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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – MTHATHA**

Case no: CA15/2014
Date Heard: 19/06/2015
Date Delivered: 20/08/2015

In the matter between:

LULAMILE BAM

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

SMITH J:

[1] The appellant and his two co-accused were charged in the Mthatha High Court with murder and unlawful injury to property. They initially pleaded not guilty, but after the close of the state case they tendered pleas of guilty on both counts. The appellant was sentenced to life imprisonment and his two co-accused to 15 years' imprisonment each. He appeals against his sentence with the leave of the court *a quo*.

[2] Mr *Halam*, who represented the appellant at the appeal hearing, submitted that the learned judge in the court *a quo* (Pakade ADJP, as he then

was) erred in not finding that there were substantial and compelling circumstances present which justified the imposition of a lighter sentence than the statutory prescribed minimum sentence in respect of the murder count. He relied for his submission in this regard in particular on the appellant's personal circumstances, the fact that he was a first offender, that he had submitted a letter of apology to the deceased's mother, had changed his plea to one of guilty, and had assisted the family financially with the deceased's funeral arrangements. He submitted that the cumulative effect of these factors is sufficiently weighty to establish substantial and compelling circumstances.

[3] Significantly, the state has, in comprehensive heads of argument, conceded that: the evidence established *dolus eventualis* as opposed to the *dolus directus* found by the learned judge in the court *a quo*; that the state had failed to prove common purpose; and that the court *a quo* erred in finding that there were no substantial and compelling circumstances present. The effect of the state's concessions in respect of the issues of intention and common purpose is that it accepted that the court *a quo* wrongly found that section 51(1) of Act 105 of 1997 (and thus life imprisonment), instead of section 51(2) - and thus 15 years' imprisonment - was applicable.

[4] As will appear from the discussion which follows below, these concessions were correctly made.

[5] The state alleged that the appellant and his co-accused had wrongfully and intentionally killed one Z. M. ("the deceased"), at his residence at Willow Locality on 15 February 2008, by pouring petrol on him and setting him alight. In respect of the unlawful injury to property count, it was alleged that at the

same place and time, they wrongfully, unlawfully and intentionally damaged the deceased's property, namely a bed and a blanket.

[6] The evidence led by the state established that on the evening of the 15th of February 2008, the appellant and his co-accused went to the home of the deceased with the view of questioning him about the theft of certain items from the appellant's shop. They questioned the deceased for some time, thereafter followed up information that he had provided; returned to his house, and poured petrol on him. The appellant had apparently instructed one of his co-accused to fetch the petrol from his vehicle which was parked outside the deceased's residence at the time.

[7] While the appellant was busy pouring the petrol on the deceased, the latter had lashed out with his arm, apparently an attempt to deflect the flow of the petrol. He, however, diverted the petrol in the direction of a lit candle which caught fire, with dire consequences for everybody in the room.

[8] The flames rapidly engulfed the deceased. According to one of the eye witnesses called by the state, Nolitha Makhwebile, the appellant had doused the flames with water and blankets. She also testified that the appellant had driven the deceased, herself and others injured in the fire, to the hospital. The deceased sustained serious burn wounds, from which he died nine days later. The appellant and his co-accused also suffered burn wounds about their bodies and faces. It also emerged from the testimony of the deceased's mother that the appellant had written a letter to her wherein he pleaded for her forgiveness and stated that he did not intend to kill the deceased. She furthermore testified that the appellant had paid for the deceased's coffin and other funeral expenses.

[9] The relevant portions of the appellant's section 112 statement read as follows:

"3. I am aware of all charges against me, that of murder and that of unlawful injury to property, in that on or about 15 February 2008 and at or near Willow Locality in the district of Dutywa, I did wrongfully and intentionally kill Z. M., an adult male by pouring petrol upon him which later caught fire, the fire caused by a candle that was a source of light on the room also thereby injuring property which was in that room.

4. By pleading guilty in these charges I am showing a sign of remorse for what I did.

5. I know what I did was wrong in the circumstances."

[10] In convicting the appellant after his change of plea, the learned judge was constrained to have regards to both the evidence adduced by the state, as well as the contents of the appellant's section 112 statement. (*S v Olivier* 2007 (2) SACR 596 (C)).

[11] The events which had caused the petrol poured on the deceased to ignite were described as follows by Makhwebile:

Mr van Drunick : He poured the petrol on him various occasions. Then on the third time when he was busy pouring the petrol over him, he hit the petrol and it went to the candle.

