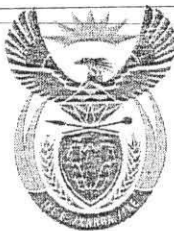


Amended
Judgment



17/01/13

IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **YES** / NO.

(2) OF INTEREST TO OTHER JUDGES: **YES** / NO.

(3) REVISED.

DATE

6/12/2012

SIGNATURE

CASE NO: A858/2011

DATE:

IN THE MATTER BETWEEN

NEHEMIA JABULANI DLUDLU

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

KOLLAPEN. J

[1] The appellant stood trial in this court on a charge of robbery with aggravating circumstances, murder and attempted murder and after pleading guilty was duly convicted of attempted theft, murder and attempted murder.

[2] On 28 February 2005 the court *a quo* imposed the following sentence on the

appellant:

- 2.1 count one (attempted theft) - one year imprisonment;
- 2.2 count two (murder) - twenty five years imprisonment;
- 2.3 attempted murder - five years imprisonment.

[3] The court ordered that the sentences imposed with regard to counts one and three were to run concurrently with the sentence imposed in respect of count two rendering it an effective sentence of twenty five years.

[4] The appellant applied for leave to appeal and was granted leave to appeal to the Full Court by HARTZENBERG, J on 13 February 2008. Leave to appeal was applied for and only granted in respect of sentence.

[5] In advancing his appeal the appellant submits that the state during the trial in the court *a quo* did not give the appellant notice that it intended to rely on the provisions of the Criminal Law Amendment Act 105 of 1997 and that the charge-sheet in question did not make any reference to Act 105 of 1997 nor was it brought to the attention of the appellant at any other stage during the trial that the provisions of Act 105 of 1997 would be relied upon. To that extent the appellant contends that the court *a quo* misdirected itself in purporting to rely on the provisions of Act 105 of 1997.

[6] On account of that the appellant contends that the court *a quo* misdirected itself

and that to that extent the sentencing proceedings rendered his trial unfair and should on account of that be set aside.

[7] The State conceded that the failure to forewarn the accused that the provisions of section 51 of Act 105 of 1997 was applicable was in conflict with the right to a fair trial enshrined in the Constitution and that accordingly it was of the view that the sentencing by the court *a quo* under the sentencing regime created by Act 105 of 1997 ought to be set aside.

[8] In my view the concession by the State was correctly made particularly if one has regard to the *dicta* in *S v Ndlovu* 2003[1] SACR 331 (SCA) where the court said as follows:

"And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be

given sufficient notice of the state's intention to enable him to conduct his defence properly."

[9] That being said and given that it is not in dispute that the appellant was not forewarned at any stage that the State sought to rely on the provisions of Act 105 of 1997 it would appear that the appellant's stance that the sentencing proceedings be set aside is unassailable and accordingly that the court should order the sentence imposed by the court *a quo* be set aside.

[10] That being the case the court is then entitled to proceed with sentencing *de novo* and in this regard given that the court is not required to act within the legislative framework of Act 105 of 1997 the court must determine what is an appropriate sentence.

[11] In *S v Zinn* 1969 2 SA 537 (A) the court referred to what has become known as the triad consisting of considerations of the seriousness of the crime, the interests of society and the position of the offender.

[12] If one has regard to the triad as well as to the proven facts in this matter then the following become relevant. The appellant was convicted of the most serious crime namely that of murder under the following circumstances: it appears that the appellant and the family of the deceased were engaged in a dispute with regard to inheritance from the estate of the appellant's late father. On

14 December 2003 the appellant went to his uncle's home armed and with the intention of retrieving a vehicle (a truck). The appellant succeeded in starting the truck and as he attempted to leave the deceased's premises with the truck the deceased succeeded in reaching the truck with a view to stopping the appellant at which point the appellant fired two shots at the deceased killing him. When one has regard to the nature of the crime then certainly it is eminently arguable that the dispute between the appellant and the deceased was a civil dispute in nature and could have been resolved using other measures including possible mediation. There was no justification for the appellant to take the law into his own hands which set off a chain of events resulting in the death of the deceased. Courts faced with such conduct must send out a clear and decisive message that the rule of law is applicable in our society and that people cannot with impunity take the law into their own hands. In this case the consequence of the stance of the appellant was the unnecessary and untimely death of the deceased.

- [13] When one has regard to the personal circumstances of the accused then it is so that he is a first offender and has lived a life free of crime and conflict for all of his 31 years, he has completed matric and is unmarried. In this regard it would be correct to characterise this crime as an unusual crime and not a crime motivated by greed or malice or hatred but rather a crime that has its genesis in a misconceived view that the appellant could through his own actions have resolved the inheritance dispute with the deceased's family.

[14] The interests of society certainly require that courts deal with serious crimes such as murder in a decisive fashion and there is little doubt that what is called for is a long period of imprisonment. However when one considers the totality of all of the factors including both the mitigating factors as well as the aggravating factors then it is certainly not a crime that should result in a sentence that has the effect of physically and psychologically crushing the appellant. In this regard the *dicta* in *S v Khumalo* 1984 (3) SA 325 (AD) is of relevance where the court cautioned against the imposition of long sentences that would have the effect of physically and psychologically crushing an offender.

[15] In addition to the above and having regard to the appellant's clean record the prospects of rehabilitation must be good and therefore the sentence imposed should also create the opportunity for rehabilitation and not be of such duration that it defeats the very objective of rehabilitation.

[16] In all the circumstances in my view a sentence of twenty years in respect of count two (the murder charge) would be an appropriate sentence. I therefore propose the following:

1. that the appeal against sentence in respect of count two be upheld;
2. that the sentence of the court *a quo* in respect of count two be set aside and replaced with the following:
 - 2.1 "that the appellant be sentenced to twenty years imprisonment".

3. The sentences in respect of count one and count three are confirmed but it is ordered that those sentences are to run concurrently with the sentence imposed in respect of count two.

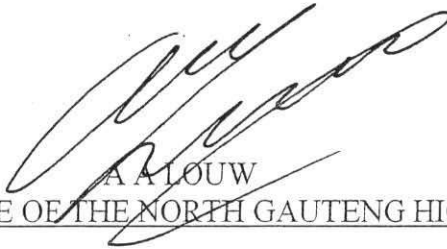
4. The sentences are antedated to ^{03 MARCH 2005}~~28 February 2005~~. *f.m*



N J KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

A858-2011

I agree



A A LOUW
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



S P MOTHLE
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 24 OCTOBER 2012
FOR THE APPELLANT: ADV F VAN AS
INSTRUCTED BY:
FOR THE RESPONDENT: ADV N P MARRIOTT
INSTRUCTED BY: