

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. A121/04

In the appeal between:

THULO ALEX MOTAUNG

Appellant

and

THE STATE

Respondent

CORAM: VAN COPPENHAGEN J *et* H.M. MUSI J *et* KRUGER J

HEARD ON: 8 AUGUST 2005

JUDGMENT BY: H.M. MUSI J

DELIVERED ON: 18 AUGUST 2005

- [1] This is a full bench appeal against sentence. The appellant appeared before Rampai J sitting in the circuit court at Harrismith on two counts of robbery, one count of murder and two contraventions of the provisions of the Arms and Ammunition Act 75 of 1969, to wit, possession of a firearm

and ammunition respectively without lawful authority. He was acquitted on one robbery charge, but was convicted on the murder charge (count one) robbery with aggravating circumstances (count three) and possession of a firearm and ammunition (counts four and five respectively). He was sentenced to 32 years imprisonment on count two, 15 years imprisonment on each of counts three and four and 3 years imprisonment on count five. He does not appeal against the sentence of 15 years imposed in respect of robbery with aggravating circumstances, count three.

- [2] I shall deal first with the appeal against the sentence imposed in respect of the murder conviction. The court *a quo* found that the murder had been premeditated and the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) became applicable in terms of which the prescribed minimum sentence of life imprisonment had to be imposed unless it was found that there were substantial and compelling circumstances justifying the imposition of a lesser sentence.

The court *a quo* found that such substantial and compelling circumstances did exist in this case. The court was therefore at liberty to impose an appropriate sentence.

[3] It is trite that imposition of sentence is a matter essentially within the discretion of the sentencing judicial officer and a Court of Appeal will only interfere if the sentence was vitiated by misdirection or irregularity or if it is otherwise shockingly inappropriate. Mr. Pretorius who argued the appeal on behalf of the appellant did not suggest that the court *a quo* committed any irregularity or misdirection in the sentencing in process. Nor was there any such suggestion in the heads of argument filed on behalf of the appellant. The only ground upon which it is submitted that this court should interfere with the sentence, is that it is shockingly inappropriate.

[4] In the heads of argument filed on behalf of the appellant but which were not drawn by Mr. Pretorius, it was suggested that the sentence of 32 years imprisonment was as good as life imprisonment and the case of **S v BULL AND ANOTHER; S v CHAVULLA AND OTHERS** 2001 (2) SACR 681 (SCA) was cited and especially the passage at page 694 paragraph 22.

[5] In that case the Supreme Court of Appeal decried what it perceived to be an attempt to circumvent the practice or policy of the Department of Correctional Services to consider

for parole persons sentenced to life imprisonment after serving 20 years of their sentences. The court was there dealing with cases where the accused had been sentenced in terms of the provisions of sections 286A and 286B of the Criminal Procedure Act 51 of 1977 (declaration as a dangerous criminal), where the periods that the accused had to serve before being considered for parole, were fixed at between 30 years to 50 years. The Supreme Court of Appeal observed that it was the possibility of being released on parole that saved life imprisonment from being stigmatised as cruel, inhuman and degrading punishment. The Court specifically discouraged imposition of excessively long prison terms that would have the same effect as the sentences there under review.

- [6] The sentence imposed in the instant case for murder can hardly be compared with the sentences dealt with in **S v BULL AND OTHERS**. *In casu* a determinate sentence of 32 years imprisonment was imposed on the appellant. The possibility of parole remains open to him.

[7] Otherwise the court *a quo* fully motivated its decision to impose the sentence it did. Of particular importance is that the appellant has a history of violent conduct as shown by his previous convictions. These include robbery committed during 1998 followed by assault with intent to do grievous bodily harm in 2000. Hardly a year had elapsed when the appellant committed the crimes in the instant case. It is to be noted also that at the time of sentencing the appellant was awaiting to be sentenced by the regional court for a conviction of attempted murder. Furthermore the deceased herein was shot and killed in cold blood for no reason whatsoever as he had not presented any resistance during the robbery. In a nutshell, there were serious aggravating circumstances in this case which far outweighed the appellant's personal circumstances.

[8] I agree therefore with Mr. Strauss for the State that, although stiff, the sentence imposed fits the crime, the criminal and the interests of society. Besides, it was stated in **S v**

MALGAS 2001 (1) SACR 469 (SCA) that the minimum sentences prescribed by the legislature are a benchmark and that even if a court is justified in departing therefrom, it should nonetheless keep in mind what the legislature has ordained to be an appropriate sentence.

- [9] Regarding the sentence of 15 years imprisonment imposed for unlawful possession of a firearm, the point was taken in the heads of argument filed on behalf of the appellant that the provisions of section 51(2) of the Minimum Sentences Act read with Part II of Schedule 2 thereto do not apply to a conviction for possession of a pistol even though it is a semi-automatic firearm. In support of this submission a number of cases were cited, including **S v SUKWAZI** 2002 (1) SACR 619 (NPD), **S v KHONYE** 2002 (2) SACR 621 (TPD) and the unreported judgment of Moseneke J (as he then was) in **S v MOKOMELA** case no A751/2002 TPD delivered on 17 February 2003. The State concedes the point and indicated that it could not support the sentence imposed.

