial and compelling circumstances present to justify a departure from the prescribed sentence of life imprisonment. It would be argued that the fact that the murder was premised on *dolus eventualis*, either that fact alone or read in conjunction with other mitigating circumstances, would constitute substantial and compelling circumstances. This argument was, however and correctly so, also abandoned during the hearing.

- [3] The Appellant and his co-accused had way-laid passer-by at a secluded place very late at night and the deceased just happened to find himself at the wrong place at the wrong time. A stone bigger than a cricket ball was hurled at him and landed on his head fracturing the skull to such an extent that bones from the skull perforated the brain tissue. He fell to the ground. The three assailants kicked him repeatedly to such an extent that his ribs broke and penetrated the lungs. This happened as he was lying on the ground, helplessly at the mercy of his attackers. The assailants' action bore all the hallmarks of brutality, lack of sympathy and barbaric conduct of "wild dogs attacking their prey" according to the trial court. The deceased was thereafter tied up and thrown into the boot of a car. At the post-mortem examination, a piece of rope was found around his neck, but was not tight enough to result in cardiac arrest or strangulation.

- [4] The respondent was justified, and I agree fully, to argue that from the manner in which the deceased was attacked, only *dolus*

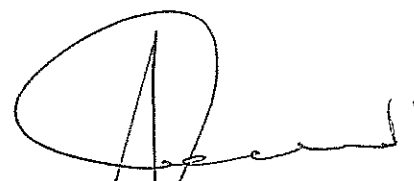
directus could be inferred and there was no question of *dolus eventualis* at all. Likewise, the Appellant was well advised not to pursue that argument at the hearing. It is trite that a court of appeal, in this case the full bench of this division can interfere with the sentencing discretion of the trial court only in limited circumstances e.g. where a misdirection was committed by the trial court and that misdirection was of such a nature, degree and seriousness that shows, directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably “**S v Pillay**, 1977 (4) SA 531 (A). See also **S v Kibido** 1998 (2) SACR 213 (SCA).

- [5] The court of appeal can also interfere with the sentence imposed by the trial court if sentence “induces a sense of shock” – **S v De Jager and Another** 1965 (2) SA 616 (A). Life imprisonment is an extremely harsh sentence, but it is a sentence prescribed by the law in cases of this nature. A departure from its imposition can only be rightly done if substantial and compelling circumstances are found to exist. The courts have repeatedly warned not to depart from imposition of life sentence where the circumstances justify its imposition for “flimsy reasons that cannot withstand scrutiny – **S v Malgas** 2001 (1) SACR 469 (SCA) and **S v Matyityi** 2011 (1) SACR 40 at 53 where Ponnar JA expressed himself as follows:

“Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them”.

Moreover, the provisions of the Criminal Law Amendment Act 105 of 1997 the so-called Minimum Sentencing Act, makes no distinction between a murder committed with *dolus directus*, *dolus indirectus* or *dolus eventualis*. It will be foolhardy in this case to find justification that the *dolus eventualis* referred to in passing would justify the finding of substantial and compelling circumstances.

[6] In the result, the appeal is dismissed.


 K.J. MOLOI, J

I concur.


 M.B. MOLEMELA, JP

I concur.


 I.B. MOHALE, AJ

On behalf of the Appellant: Adv. P.W. NEL
 Instructed by:
 Bloemfontein Justice Centre
 BLOEMFONTEIN

On behalf of the Respondent:

Adv. F. PIENAAR

Instructed by:

Director of Public Prosecutions

BLOEMFONTEIN