

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA

Case No.: CA70/14

Date Heard: 22 May 2015

Date Delivered: 5 June 2015

In the matter between:

THEMBILE NGUBO

Appellant

And

THE STATE

Respondent

JUDGMENT

EKSTEEN J:

[1] The appellant was convicted in the High Court of Mthatha of various offences, including one count of murder. He was sentenced to life imprisonment in respect of the count of murder. He appeals, with leave of the court *a quo*, only against the sentence imposed in respect of the murder.

[2] The events leading to the commission of the offence on 6 April 2006 in the rural locality of Lubanzi, are set out in the judgment of the court *a quo*. One Venter (the deceased), ran a trading store at Zitulele. Early in the morning of 6 April 2006 he and his wife set off from their home with their three grandchildren in a bakkie. Near their home they were ambushed by the appellant and three accomplices (the assailants). The assailants were armed with firearms and opened fire randomly and

indiscriminately on the bakkie in which the Venters drove. Numerous shots were discharged and the deceased died as a result of gunshot wounds sustained in the incident.

[3] The Venters carried a firearm with them too and Mrs Venter returned fire. This caused the assailants to flee. The gunfire had, however, attracted the attention of local residents who emerged and saw the assailants flee. They apprehended the appellant and returned him to the scene where he was later arrested.

[4] The appellant made a confession to the South African Police Services which he disowned at the trial. A trial-within-a-trial followed and the court *a quo* ruled that the confession was admissible in evidence. This finding is not attacked.

[5] It emerged from the confession, and the trial Judge found, that the assailants had met the previous evening, on 5 April and resolved to rob the Venters the next morning. They accordingly proceeded to wait for the Venters to emerge from their home on 6 April. All four were armed. When the Venters emerged they approached the bakkie and gunshots were discharged. The appellant acknowledges that they fled when Mrs Venter returned fire and he states that he discarded his firearm as he ran. As he was not able to run as fast as the other three members of the community caught up with him and apprehended him. Although the appellant denied in his confession that he had fired shots from his firearm the Judge *a quo* found the contrary.

[6] The offence of murder on the facts which the court *a quo* found to be proved attracts a discretionary minimum sentence of life imprisonment in terms of the provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997 (herein referred to as “the Act”). By virtue of the provisions of the Act the court is required to impose a sentence of life imprisonment unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The Judge *a quo* gave careful consideration to this issue and concluded that no substantial and compelling circumstances existed. He accordingly imposed the sentence of life imprisonment.

[7] The matter of sentence is primarily a matter in the discretion of the court burdened with the task of imposing the sentence. A court of appeal will only interfere with the sentence imposed if the reasoning of the court is vitiated by misdirection, or where the sentence imposed can be said to be startlingly inappropriate, or to induce a sense of shock, or where there is a striking disparity between the sentence imposed by the sentencing court and that which the court of appeal considers to be fair. (Compare for example ***S v Kgosimore*** 1999 (2) SACR 238 (SCA).)

[8] The approach which a court is required to adopt in instances where discretionary minimum sentences in terms of the Act find application was authoritatively set out in ***S v Malgas*** 2001 (1) SACR 469 (SCA). Marais JA pointed out that the courts were required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed. The prescribed sentences, he said, are not to be departed from lightly and for flimsy reasons.

[9] Marais JA remarked that if the court, on consideration of all the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing the sentence, it is entitled to impose a lesser sentence (p. 482e-f).

[10] In appeal before us Mr **Giqwa** argued that the court *a quo* had given inadequate recognition to the personal circumstances of the appellant and had over-emphasised the seriousness of the offence. He accordingly contends that the court *a quo* erred in concluding that no substantial and compelling circumstances existed.

