

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

Appeal No. : A145/2012

In the matter between:-

MVULA SAMUEL DAIL

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, AJP *et* VAN DER MERWE, J *et* MBHELE, AJ

HEARD ON: 2 JUNE 2014

JUDGMENT BY: RAMPAL, AJP

DELIVERED ON: 12 JUNE 2014

- [1] This is an appeal against sentence only. The appellant was sentenced to 20 years imprisonment on 12 September 2011 following his conviction on a charge of murder. He was aggrieved by the sentence. He successfully applied for leave to appeal. He now comes to us on appeal with the leave of C.J. Musi, J granted on 1 June 2012. The respondent opposes the appeal.

- [2] The charge against the appellant was one of murder. The respondent alleged that he murdered Ms Dilahloane Maria Ditsoatlise, a woman 34 years of age at Bultfontein on 24 August 2010 by stabbing her with a knife.
- [3] The appellant was tried by Mathebula, AJ in Bloemfontein. On 12 September 2011 he pleaded guilty to the charge. He was legally represented by Ms S. Kruger, a local public defender. Mr M. Strauss appeared for the respondent. The appellant was then convicted on his plea.
- [4] On the same day a custodial sentence of 20 years imprisonment was imposed on the appellant. He was aggrieved. He later applied for leave to appeal, which application was granted by C.J. Musi, J seeing that Mathebula, AJ was no longer on the bench.
- [5] The notice of appeal was filed on 7 June 2012 on behalf of the appellant. His grounds of appeal were, among others:
- 5.1 that the court *a quo* erred in that it did not find that substantial and compelling circumstances existed to justify the imposition of a sentence less than the prescribed minimum sentence – *vide* rule 2.1 notice of appeal;
 - 5.2 that the court *a quo* erred in that it failed to record its reasons for its incremental deviation from the prescribed minimum sentence of 15 years for a first offender in respect of the crime of murder – *vide* 2.3 notice of appeal;

5.3 that the court *a quo* erred in that it failed to attach proper and due weight to the cumulative extenuating factors of the appellant's profile as an individual offender – *vide* 2.2 notice of appeal.

- [6] The sentencing of an offender is first and foremost the prerogative of the trial court – **S v Giannoulis** 1975 (4) SA 867 (A). Sitting as we are in an appellate mode, we cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if we were the trial court and then substitute the original sentence with a different sentence of our own simply because we reckon it is more preferable than the one imposed by the trial court – **S v Malgas** 2001 (1) SACR 469 (A) at 478d – e.

- [7] Our judicial power to exercise appellate interference is limited and for sound reasons. Where the original sentence imposed by a trial court is in all circumstances shockingly severe and thus inappropriate, a court exercising appellate jurisdiction can also interfere with the sentencing discretion of a trial court – **S v De Jager** 1965 (2) SA 612 (A).

- [8] A court constituted, as we are, to exercise appellate jurisdiction, is in essence called upon to oversee the fairness of the proceedings in the court *a quo* and to determine whether the ultimate outcome was underpinned by the dictates of justice or not. We have to ensure that the personal circumstances of an aggrieved individual offender have been properly taken into account and that his profile has been

evenly balanced against the backdrop of the crime committed as well as the interest of society offended. The delicate balancing act demands careful and objective measure of restraint. Great care has to be taken in order to see to it that no cornerstone of the triad is overemphasised or underemphasised at the expense of another – **S v Zinn** 1969 (2) SA 537 (A).

- [9] On behalf of the appellant Ms Kruger submitted that the court *a quo* committed material misdirection by increasing the already severe prescribed minimum sentence of 15 years imprisonment by an additional five long more years without giving reasons for such an adverse deviation. Accordingly counsel submitted, on the strength of the sharpening of the sentence, that we have to interfere. She urged us to uphold the appeal on those grounds.

- [10] Mr Strauss, counsel for the respondent, sharply differed. He submitted that the provisions of section 51 Criminal Law Amendment Act 105 of 1997, as amended, provide that a minimum sentence of 15 years imprisonment in the case of a first murder offender permissive and not prohibitive. He stressed that such a sentence was and remains a guideline which in no way limits the discretion of a trial judge, in an appropriate case, to impose a sentence heavier than the prescribed minimum sentence.

- [11] In developing that argument further, counsel contended that seeing that the court *a quo*, in any event, had correctly found

that there were no substantial and compelling circumstances in favour of the appellant to warrant a lighter sentence than the prescribed minimum sentence, it was entitled to up the punishment to a level above the prescribed minimum sentence as the trial judge did. He conceded that the sentence of 20 years imprisonment was indeed a stiff punishment. Nonetheless he submitted that it met the demands of the time. He further submitted that the absence of reasons for the loaded or higher sentence in itself constituted no misdirection at all that could trigger off any appellate interference. He urged us to dismiss the appeal and to confirm the sentence.

[12] In considering the appeal we have to take into account the appellant's personal profile as an individual offender. The first component of the triad concerns the profile of an individual offender. The mitigating factors were:

- that the appellant was about 37 years of age at the time he committed the fatal crime;
- that he was 38 years of age at the time he was sentenced;
- that he and the victim lived together as husband and wife in accordance with the customary regime of marriage;
- that he had two dependent minor children who were eight years of age and three years of age;
- that those children were in the custody and care of his mother;
- that his formal education came to an end when he was in standard five;

- that beyond such level he could not proceed as a result of his learning difficulties;
- that he was suffering from epilepsy;
- that he was arrested on 24 August 2010; and
- that he remained incarcerated until he was sentenced on 12 September 2011.