Mr van Drunick : Now who hit the petrol?

Witness : it was the deceased, Zamile

Mr van Drunick : Al right and then you say it went to the candle, whilst in other words it then lit, is that right?

Witnes : that it correct."

[12] Ms *Triesche*, who appeared for the state, correctly conceded that the evidence established intention in the form of *dolus eventualis*, as opposed to *dolus directus* as found by the court *a quo*. The ineluctable inference from the proved facts is that the appellant had intended to threaten the deceased by pouring the petrol on him, and not to actually set him alight. There can nonetheless be no doubt that he subjectively foresaw the possibility that the petrol might ignite, especially in view of the fact that the room had been lit by an open flame candle, and that he had reconciled himself to this possibility.

[13] The state was also not assisted in this regard by the so-called letter of apology which the appellant had written to the deceased's mother. It appears from his judgment that the learned judge in the court *a quo* had relied mainly on the contents of that letter for his conclusion that the appellant had direct intention to kill the deceased. The state has correctly conceded that if anything, the contents of that letter served to confirm that the appellant did not have direct intention to kill the deceased.

[14] The fact that the appellant had admitted in his plea that he had "*intentionally*" killed the deceased was, in the absence of further probing by the presiding judge to determine the true meaning of the words, not sufficient proof of direct intention. While not impacting on the propriety of the appellant's conviction on the murder charge, this finding is exceedingly relevant insofar as sentencing is concerned.

[15] The state has also correctly conceded that the evidence did not establish common purpose, or that the murder had been planned or pre-meditated. The

evidence led by the state failed to establish that there had been prior agreement or active association, which are required to establish the common purpose. The appellant also did not admit in his plea that he had acted in common purpose with his co-accused. The state has thus correctly conceded that, the appellant having been a first offender, section 51(2) of Act, which prescribes a minimum sentence of 15 years' imprisonment, was of application.

[16] We are, in addition, of the view that the cumulative effect of the mitigating circumstances mentioned above, indeed constitute substantial and compelling circumstances which justify the imposition of a lighter sentence.

[17] The appellant was [.....] years old at the time of the commission of the offences, was a first offender, a businessman and bread winner of his family. He is married with children. There can be little doubt that the appellant's remorse was immediate and genuine. It is common cause that he attempted to douse the flames that had engulfed the deceased, had driven him and others to the hospital, had written a letter of apology to the deceased's mother, and contributed financially to the funeral. It is significant that the deceased's mother also considered these acts of contrition as genuine and heartfelt.

[18] Under these circumstances the imposition of the minimum prescribed sentence would, in our view, amount to an injustice, and we are consequently constrained to impose a lighter sentence.

[19] The offences, however, remain serious, and Mr *Halam* has conceded that they warrant a lengthy period of imprisonment. The deceased suffered considerably before he died. He spent nine days in hospital, and must have

endured unbearable pain as a consequence of his serious burn wounds. An effective period of 10 years' imprisonment, antedated to the date of sentencing by the court *a quo*, would, in our view, be fair and appropriate punishment in the circumstances.

[20] In the result the appeal against sentence succeeds, and the following order issues:

(a) The appellant's sentence is set aside and there is substituted the following sentence:

- (i) In respect of count 1 the accused is sentenced to undergo 10 years' imprisonment.
- (ii) In respect of count 2 the accused is sentenced to 3 years' imprisonment.
- (iii) The sentences are antedated to the date of sentencing by the court *a quo*, and shall run concurrently.

J.E SMITH
JUDGE OF THE HIGH COURT

I AGREE:

F. B. A. DAWOOD
JUDGE OF THE HIGH COURT

I AGREE:

NDZONDO
ACTING JUDGE OF THE HIGH COURT

Appearances		
Counsel for the Plaintiff	:	Advocate Halam
Attorney for the Plaintiff	:	c/o MANTYI ATTORNEYS 1 ST FLOOR, CLUBLINK BLD 28 MADEIRA STREET MTHATHA CELL NO: 082 558 2904
Counsel for the Defendant	:	Ms Triesch
Attorney for the Defednant	:	The National Director of Public Prosecutions of South Africa Broadcast house 94 Sissons Street Fortgale Mthatha
Date Heard	:	19 JUNE 2015
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