

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A249/10

In the appeal between:-

ZAKARIA NTSHASA

Appellant

and

THE STATE

Respondent

CORAM: H.M. MUSI, JP *et* FISCHER, AJ *et* SINGH, AJ

HEARD ON: 7 MARCH 2011

DELIVERED ON: 17 MARCH 2011

JUDGMENT

H.M. MUSI, JP

[1] During June 1996 the appellant was arraigned on charges of murder (count 1) and attempted murder (count 2) before Lichtenberg JP (as he then was). He was duly convicted as charged and sentenced to life imprisonment on count 1 and 12 (twelve) years imprisonment on count 2. His application for leave to appeal was refused, whereupon he petitioned the President of the Supreme Court of Appeal (SCA). On 16

February 2010 the latter court granted him leave to appeal to the full bench of this court against sentence only. This is how the matter comes before us.

- [2] The circumstances under which the appellant was convicted and sentenced are briefly that on 8 November 1996 during the day in Welkom the appellant, who was driving his motor vehicle, a bakkie, was involved in a collision with another vehicle, a Volkswagen Kombi, driven by Mrs. C.H.G. Oberholzer (the deceased). Following the collision, the appellant fired shots at Mr. V.B. Shooter, a passer-by who had arrived on the scene shortly after the collision had occurred, injuring him severely. When the latter fled, he turned on the deceased who had been sitting in her car and fired several shots at her which all struck her, killing her instantly. The trial court dismissed as false the appellant's defence that he had acted in self-defence when shooting the deceased and Mr. Shooter and that none of the victims had provoked or in any way threatened him. It found that the collision was due to the appellant's negligence in that he had been driving at an excessive speed and had failed to keep a proper lookout. The trial court accordingly found that there

had been no justification whatsoever for the shootings and that the appellant had a direct intent to kill the deceased and Mr. Shooter.

[3] It is trite that sentence is a matter that falls within the discretion of the trial court and that a court of appeal will only interfere if the sentence is vitiated by irregularity or misdirection or if it is otherwise startlingly inappropriate. *In casu*, there has been no suggestion of any irregularity or misdirection in the sentencing process. The target of the appeal is the sentence of life imprisonment imposed in respect of the murder conviction, it being contended that it is shockingly inappropriate.

[4] When this appeal was argued on 28 February 2011 Mr. K. Pretorius of the Bloemfontein Justice Centre (Legal Aid SA) represented the appellant and Mr. Hoffman of the Office of the Provincial Director of Public Prosecutions represented the State. Mr. Pretorius argued that the trial court overemphasised the interests of society and the gravity of the offence and did not pay sufficient attention to the personal circumstances of the appellant, which resulted in

the trial court imposing an excessively severe sentence of life imprisonment. He suggested that 20 (twenty) years imprisonment would have been appropriate. In supporting the sentence of life imprisonment, Mr. Hoffman submitted that the trial court had thoroughly dealt with and taken into account all the factors relevant to sentence and submitted that life imprisonment was an appropriate sentence in the circumstances of the case.

[5] During argument I broached the subject of whether this was not a road rage case and noted that counsel had not considered this in their heads of argument. We then adjourned the matter and directed counsel to file supplementary heads of argument wherein they dealt with this aspect with reference to case law. Such heads of argument were filed in due course, but when the hearing resumed on 7 March 2011, new counsel appeared for the parties. Mr. Van der Merwe came in for the appellant and Mr. Lencoe for the State.

[6] Both counsel agreed that the instant case fell within the category of cases normally referred to as “road rage” cases

and that we should deal with the appeal on that basis. Mr. Lencoe stood by the arguments earlier raised by Mr. Hoffman for the State. Mr. Hoffman had argued *inter alia* that the instant case was worse than the road rage cases that he had been aware of and that *in casu* life imprisonment was still an appropriate sentence. In submitting that life imprisonment was shockingly inappropriate, Mr. Van der Merwe drew attention to one aspect of the case that appears not to have been fully canvassed, if at all, during the trial, namely, the role of the extreme anger that seems to have propelled the appellant to commit the offences and, in particular, its probable causes. I shall revert to this aspect in due course.

- [7] It is apposite to refer to what Brand JA said in **S v McMILLAN** 2003 (1) SACR 27 (SCA) at 34 f – g par. [10]:

“Dit is waar dat elke saak op sy eie meriete beoordeel moet word en dat vonnisse wat in soortgelyke sake opgelê is nie die vonnisoplegger se diskresie bind nie, maar slegs riglyne by vonnigoplegging bied. Terselfdertyd is dit tog 'n onmiskenbare vereiste van geregtigheid dat vonnisse as konsekwent

waargeneem moet word. Hierdie oorweging laat nie toe vir die oplegging van 'n vonnis wat geheel en al uit pas is met vonnisse in vergelykbare sake nie.”

Consistency of punishment for comparable cases is a principle that was well recognised and entrenched in the enactment of the Criminal Law Amendment Act, 105 of 1997, which provides for prescribed minimum sentences for specified offences. See **S v MALGAS** 2001 (1) SACR 469 (SCA) at 476 h – 477 a.

