

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, MTHATHA)**

Case no: 89/2010

In the matter between:

VAKELE MCOTELI

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

PAKADE ADJP:

[1] The Appellant was arraigned for trial before Mthembu AJ, on a charge of murder. He was duly convicted and sentenced to undergo life imprisonment. The Appeal comes before us with the leave of the Court *a quo*.

[2] I have had the privilege of reading the judgment drafted by Notununu AJ and while I agree with his finding on the existence of substantial and compelling circumstances, I, however, do not agree that a (15) fifteen year term of imprisonment would be an appropriate sentence that should be

imposed in terms of section 51(2) of the Criminal Law Amendment Act, 105 of 1997. I, however, do agree with his criticism of the Presiding Judge that his persistent tedious cross examination of the Appellant gave an impression that he descended to the arena. I must, however, add my own observation on this point to emphasize caution to Judicial Officers that they should guard against over stepping the mark in asking questions to either a witness or an accused person on trial. It is indeed a fundamental principle of our law that an accused person is entitled to a fair trial. This necessarily presupposes that the Judicial Officer who tries his case is fair and unbiased and that he conducts the trial from the start to completion in accordance with those rules and principles or the procedure which the law ordains (*S v Alexander and Others* (1) 1965(2) SA 796 (A); *S v Mushimba en Andere* 1977(2) SA 829 (A). In *S v Rall* 1982 (1) SA 828 (A) Trollip AJA said at 833B :

"Of course, if the offending questioning of witnesses or the accused by the Judge sustains the inference that in fact he was not open-minded, impartial, or fair during the trial, this court will interfere and grant appropriate relief".

I would think that this is a misdirection which calls for interference with the sentence of life imprisonment imposed by the Court *a quo*. Having said this, however, I proffer the following reasons for disagreeing with the sentence proposed by Notununu AJ:

[3] The starting point as an accepted approach in adjudicating an appeal against sentence is that interference with sentence is justified only on limited circumscribed grounds. These are , where the trial court's reasoning is vitiated by misdirection or where the sentence is disturbingly or startlingly

inappropriate or induces a sense of shock or where the sentence is so disparate to that which a court of appeal sitting as a court of first instance, would have imposed. Accordingly, the true inquiry relates to the determination of whether the Court *a quo* properly exercised its discretion in imposing the prescribed sentence on the Appellant or not. If it did, then this court's interference with the sentence is hamstrung, but if not, the interference is justified.

[4] In this appeal, the Appellant relies on the misdirection of the Court *a quo* in failing to find that there are substantial and compelling circumstances which justify the imposition of a sentence less than the prescribed one and also on certain pronouncements made by the trial court when passing sentence. I have already said that there are substantial and compelling circumstances which justify the reduction of the sentence of life imprisonment but I will return to this point at an appropriate time in the judgment.

[5] Misdirection as a ground of appeal is aptly elucidated by Trollip JA in *S v Pillay*¹ as follows:

"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court imposing it exercised its discretion

¹ 1977(4) Sa 531 (A) at 535 D-G

properly and judicially , a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature that, the degree ,or seriousness that it shows , directly or inferentially ,that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one which vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that "the dictates of justice" clearly entitle the Appeal court to "consider the sentence afresh" (cf Nel's and Hockey's cases, supra)".

[6] As already alluded to in paragraph [4] above, there are only two ways of exercising a discretion. It is either that the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; but if it was not, it is free to do so.

[7] The type of misdirection relied upon by the Appellant is that the court *a quo* improperly exercised its discretion by failing to consider or by simply glossing over the mitigating factors which would have enabled him , on a proper assessment thereof , to find that there are substantial and compelling circumstances to justify a lesser sentence than the prescribed one .

