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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case number. CA&R 56/2022

Date heard: 27/02/2023

Date delivered: 09/02/2024

Reportable: Yes/No

Circulate to Judges: Yes/No

Circulate to Magistrates: Yes/No

In the matter between:

RICHARD MOLALE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: Williams J et Nxumalo J

JUDGMENT

WILLIAMS J:

1. The appellant, Mr Richard Molale, was convicted in the Regional Court, Barkly West, on two counts, namely, murder read with the provisions of s51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act) and robbery with aggravating circumstances read with the provisions of s51(2) of the Act. He was sentenced

on the count of murder, to life imprisonment and on the count of robbery to 15 years imprisonment.

2. This appeal lies only against the sentences imposed and on the basis, (i) that the trial court had no jurisdiction to sentence the appellant to life imprisonment on the murder charge; and (ii) that the trial court erred in finding that no substantial and compelling circumstances were present to justify a deviation from the minimum prescribe sentence. The appeal against the appellant's convictions on the basis that the trial court was not properly constituted, has been abandoned by Mr Fourie who appeared for the appellant and correctly so.

The jurisdiction of the regional court

3. The appellant was charged with murder and robbery with aggravating circumstances, both counts read with the provisions of s51(2) of the Act. He was convicted accordingly. The trial court clearly stated in his judgment that *"He is accordingly convicted of murder and robbery. The provisions of section s51(2) of Act 105 of 1997 are therefore applicable."*
4. As a first offender in respect of both offences, the prescribed minimum sentence in terms of s 51(2) is 15 years imprisonment. S51(2) further provides that the maximum term of imprisonment that a regional court may impose shall not exceed the minimum term of imprisonment by more than 5 years.
5. In his judgment on sentence however, the trial court, having regard to the evidence that the murder was committed during the course of the robbery, found that s51(1) of the Act applied and that the prescribed sentence in respect of the murder conviction is one of life imprisonment. Having found no substantial and compelling circumstances to deviate from the sentence so prescribed the appellant was sentenced to life imprisonment on the murder charge, and 15 year imprisonment on the charge of robbery with aggravating circumstances, the sentences to be served concurrently. The question to be answered is whether

the regional court had the jurisdiction to sentence the appellant under s51 (1) of the Act.

6. A similar situation (with regard to rape) arose in the Constitutional Court in the matter of *S v Ndlovu* 2017(2) SACR 305(CC). Whilst the appellant had been charged with rape under s 51(2), the evidence led during the trial pointed to a violent rape during which the complainant sustained serious injuries. The regional magistrate, on the strength of the grievous bodily harm inflicted upon the complainant, sentenced the appellant to life imprisonment under s51 (1) of the Act.
7. The Constitutional Court held as follows:
 - 7.1 That magistrate's courts are creatures of statute and have no jurisdiction beyond that granted by the Magistrate's Court Act and other relevant statutes;
 - 7.2 The appellant had unambiguously been convicted of rape read with the provisions of s51 (2) of the Act;
 - 7.3 The charge was not defective or incomplete and thus capable of being cured by evidence as provided for in s88 of the Criminal Procedure Act 51 of 1977;
 - 7.4 That the regional court therefor had no jurisdiction to sentence the appellant to life imprisonment in terms of s51 (1) of the Act and that the sentence had to be set aside; and
 - 7.5 That an appropriate sentence be imposed within the regional court's jurisdiction in terms of s51 (2) of the Act.

8. The Constitutional Court also reiterated the responsibility of both prosecutors and the courts to ensure that accused persons be prosecuted and convicted in terms of the correct provisions of the Act by respectively applying for an amendment to the charge, should it not accurately reflect the evidence led, and for the court to invite the state to apply to amend the charge and to give the defence the opportunity to make submissions with regard to any prejudice which may be suffered as a result of such an amendment.
9. In light of the *Ndlovu* judgment, the state represented by Ms M Engelbrecht, conceded that the trial court *in casu* had no jurisdiction to sentence the appellant to life imprisonment on the charge of murder and as such the sentence should be set aside.
10. The parties were *ad idem* that we were in as good a position as the trial court to sentence the appellant afresh and that it would be in the interest of justice, given the time that has elapsed since the appellant was sentenced, that the matter not be referred back to the regional court for sentencing. The same procedure was followed in *Ndlovu* and there can therefore be no obstacle to this court imposing an appropriate sentence.

