

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A60/2014

In the matter of:

DANIEL NTSIKELO DRAAI

Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA, J *et* TSATSI, AJ

JUDGEMENT BY: MOLEMELA, J

HEARD ON: 11 AUGUST 2014

DELIVERED ON: 11 NOVEMBER 2014

- [1] This is an appeal against the sentence of life imprisonment imposed on the appellant pursuant to his conviction by the Bloemfontein Regional Court on a charge of murder. The appeal is brought with leave of the trial court and is directed against sentence only.
- [2] The notice of appeal filed on behalf of the appellant reflects the following grounds of appeal:-
- (i) that the trial court erred in finding that there were no substantial and compelling circumstances warranting a deviation from the mandatory life imprisonment sentence;

- (ii) that the life imprisonment sentence imposed on the appellant is strikingly inappropriate and induces a sense of shock;
- (iii) that the trial court over-emphasised the seriousness of the offence as well as the interests of society at the expense of the appellant's personal circumstances.

[3] The facts that led to the appellant's prosecution are as follows. On the 9th February 2008 the appellant met, the deceased, the deceased's brother and his two friends at a tavern. The appellant informed them that there was a traditional feast at his home in celebration of his brother's successful completion of his initiation. The deceased and his three afore-mentioned companions ended up attending the traditional ceremony, which was apparently attended by many other people.

[4] At some point the appellant's mother purchased a case of bottled beer. The trouble started when all and sundry started grabbing bottles of beer from the case. The appellant reprimanded these people and instructed them to return the bottles they had grabbed. Everyone complied except the deceased. The deceased's refusal to return the bottle of beer led to a quarrel between the appellant and the deceased, after which the appellant hurriedly left his home.

[5] On his return, the appellant was in the company of one Brown, Mojanke, Stuart and several other persons. Brown started quarrelling with the deceased, *inter alia* accusing the

deceased of recruiting prospective initiates for the leader of a rival initiation school.

- [6] The appellant's mother intervened and asked all the people that were involved in the altercation to leave her house. As the deceased and his companions were leaving the premises, the appellant stabbed the deceased with a knife on the chest. The deceased was then surrounded by the appellant's cohorts, with Brown and Stuart also stabbing the deceased; Mojanke hit the deceased with the barrel of a gun while the rest of the group chased after the deceased's brother and his two friends. The deceased sustained 16 stab-wounds. The post mortem report revealed that the deceased died from multiple incisive wounds which caused damage to the blood vessels and the lung.
- [7] It is trite law that the appeal court will only interfere with sentence if it is of the opinion that it is vitiated by an irregularity or where the trial court misdirected itself. In **S v Rabie** 1975 (4) SA 875 (AD) the court stated as follows:- "It is trite that, in every appeal against sentence the court hearing the appeal (a) should be guided by the principle that punishment is, 'pre-eminently a matter for the discretion of the trial court and (b) should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised' The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate." In **S v Salzwedel** & others 1999(2) SACR 586 (SCA) at 591 H: "An appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate' or totally out of proportion to the gravity or magnitude of the offence, or

sufficiently disparate or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably.”

- [8] In **S v Malgas** 2001 (1) SACR 469 (SCA) at 478 Marais J remarked as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh.”

- [9] In the assessment of an appropriate sentence, regard must be had, *inter alia* to the triad of sentence as well as the objectives of punishment, namely deterrence, prevention, rehabilitation and retribution. See **R v Karg** 1961 (1) SA 231 (A) at 236A-B.

- [10] In the case of **S v Banda** 1991 (2) SACR 352 (BGD), it was reiterated that court decisions must promote respect for the law and must reflect the seriousness of the offence and provide just punishment for the offender while taking into account the personal circumstances of the offender.

- [11] The conspectus of the record of the trial court’s proceedings reveals that the trial court was mindful of all the circumstances of the case. It properly considered the triad of sentence as well as the afore-mentioned objectives of

sentencing. I'm satisfied that it properly addressed itself to all the principles applicable to sentencing.