[8] It was submitted by Mr Dukada SC, counsel for the Appellant, on this ground that, that the Appellant is a young first offender who had been provoked by the deceased had not been properly taken into consideration by the judge in the Court *a quo* and also that on its assessment of the merits and demerits of the case, it over- emphasized the seriousness of the offense

at the expense of the mitigating circumstances . The further submission made by counsel for the Appellant, which is also the ground of appeal, is that the adverse utterances/pronouncements the Learned Judge *a quo* made in the course of his address on sentence clearly indicate that he was angry and that it is that very anger which removed his focus and objectivity to the principles of fairness and mercy in sentencing the Appellant. In developing his argument on the latter point , Mr Dukada submitted that the Court *a quo* was thus influenced by irrelevant considerations in its determination of the sentence, being that 'the Appellant was a preacher in a church but was involved in adulterous relationship with the deceased', that 'he killed the deceased because he wanted to conceal the fact that he had committed adultery with the deceased , a member of his church', that 'there is a segment of men in society who are bent on gratifying their sexual lust on defenseless women and thereafter kill them'.

[9] I have no doubt that these utterances were uncalled for and in so doing the Learned Judge overstepped the mark in his condemnation of the conduct of the Appellant. No doubt the Learned Judge was indeed angry when he sentenced the Appellant and such anger detracted his focus and objectivity.

[10] Holmes JA deprecates sentencing in anger. This view is fortified by his remark in **S v Rabie**² that "mercy eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger". In my view, the anger in which the Judge *a quo* found himself in constitutes a misdirection of the magnitude which vitiates the sentence he had imposed on the Appellant. Had his mind not have been clouded by anger which detracted his

² 1975 (4) SA 855 (A) at 862

focus and objectivity to the real mitigating factors that the Appellant was a young first offender who acted under provocation, was remorseful, that the killing was not premeditated for a long time and that it was not a cold-blooded murder, the Learned Judge would have found that the mitigating factors outweigh the aggravating circumstances, thus calling for a departure from the standardized punishment. As the dictum in *S v Malgas*³ is that the promulgation of the minimum sentences legislation is an indication that sentencing will no longer be "business as usual" and that the court no longer has a clean slate to inscribe whatever sentence it thought fit for the specified offense, the court has to approach the question of sentence conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.

[11] The Appellant testified in mitigation of sentence and called a witness to support his version. He testified that he was born on the 27 December 1983. He passed standard ten at school and is working as a teacher/ educator. He is married and has one eight year old child. His wife is not employed but is a BA Social Science student in Walter Sisulu University in Mthatha. He is responsible for the payment of fees for his wife in the University. He testified that he is remorseful because he pleaded guilty to the charge of murder, he co operated with the police at the time of arrest and he made a confession. He apologized to the deceased's family and had assisted them in the funeral arrangements by purchasing some grocery items. He also assisted towards the buying of a coffin for the deceased's burial. He apologized to

³ 2001(1) SACR 469 (SCA); 2001(2) SA 1222

the congregation of his church in which he is a member . He also apologized to the Education Department as well as to his wife.

[12] In his plea explanation, the Appellant stated that he had been in love with the deceased since July 2009. Shortly thereafter she informed him that she was pregnant with his child. He requested her to obtain an abortion because he was married. She refused. On the 27 September 2009 they met in church at the Unity Hall in Mthatha. After the church service he transported the church congregants to various places as usual and the deceased was among them. After he had finished transporting the congregants, he remained in his car with the deceased. The deceased asked for an advance of the sum of R 331.00 but the Appellant could only advance her with an amount of R200.00. The deceased turned down that advance and demanded the sum of R 331.00 failing which she would go and sleep with him at his home. The Appellant then became enraged because he was staying with his wife and relatives at home.

[13] He then drove his car with the deceased towards the direction of Mthatha Dam in order to drown her in the dam but could not succeed on account of a group of people who were fishing in the dam. He then took another direction away from the dam to look for another spot. He found a convenient spot to kill the deceased but there were a group of boys playing football. He then took a direction towards Highbury and at a spot there he parked his motor vehicle in the open veld. The deceased jumped out off the motor vehicle and ran away. The Appellant chased her and caught up with her. He grabbed her by the arm and dragged her back to the motor vehicle. In the course of dragging her, he took a tie off his neck and strangled her

with it until she became dizzy. While she was dizzy and helpless the Appellant saw another car approaching the spot where he and the deceased were and he then ran into his own car and drove away ,leaving the deceased lying down helpless at the spot, having his tie around her neck.

