

Not Reportable

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. AR 114/2013

In the matter between:

M NTOMBELA

Appellant

and

STATE

Respondent

JUDGMENT

GORVEN J:

[1] The appellant was accused number two at the trial before Jappie J. He faced two counts; one of robbery with aggravating circumstances and one of murder. Both were alleged to have taken place on 2 August 2010 at Port Edward and the victim in both instances was Clifford Langley Zarge. In essence, the robbery resulted in his murder.

[2] The appellant pleaded guilty on both counts. He put up a written statement in terms of s 112 of the Criminal Procedure Act 51 of 1977 (the Act). He says that he and the erstwhile accused 1 were walking along the road in which the deceased's house was located. They had agreed to break into a house when the opportunity presented itself and, when they noticed that the sliding glass door of the deceased's house was open, they entered. The deceased, when he noticed them, stood up and attempted to assault them. They had armed themselves with knives and demanded money but, when the deceased refused and resisted, they both stabbed him several times. The appellant grabbed the

laptop of the deceased and they both fled. The relevant admissions concerning common purpose, intention and causation of death were made and the appellant and his co-accused were duly convicted.

[3] The two offences attracted prescribed sentences in terms of the Criminal Law Amendment Act 105 of 1997; the minimum for count 1 being 15 years and that for count 2 being life imprisonment. The trial court held that there were no substantial and compelling circumstances on count 1 which would warrant a sentence less than the minimum in the range prescribed, but found that such circumstances did exist in respect of count 2. Both were sentenced to 15 years' imprisonment on count 1 and 20 years' imprisonment on count 2 and it was ordered that 5 years of the sentence on count 1 was to be served concurrently with the sentence imposed on count 2. This made for an effective term of imprisonment of 30 years for each of them. A non-parole period of 20 years' imprisonment was set in terms of s 276B(2) of the Act. The appeal against sentence comes before us with leave of the court *a quo*.

[4] It is trite that an appeal court is only entitled to uphold an appeal against a sentence in limited circumstances.¹ One of these is where the trial court has misdirected itself. I am of the respectful view that there are at least two misdirections warranting interference on appeal.

[5] It is noteworthy that accused 1 was 22 years of age and had a previous conviction for housebreaking for which he had served 2 years' imprisonment. He was released very shortly before the offence took place. The appellant, on the other hand, was barely 18 years old at the time of the offence and was a first offender. The state accepted that he was remorseful for his conduct. The state also conceded that the appellant was 'in a different league' to accused 1. The

¹ *S v Rabie* 1975 (4) SA 855 at 857D-F.

court *a quo* quite appropriately, in my respectful view, drew the inference that accused 1 had influenced the appellant in the commission of the offence. It also found that because of his age and the fact that he had no previous convictions, there is potential for the appellant to be rehabilitated. It was doubted that this was so in respect of accused 1. Despite these strong distinguishing features, each received the same sentence. A clue to why this might have been so is found in the judgment where the learned judge said, ‘I might be doing [accused 1] an injustice if I did differentiate between you and [appellant] because it is so, on the facts presented before me, that it was [appellant] who in fact inflicted the fatal injury on the deceased’. This is a clear misdirection since the evidence disclosed that they both stabbed the deceased and no evidence was led as to who had inflicted the fatal wound. It is my view that the failure to give expression to these distinctions by imposing different effective sentences on the two accused persons amounts to a material misdirection.

[6] In addition, as mentioned, a non-parole period in terms of s 276B(2) of the Act was fixed. This was done without inviting any submissions as to the appropriateness or otherwise of doing so. It has recently been held that this may amount to a breach of the fair-trial rights of an accused.² In addition, a non-parole period should be prescribed in only exceptional circumstances and no such circumstances were placed before the court *a quo*. Indeed, the prospect of rehabilitation would ordinarily militate against such a non-parole period being imposed.³ The above factors in my respectful view constitute misdirections by the court *a quo*. I should point out that, at the time of sentence, the judgment in *Mthimkhulu* had not yet been handed down.

² *Mthimkhulu v State* (547/12) [2012] ZASCA 53 4 April 2013, paras 20-21.

³ *Mthimkhulu* para 23.

[7] As a result of the misdirections referred to above, I am of the view that the appeal against sentence must succeed. We are therefore at large to determine an appropriate sentence if there are sufficient facts on which to do so.

[8] The issue, then, is what the appropriate sentence should be. I am satisfied that, in respect of count 1, there is no basis for interfering with the finding that no substantial and compelling circumstances exist which warrant a sentence of less than the minimum sentence in the range prescribed. The sentence of 15 years' imprisonment must therefore stand. As regards count 2, the court *a quo* held that such circumstances existed. I respectfully agree. However, I find it necessary to reflect the fact that the appellant was in all probability influenced by accused number 1 and was also just over 18 years old, a first offender at the time, showed remorse and is a candidate for rehabilitation. In my view this would be appropriately achieved by ordering the entire sentence on count 1 to run concurrently with that on count 2, giving an effective term of imprisonment of 20 years rather than the effective term of 30 years imposed on accused 1.

[9] In the result:

1. The appeal against the sentences imposed on the appellant is upheld.
2. The sentences are substituted by the following:

‘On count 1, accused 2 is sentenced to a term of imprisonment of 15 years.

On count 2, accused 2 is sentenced to a term of imprisonment of 20 years.

The whole of the sentence on count 1 is ordered to run concurrently with that on count 2.’

GORVEN J

SEEGOBIN J

CHILI AJ

Date of Hearing: 24 May 2013
Date of Judgment: 31 May 2013
For the Appellant: I Khan instructed by the Pietermaritzburg Justice
Centre
For the Respondent: S Sankar instructed by the Director of Public
Prosecutions.