- [10] These cases all dealt with the interpretation of the following provision of Part II of Schedule 2 to the Minimum Sentences Act:

“Any offence relating to (b) possession of an automatic or semi-automatic firearm, explosives or armament.”

In terms of section 51(2) any offence falling under this provision, is punishable with a minimum sentence of 15 years imprisonment.

- [11] In all the above mentioned decisions, this provision was interpreted with reference to the provisions of the Arms and Ammunition Act 75 of 1969, firstly, because the Minimum Sentences Act itself does not create any offences. Moseneke J puts the matter as follows in **S v MOKOMELA** at paragraph 14:

“The Act does no more than describe circumstances of aggravation which if present, in relation to a conviction on a specified and existing offence, a prescribed minimum sentence

shall be imposed, save if the court were to find, after due inquiry, that substantial and compelling circumstances, which dictate the imposition of a lesser sentence, exist.”

Secondly the offences for which punishment is prescribed in this part of Part II of Schedule 2, are those created by the Arms and Ammunition Act.

[12] The decisions in **S v SUKWAZI** and **S v MOKOMELA** in particular, point out that there is no such offence as possession of a semi-automatic firearm in the Arms and Ammunition Act. Reference to possession of a semi-automatic firearm, being reference to a non-existent offence, is therefore an absurdity.

[13] Reference is also made in particular to sections 2 and 32 of the Arms and Ammunition Act. Now section 32 prohibits possession of high calibre firearms like machineguns or machinerifles and similar armament (the AK47's, R5 rifles, Uzi submachineguns). In section 39(2)(aA) heavy penalties are provided for contravention of section 32. By contrast,

section 2 prohibits unlawful possession of firearms generally and the corresponding penalties set out in section 39(2)(b) are not as severe as those attaching to possession of the class of a firearm specified in section 32.

[14] It is pointed out that it would be an absurdity and manifestly unjust if small calibre firearms like pistols were to be punished with a minimum sentence of 15 years imprisonment alongside possession of the powerful firearms alluded to above, when firearms like revolvers and shotguns, which are of heavier calibre than pistols, do not even attract the prescribed minimum sentences. Moreover it is clear from the structure of the Arms and Ammunition Act that pistols fall within the category of firearms the possession of which is prohibited by section 2. The conclusion is reached therefore that the inclusion of the word semi-automatic firearm in the provision under discussion is an anomaly which the legislature could not have intended.

[15] In **S v KHONYE** *supra* De Villiers J approached the matter

from an altogether different perspective based on the rules of interpretation of statutes regarding repeal of an existing statute by a subsequent one. He concluded as follows at page 625F:

“Myns insiens, is dit duidelik dat Wet 105 van 1997 nie uitdruklik of by ontwyfelbare wetsduiding artikel 39(2)(b) van Wet 75 van 1969 herroep of wysig nie.”

For that reason the learned Judge was of the view that the penalties provided for by section 39(2)(b) for unlawful possession of a pistol, even if it is a semi-automatic firearm, remain in force and are not affected by the provisions of the Minimum Sentences Act.

- [16] However the remarks made *obiter* at page 626b of the judgment indicate that De Villiers J would agree with the line of reasoning followed by Combrinck J in **S v SUKWAZI** and Moseneke J in **S v MOKOMELA**. Indeed the learned Judge seems to confirm this much in **S v MOLEELE** 2003 (2) SACR 255 (TPD).

[17] It should be noted that the Arms and Ammunition Act has been repealed and replaced by the Firearms Control Act 60 of 2000. To my mind, the provisions of this new Act do not detract from the interpretation discussed above. On the contrary, they confirm the correctness thereof. A semi-automatic firearm is defined in section 1 as self-loading, but not capable of discharging more than one shot with a single depression of the trigger. This is in contrast to the definition of a fully automatic firearm. Powerful weapons like a fully automatic firearm are singled out for more stringent control in section 4. They may not even be licensed except under clearly laid down conditions. A semi-automatic firearm is not included in that category. It stands to reason that its possession falls under the general prohibition of section 3 which attracts less severe penalties.

[18] In the result, I agree with the submission that the court *a quo* erred in imposing the minimum sentence of 15 years imprisonment in respect of count four. It stands to reason

that the sentence has to be set aside. It was agreed at the hearing that a sentence of 3 years imprisonment on this count and 1 year on count five would be appropriate.

[19] I would make the following order:

19.1 The sentences of 32 years imprisonment and 15 years imprisonment imposed respectively in respect of counts two and three are confirmed.

19.2 The sentences of 15 years imprisonment and 3 years imprisonment imposed on counts four and five respectively are set aside and replaced with 3 years and 1 year.

19.3 All the sentences to run concurrently.

H.M. MUSI, J

I agree.

G. VAN COPPENHAGEN, J

I agree.

A. KRUGER, J

On behalf of appellant:

Mr. K. Pretorius
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of respondent:

Adv. M. Strauss
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/sp