Relevant circumstances

11. The accepted evidence which served before the trial court can be summarised as follows:
 - 11.1 In the early hours of 29 November 2014, the deceased, 27 year old Mr Xavier Chirindza and two of his friends encountered the appellant and three of his friends in the street as they were walking home. The appellant and his friends recognised the deceased as a street vendor who would probably have money on him and decided to rob him.

- 11.2 The appellant and his friends approached the deceased and his friends and started talking to them. When the appellant took out his knife the deceased's friends managed to run away from the danger.
- 11.3 The deceased who was inebriated, was not so fortunate. He was quickly surrounded by the appellant and his cohorts. While the appellant stabbed the deceased his three friends robbed the deceased of R100, 00 in cash and his cellphone.
- 11.4 The deceased died shortly after the attack. The forensic pathologist who conducted the post-mortem examination of the deceased identified 16 stab wounds inflicted over the head and upper body of the deceased, with the chest cavity penetrated multiple times.
12. The appellant was 27 years old at the time of sentencing. At that stage he had already been in custody, awaiting trial, for 4 years. He would therefore have been about 23 years of age when the offences were committed. He worked as a farm labourer before his arrest and earned R2500, 00 per month. He is single and does not have any children. The appellant has 2 previous convictions for housebreaking with intent to steal and theft committed respectively during 2008 and 2012.
13. During the sentencing proceedings the trial court requested a victim impact statement to be compiled. This statement emanated from the girlfriend of the deceased, Ms M[...]. She stated that she and the deceased had a son aged 2 years at the time of his death. The deceased who was a street vendor maintained her and their son. After the death of the deceased she and their son moved out of the shack she shared with the deceased as the memories were too painful. She eventually moved back into the shack but she still gets emotional when thinking about the deceased. What hurts her most is that their son does not even remember his father anymore.

Consideration of sentence

14. During argument before us Mr Fourie conceded that in instances of serious crimes where a long period of imprisonment is inevitable, the personal circumstances of an offender recede into the background and only become relevant in considering whether he is capable of rehabilitation (See *S v Vilakazi* 2009 (1) SACR 552 SCA at paragraph 58 thereof).
15. *In casu*, the appellant's personal circumstances, despite his relative youthfulness when the offences were committed, paint a bleak picture of his prospects for rehabilitation. According to my calculations he was 17 years old when he committed his first offence of housebreaking with intent to steal and theft and 21 years old when the second such offence was committed. Within two years he had progressed to the current offences, showing no respect for the life of another person in pursuit of his greed for the possessions of another. This was a particular heinous crime – an instance of what is termed “*overkill*” – perpetrated against a completely defenceless person. In my view the trial court was correct in finding that there were no substantial and compelling circumstances present.
16. In these circumstances an appropriate sentence for the murder charge would have been the maximum which the regional court could impose i.e. 20 years imprisonment. However the appellant had been in custody awaiting finalisation of his trial for an inexplicably long period of 4 years. In *Vilakazi supra* (paragraph 16), it was held that it would be most unjust if the period in custody awaiting trial is not brought into account when imposing sentence. The sentence imposed herein is intended to reflect such consideration.
17. With regard to the sentence of 15 years imprisonment imposed for the robbery with aggravating circumstances, Mr Fourie could not advance any substantial and compelling circumstances applicable and quite correctly so, in my view. The trial court ordered the sentence in respect of the robbery with aggravating

circumstance to be served concurrently with that in respect of the murder charge. In my view the time spent awaiting trial is sufficiently ameliorated by such an order of concurrency.

The following order is made:

- a) The appeal against sentence succeeds in part.
- b) The sentence imposed on the murder charge is set aside and substituted with the following:

“The accused is sentenced to imprisonment for a period of 16 years.”

- c) The appeal against the sentence of 15 years imprisonment imposed in respect of the robbery with aggravating circumstances charge is dismissed.
- d) The sentence in respect of the charge of robbery with aggravating circumstances is to be served concurrently with the sentence in respect of the murder charge.
- e) The sentences are antedated to 7 November 2018.

CC WILLIAMS
JUDGE

I concur

APS NXUMALO
JUDGE

For Appellant:

Mr P Fourie
Legal Aid SA

For Respondent:

Adv M Engelbrecht
Office of the DPP