Personal circumstances

[11] On behalf of the appellant it is argued that the court *a quo* failed to have regard to, or to have adequate regard to, certain of the personal circumstances of the accused. The argument is confined to three features of the personal circumstances of the accused. Firstly, that the appellant was a first offender. Secondly, that he was just 27 years of age at the time of the commission of the offence and therefore relatively young and capable of rehabilitation. Thirdly, that he had spent one year and seven months in custody awaiting trial.

[12] Cumulatively, so the argument goes, these features ought to have been held to constitute substantial and compelling circumstances justifying the imposition of a lesser sentence in that they render the prescribed sentence unjust in the circumstances.

[13] The court *a quo* gave careful consideration to each of these circumstances in the exercise of its discretion.

First offender

[14] In summarising the personal circumstances of the appellant the Judge *a quo* stated:

[15]

“As far as the personal circumstances of the accused are considered, the fact that he has no previous convictions and that this is his first brush with the law is undoubtedly a factor which the Court must take into account and which operates in his favour as a mitigating feature.”

[16] Later, in evaluating the various features of the case for purposes of the assessment of an appropriate sentence the court again reiterated that it took into account that the appellant had no previous convictions. The submission that the trial court failed to have regard to this feature is therefore unfounded.

Age

[17] The appellant, as recorded earlier, was approximately 27 years of age at the time of the commission of the offence. This feature too the Judge *a quo* weighed carefully. He stated:

“It was contended by Mr Mgudlwa on behalf of the accused, that I must take into account his relative youthful age, which is 29. He will turn 30 years in September this year. That means he was approximately 26 years old, nearly 27,

when these crimes were committed. I take into account that the accused is a relatively youthful person.”

[18] Later in the judgment in weighing up the appropriate sentence to be imposed the Judge *a quo* reiterated:

“I do take into account the fact that he was approximately 27 years old at the time of the commission of the offence.”

[19] Mr **Giqwa** refers, however, to ***S v Nkomo*** 2007 (2) SACR 198 (SCA) where at 203e-g Lewis JA stated:

“[13] The factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes, that he was employed, and that there may have been a chance of rehabilitation. No evidence was led to that effect, however.

[14] Nonetheless these are substantial and compelling circumstances which the sentencing Court did not take into account. A sentence of life imprisonment - the gravest of sentences that can be passed, even for the crime of murder - is in the circumstances unjust and this Court is entitled to interfere and to impose a different sentence, one that it considers appropriate.”

[20] It is immediately apparent from this dictum that the court *a quo in Nkomo* failed to take these features into consideration. In the present case the Judge *a quo* gave careful consideration to this feature.

[21] Most significantly, however, this dictum, particularly the reference to the relative youth of a perpetrator was convincingly revisited in the Supreme Court of

Appeal in the matter of **S v Matyityi** 2011 (1) SACR 40 (SCA) where Ponnann J stated at 47e-48b:

“During the course of the judgment reference was made to the respondent's 'relative youthfulness', without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.”

[22] The approach set out in **Matyityi** (*supra*) has been accepted and followed since the publication of the judgment. The dictum to which I have referred above serves to greatly diminish the impact of the submission made on behalf of the appellant.

Prospects of rehabilitation

[23] It is argued on behalf of the appellant's that the appellant's relative youthfulness is an indication of his prospects of rehabilitation.

[24] Reference to rehabilitation is ordinarily intended to refer to the prospect of the improvement of the offender. *Van der Merwe: Sentencing* [(1991) Juta] argues that where an offender has been made to see that he has acted in error and, were he to acknowledge that his punishment has been fair, he would have gone a long way towards true rehabilitation. In the present case, however, the appellant refuses to acknowledge his wrongdoing and persists in denying his guilt. In this context the Judge *a quo* stated:

“The question of rehabilitation, this Court often finds is a very powerful argument operating in favour of an accused person.

However, before any person can be rehabilitated, there must be a genuine and truthful expression of remorse for his deeds. I do not believe any criminal can ever be rehabilitated unless he accepts that what he did was wrong and expresses remorse and sorrow for his deeds. Unless he does so, his chances on rehabilitation, I believe, are relatively slim.”