[12] In considering whether there were substantial and compelling circumstances that warranted imposition of a lesser sentence the trial court correctly considered the following mitigating factors: that the deceased was 21 years old at the time of commission of the offence, that he had studied up to grade 10 level; that he was employed, earning R1 600 per month; that he had a dependant that he was supporting.

[13] The trial court also correctly considered the following factors to be aggravating: the seriousness of the offence and its prevalence; that the appellant was not a first offender as he had a previous conviction of indecent assault which was suspended for three years on condition that he did not commit a similar offence and also on condition that he underwent correctional supervision; that the appellant played a leading role in the commission of the offence in that he was the one who enlisted the presence of the people that subsequently participated in the stabbing; he was in fact the first one who stabbed the deceased and persisted with the assault on the deceased despite the intervention of the deceased's brother. The offence was committed in full view of onlookers; the impact of the offence on witnesses and on the deceased's family, who had at the time of the trial still not yet come to terms with the deceased's death; the appellant's lack of remorse. Furthermore, the circumstances under

which the offence was committed also reveal a measure of premeditation. It is clear that the aggravating factors far outweigh mitigating factors.

[14] It is clear from the record that the deceased succumbed to fatal injuries inflicted in a vicious attack. His killing was senseless and barbaric, constituting a flagrant disregard of the sanctity of human life. The trial court aptly described the conduct of the appellant and his co-perpetrators as being similar to that of “lions in the jungle, tearing and bludgeoning a buffalo calf to death”. They were only too happy to carry out this inhuman deed in broad daylight and in full view of members of the public. No civilised society should have to contend with such a deplorable state of affairs when the right to life and human dignity are expressly protected by the Constitution.

[15] Much was made about the age of the appellant at the time of commission of the offence. While this is indeed a strong mitigating factor, it has to be taken into account that despite his youthfulness, the appellant played a leading role in the commission of the offence. This incident was not his first brush with the law and was in fact committed 18 months after imposition of the suspended sentence. The suspended sentence clearly failed to discourage him from further participation in crime. On the contrary, he went on to commit a more serious, heinous offence. In the case of **Director of Public Prosecutions, Kwazulu-Natal v Ngcobo & Others** 2009 (2) SACR 361 (SCA) the court set aside the 18 years

imprisonment sentence imposed on the appellants, whose ages ranged between 20 and 22 years, and substituted that sentence with life imprisonment. The court remarked as follows at par [26]:

“Courts are expected to dispense justice. This kind of brutality is regrettably too regularly a part of life in South Africa. Courts are expected to send out clear messages that such behaviour will be met with the full force and effect of the law. The legislature is concerned and so too should we be.”

- [16] The involvement of liquor in the commission of the offence must be cumulatively considered with other mitigating factors. It is not an aspect that detracts from all the other circumstances of the case that clearly militate against a departure from the prescribed minimum sentence. It is apposite to refer to the case of **S v Vilakazi** 2009 (1) SACR 552 (SCA) at 574 para [58] where the court stated as follows:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions of whether the accused is married or single, whether he has 2 children or 3, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided.”

- [17] Having considered all the circumstances of the case I find that what induces a sense of shock is not the sentence that was imposed, as argued by the appellant, but rather the

brutality of the deed and the callousness with which it was committed.

[18] The authorities mentioned above all emphasize that courts should send a clear message that violent crimes will not be tolerated. I align myself to that view. The sentences that we impose must ensure that criminals and prospective criminals realise that the murder of one individual is one too many.

[19] I am satisfied that the trial court correctly found that the appellant's personal circumstances, cumulatively viewed, do not constitute substantial and compelling circumstances that warrant imposition of a lesser sentence than that of life imprisonment. There is no justification for tampering with that finding and the sentence that the trial court imposed. It follows that the appeal has to fail.

[20] In the result the following order is given:

1. The appeal against sentence is dismissed and the sentence of life imprisonment imposed by the trial court is confirmed.

M. B. MOLEMELA, J

I concur.

E. K. TSATSI, AJ

On behalf of the appellant: Adv. J. S. Makhene
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. K. G. Mashamaite
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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