[14] The Learned Judge did not accept that the Appellant had shown some remorse. He was of the view that he should have gone a step further as to report to his wife, first thing on his arrival at home that he strangled the deceased, as well as to his father, a pastor and the congregants .However, it appears under cross examination by the Learned Judge and the State Counsel that he did disclose the matter to his wife after he had been arrested.

[15] Dealing with remorse as a mitigating factor, Ponnai JA made the following dictum in **S v Matyityi**⁴:

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse .Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question . It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the

⁴ 2011(i) SACR 40(SCA) at 47 a-d

penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."

[16] It is trite law that punishment must fit the criminal as well as the crime committed, be fair to society and be blended with a measure of mercy according to circumstances (– **S v Kumalo**⁵; **S v Sparks and another**⁶). In **S v Zinn**⁷ Rumpff JA held that the basic elements to be considered in sentencing are the "triads consisting of the crime, the offender and the interests of society". These consist of the nature, magnitude and the effect of the crime itself, the interests of society and the interests of justice and circumstances of the offender.

[17] There is nothing that detracts from his plea explanation that the Appellant was not truly remorseful when he said he was. There is no basis either for concluding that he made a confession and pleaded guilty because he knew that there was overwhelming evidence implicating him. The appellant was only together with the deceased in an isolated spot where he killed her and left her there. I think it can be accepted to his credit that he is the one who had led to the discovery of the deceased who could not have

⁵ 1973(3) SA 697 at 698

⁶ 1972(3) SA 396 (A)

⁷ 1969(2) SA 537 (A)

been found if he did not co- operate. Quite obviously , the killing was actuated by anger after the deceased had threatened to go and sleep in appellant's house in which he lives with his family . That understandably angered him. That anger subsided after he had killed the deceased and regret ushered itself in his mind. That, in itself cannot constitute remorse in the opinion of Ponnan JA , with whom I agree . What constitutes remorse in this case, in my respectful view, is the fact that the Appellant co operated in the finding of the deceased, his plea of guilty and the confession he made.

[18] The seriousness of the offense and the absolute resolve in which it was committed on a defenseless woman, who had attempted to flee from the Appellant, cannot be overlooked as an aggravating circumstance which renders the offense punishable with a direct long term of imprisonment to deter, not only the Appellant, but also others who may be of the same mind as him, from committing the same offence.

[19] The following order is made:

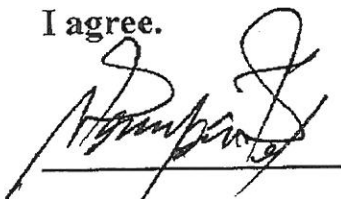
1. The Appeal is upheld.
2. The sentence of Life Imprisonment is set aside and is substituted with a sentence of (20) twenty years imprisonment, ante dated to 18 March 2011.



LP Pakade

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

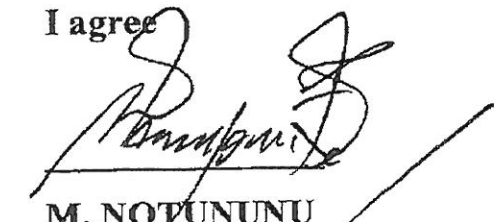
I agree.



D. Van Zyl

JUDGE OF THE HIGH COURT

I agree



M. NOTUNUNU

ACTING JUDGE OF THE HIGH COURT

For the Appellant : Adv Dukada SC
Instructed by : Nguza and Associates
27 Victoria Street
Mthatha

For the Respondent : Adv Mtengwane
Instructed by : Director of Public Prosecutions
Broadcast House
94 Sissons Street
Mthatha

Delivered on : 17 January 2013