[25] The reasoning of the Judge *a quo* is not attacked in the appeal before us. Rather, it is suggested that by virtue of the appellant's relative youth there is a longer period during which he may recognise the error of his ways and acknowledge the fairness of his punishment. The difficulty with the argument is that no evidence was tendered to lay any foundation therefore and, it seems to me, it is pure speculation. I find no misdirection in the reasoning of the Judge *a quo*.

Period of incarceration pending trial

[26] This feature too, the trial Judge pertinently recognised and considered in the exercise of his discretion. I can find no basis in the evidence for concluding that the Judge *a quo* had given inadequate and improper consideration to this feature.

[27] It is a well-established principle that when considering the duration of a prison sentence to be imposed the court will have regard to the period of incarceration which the accused person has already endured as a result of the offence which he has committed. Where, however, the enquiry is directed at whether substantial and compelling circumstances exist justifying a deviation from a discretionary prescribed minimum sentence of life imprisonment this feature can carry very little weight. If the accused were tried and convicted on the same day of his arrest the prescribed sentence would have been life imprisonment. It is an indeterminate period which endures until the end of the lifetime of the accused person, irrespective of when it commences. It is accordingly difficult to understand why the fact of his incarceration pending trial should justify the imposition of a lesser sentence than life imprisonment which would have been justified had he been tried summarily at the time of his arrest. Nevertheless, the court *a quo* did have regard to this feature and did give proper effect to it. There was accordingly no misdirection on the part of the court *a quo*.

[28] The court *a quo* having recognised all these features found, correctly, that these factors were to be weighed against the other features of the case.

Over-emphasis of the seriousness of the case

[29] It is argued on behalf of the appellant that the Judge *a quo* over-emphasised the seriousness of the offence at the expense of the appellant's personal circumstances. The offence committed is indeed a very serious offence. The facts relating to the offence are set out earlier herein.

[30] Human life is the most precious value which our legal system seeks to protect, as it has done since time immemorial, hence the Biblical commandment "Thou shalt not kill". In ***S v Makwanyane and Another*** 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para [144] Chaskalson P gave expression thereto where he stated:

"The rights to life and dignity are the most important of all human rights and the source of all other personal rights."

[31] The courts are accordingly fully justified in accentuating the seriousness of acts of coldblooded murder.

[32] The facts of the present case attracts the recommended minimum sentence of life imprisonment on no less than three grounds set out in the Act. Firstly, it was a pre-mediated, calculated act. Secondly, the murder was committed during an attempt to commit an act of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977. Thirdly, the offence was committed

by a group of persons acting in the execution or furtherance of a common purpose (compare Schedule 2 Part 1 of the Act).

[33] In **S v Mahomotsa** [2002] 3 All SA 534 (A) at 541G-J Mpati JA stated:

“One must of course guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.”

[34] I have no hesitation in concluding that the facts of the present case are sufficiently horrendous to justify the prescribed sentence.

Conclusion

[35] In all the circumstances I am not persuaded that there has been any misdirection on the part of the court *a quo*. The murder is clearly a very serious offence. When the features relating to the seriousness of the offence and the interests of society are weighed up against the personal circumstances raised in argument I am unable to find any significant disparity between the sentence which I would have been inclined to impose and the sentence in fact imposed. In these

circumstances I can find no ground to justify any interference in the sentence imposed by the trial Judge.

[36] In the result the appeal is dismissed.

J W EKSTEEN

JUDGE OF THE HIGH COURT

VAN ZYL ADJP:

I agree. The appeal is dismissed.

D VAN ZYL

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

ZILWA AJ:

I agree.

P H S ZILWA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Mr Giqwa instructed by Mthatha Justice Centre, Mthatha

For Respondent: Mr Joubert instructed by The Director of Public Prosecution,
Mthatha