- [8] It is therefore important to look at comparable cases. Only two cases involving road rage were cited in the supplementary heads of argument. In **S v SEHLAKO** 1999 (1) SACR 67 (WLD) the accused was involved in a motor vehicle collision with another motorist. He became angry and shot the other motorist at point blank range killing him. It was found that although he had not planned the murder and acted on the spur of the moment out of anger, the accused nonetheless had the necessary intention to kill. He was a 37 year old married man who had two wives and many dependent children and also maintained other relatives. He

was a first offender. He was sentenced to 18 (eighteen) years imprisonment.

- [9] In **S v EADIE** (2) 2001 (1) SACR 185 (CPD), the accused had been angered by the driver of the other motor vehicle, who had driven rather provocatively and recklessly in relation to the accused. The accused stopped his car, took out a hockey stick and went out and found the other driver in the process of trying to get out of his car. The accused beat up the other motorist with the hockey stick until it broke, whereafter he hit him with fists and booted feet. The other motorist died as a result of the injuries inflicted by the accused. The accused was a 35 year old married man with two young children. He had previous convictions. He was sentenced to 15 (fifteen) years, 5 (five) of which were suspended on certain conditions.

- [10] I accept that there are factual differences between the instant case and **SEHLAKO** and **EADIE**. In **SEHLAKO** the collision was caused by the negligence of the victim. In **EADIE** no collision took place, the accused having stopped his vehicle on his own as a result of the reckless manner in which the

other motorist had been driving. In **EADIE** the accused had acted out of extreme provocation, whereas in the instant case as in **SEHLAKO** there was no provocation. Most importantly, the instant case is marked out by the utter senselessness and coldblooded manner in which the deceased was executed. Bullets were pumped into her body at close range while she was sitting in her car, having tried to get out of the way of the appellant. It is completely inexplicable why she had to be shot and killed.

- [11] The point, however, is that there is a common denominator between all these cases. In all of them the murder was not planned. Rather the killer acted impulsively on the spur of the moment but with the intention to kill. It is of little moment that the intention in one case took the form *dolus eventualis*. In all the cases it is extreme anger at the fault, real or perceived, of the other motorist that drove the killer. The following statement by Borchers J in **S v SEHLAKO**, *supra*, at 71 i – j applies to all cases of this nature:

“As far as the offence is concerned, the murder can on the facts before me only be attributed to what has come to be called 'road

rage'. It was obviously not premeditated. It arose directly from the fact that the accused believed that the deceased was responsible for the collision which occurred between their respective vehicles. It was, however, a cold-blooded and wholly unnecessary killing.”

This statement was quoted with approval by Navsa JA in **S v EADIE** 2002 (1) SACR 663 (SCA) at 693 c – d.

[12] It is apposite to briefly sketch the personal circumstances of the appellant. He was a 41 year old married man with three minor children. He had previously been employed in the mining industry where, according to the trial court, he held a responsible position. He was a first offender.

[13] The trial court remarked that the appellant lost his job due to no fault on the part of his employer, but did not elaborate. This partly explains the one difficulty I have with this matter. This is that not much, if any, was done to explore the probable causes of the appellant's anger. It could not be assumed that it was his nature to behave as he did. There is nothing in the scanty history of him we know or his conduct

subsequent to the incident that would suggest that. There must have been something that triggered the burst of anger and aggression. Road rage has been described as

“a product of the confluence of a number of factors - aggression, increasing frustration, the feeling of power associated with driving – which converge to create a cauldron of stressful conditions”.

See **S v EADIE (SCA)**, *supra*, at 693 b – c.

There are indications from the record of some of the factors that may have combined to produce a cauldron of stressful conditions on the part of the appellant. He had just lost his employment in the very same month during which the crimes were committed and it appears that he was fired. This would obviously have caused resentment and frustration. Now his prized possession, the bakkie, got damaged.¹

[14] With respect, the trial court overlooked the fact that this was a typical road rage incident, as a result of which it imposed a

¹ The record indicates that he was particularly fond of the bakkie as shown by the things he had fitted in it and had the issues been probed it may well have emerged that he was relying on it for generating income and that perhaps it was not insured.

sentence that was out of step with sentences normally imposed for this type of offence, and which was shockingly inappropriate. We are therefore entitled to interfere and set aside such sentence. In considering an appropriate sentence, this court must keep in mind what was said by Navsa JA in **EADIE (SCA)**, *supra*, at 693 h:

“The message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law.”

The sentence to be substituted must also reflect our revolt at the brutal manner in which the appellant executed an innocent, defenceless woman. A lengthy term of imprisonment is called for and I think 23 (twenty three) years will be appropriate.

The following order is made:

- (a) The appeal against sentence is partly upheld in that the sentence of life imprisonment imposed on the murder conviction (count 1) is set aside and for it is substituted

a sentence of 23 (twenty three) years imprisonment.

- (b) The appeal against the sentence of 12 (twelve) years imposed for attempted murder (count 2) is dismissed and such sentence is confirmed. The 12 (twelve) years imprisonment to run concurrently with the sentence of 23 (twenty three) years imprisonment and the sentences to be antedated to 20 June 1996.

H.M. MUSI, JP

I concur.

P.U. FISCHER, AJ

I concur.

S. SINGH, AJ

On behalf of appellant:

Mr. P. Van der Merwe
Instructed by:
Bloemfontein Justice Centre
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:

Mr. M. Lencoe
Instructed by:

Director of Public Prosecutions
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/sp