[13] On the other hand, in considering an appeal, we also have to take into account the gravity of the crime committed. The second component of the triad concerns one dimension of the aggravating factors.

“The crimes which the appellant committed are extremely serious. We live in a society which is becoming increasingly lawless... Persons who perpetrate such crimes must be punished severely. Society demands this and it is absolutely necessary that the message go out to the world that people who commit these sorts of crimes will be dealt with severely.”

S v Valley 1998 (1) SACR 417 (W) at 420B – D per Hoffman AJ.

[14] In **S v Reay** 1987 (1) SA 873 (A) at 877C Galgut AJA, said the following about the gravity of a crime as an aggravating factor:

“Where a crime is prevalent a severe sentence may be justified in order that it may act as a deterrent to others.”

No crime can be more serious than murder. Family murders are disturbingly not only on the increase in this province, but all over the country. More often than not male spouses are implicated.

[15] Moreover we further have to take into account the interest of society in considering sentence on appeal. The third component of the triad also concerns another dimension of aggravating factors.

[16] The interest of society demands that offenders be deterrently punished. The deterrent objective of sentencing is an element of the sentencing process which needs to be seriously considered in the interest of society. Our courts must be mindful that when offenders are lightly punished for serious offences, the respect which society has for law and order would be undermined – **S v Du Toit** 1979 (3) SA 846 (A).

[17] The following circumstances constituted aggravating factors in this case:

- The victim was a defenceless woman and the appellant's wife.
- She was brutally attacked and knifed to death in the comfort of her own family sanctuary.
- The appellant inflicted 38 stab wounds on the helpless woman.
- The appellant had on a previous occasion attacked and assaulted the victim.

- The victim feared the appellant so much that she even obtained a family violence interdict against him.
- The appellant's aggressive conduct towards the victim seemed to have forced her to leave the common home.
- The appellant's previous convictions are indicative of his violent nature.

[18] In the light of the foregoing and on the strength of a comparative analysis between the aggravating circumstances and the mitigating circumstances I am persuaded that the court *a quo* correctly found that no substantial and compelling circumstances existed in this matter to justify decremental deviation from the prescribed minimum sentence. The mitigating factors were eclipsed by the aggravating factors. On the facts, the finding of the court *a quo* that there were no circumstances which substantially compelled downward deviation, was one which I could not, on appeal, hold to be wrong. I am not persuaded that the cumulative impact of the personal circumstances of the appellant including but not limited to his personal profile, his plea, his voluntarily surrender, the period of his incarceration or his poor intellectual capacity together could be considered as substantial and compelling circumstances.

[19] I am not persuaded that the failure of the trial judge to record reasons that persuaded him to sharpen the punishment over and above the prescribed minimum sentence constituted a misdirection so material as to justify appellate interference. Where a judge, in the exercise of his or her discretion,

decrementally deviates from the prescribed minimum sentence, he or she is required to record his reasons for such deviation. However, where a judge in the exercise of his discretion deems it appropriate to deviate from the prescribed minimum sentence by imposing a sentence in excess of that statutory margin he or she is not obliged to give reasons. It is perhaps desirable but certainly not peremptory to do so. I would, therefore, refrain from concluding that an omission to give reasons in that context, constituted a material and appealable misdirection. I found the argument of Mr Strauss in this regard persuasive.

[20] Notwithstanding the vicious and brutal attack of the victim, the appellant could not be properly described as a coldblooded murderer or an animal. Upon my reading of the judgment, the impression I got was that it was this characterisation of the appellant by the trial court which impelled the trial judge to punish the appellant in that way. In my view the punishment of 20 years imprisonment was retributively excessive.

[21] What we do know about the appellant is that after this gruesome murder of his wife, he surrendered himself to the police. On his appearance in the court *a quo* he pleaded guilty. He could not go any further beyond standard 5 at school. It would seem that he was intellectually impaired. He had a learning disability. We cannot tell with certainty as to what adverse impact the ailment of epilepsy had on his learning ability or his ability to control his temperament. But above all these factors, it must not be forgotten that this

unfortunate incident was a crime of passion *criminis passionale*. I think his brutal actions were abnormal. The aggression he displayed by repeatedly stabbing his spouse, as he did, was probably a manifestation of deep-seated emotional turmoil and hurt. It may well be that his epileptic condition was implicated in the brutal force he unleashed on the victim.

[22] Upon consideration of all these factors I am inclined to think that the court *a quo* committed a material and appealable misdirection by overstepping the mark of the prescribed minimum sentence to the extent of five years imprisonment. In view of that misdirection appellate interference is warranted. In a case of premeditated murder of a wife, which was not the case here, the sentence ultimately imposed on the guilty husband by the Appellate Division, now the Supreme Court of Appeal was 16 years imprisonment. See **S v Di Blasi** 1996 (1) SACR 1 (AD). Having considered all the relevant factors, I am of the view that a reduction of five years from the sentence imposed would be a fitting and appropriate punishment for the appellant for what he did.

[23] Accordingly I make the following order:

23.1 The appeal succeeds.

23.2 The conviction stands.

23.3 The sentence of 20 years imprisonment imposed on the appellant is set aside and it is substituted with one of 15 years imprisonment antedated to 12 September 2011.

M. H. RAMPAL, AJP

I agree.

C. H. G. VAN DER MERWE, J

I concur.

N. M. MBHELE, AJ

On behalf of appellant: Ms S. Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Mr M. Strauss
Instructed by:
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