



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

CASE NO: AR171/20

In the matter between:

SENZO SHOMPOLO SIBISI

FIRST APPELLANT

BONGINKOSI ZIQUBU

SECOND APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, per Radebe J (sitting as court of first instance):

1. The first and second appellants' appeals against the sentences imposed are upheld.
2. The sentences of the court *a quo* are set aside and replaced with the following:
In respect of the first appellant:
 - 2.1 in respect of the count of murder, the accused is sentenced to 25 years' imprisonment;

2.2 in respect of the count of robbery with aggravating circumstances the accused is sentenced to 15 years' imprisonment;

2.3 the sentence imposed on count 2 will run concurrently with that imposed on count 1.

In respect of the second appellant:

2.4 in respect of the count of murder, the accused is sentenced to 25 years' imprisonment;

2.5 in respect of the count of robbery with aggravating circumstances the accused is sentenced to 15 years' imprisonment;

2.6 the sentence imposed on count 2 will run concurrently with that imposed on count 1.

3. Such sentences are ante-dated to 24 February 2014.

JUDGMENT

Henriques J (M E Nkosi J and M Tucker AJ concurring)

Introduction

[1] This is an appeal by the first and second appellants against their sentences imposed by the court *a quo* on 24 February 2014 pursuant to their convictions of murder and robbery with aggravating circumstances on 30 January 2014. Leave to appeal against the sentences imposed only having been granted by the court *a quo* on 24 February 2014.

[2] It is common cause that the provisions of the Criminal Law Amendment Act¹ (the CLAA) also known as the minimum sentencing legislation applied to their convictions. In respect of both counts they were convicted on the basis of common purpose, the court *a quo* finding that the respondent discharged the onus of establishing that the

¹ Criminal Law Amendment Act 105 of 1997.

appellants acted in furtherance of a common purpose at the time of the commission of the respective offences.

[3] Mr *Barnard* who appeared on behalf of the first appellant, submitted that the court *a quo* erred in finding that the first appellant had failed to show the existence of substantial and compelling circumstances allowing for a deviation from the prescribed minimum sentences. He submitted in particular that the court ought to have found the following factors cumulatively amounted to substantial and compelling circumstances namely:

- (a) that he had no previous convictions, was a first offender and had no pending cases;
- (b) that he was 28 years old at the time of the commission of the offences and was employed at the time of his arrest;
- (c) that he was a father of two minor children; and
- (d) that he had spent four years in custody awaiting trial given his arrest in August 2010.

[4] In addition, he submitted that in considering the triad of *Zinn*², the court *a quo* failed to take into account that the murder was not planned or premeditated. This was based on his submission that “the appellants by chance stumbled across the deceased where he had been parked in his vehicle.” Although he concedes that a lengthy term of imprisonment was warranted, he submits that the ultimate sentence of life imprisonment was not warranted given the facts of the matter. He further submits that no information had been placed before the court *a quo* that the first appellant was not a good candidate for rehabilitation.

[5] The main thrust of the first appellant’s appeal also relates to the fact that the time spent in custody awaiting trial was not considered by the court *a quo* having regard to the decisions in *S v Vilakazi*³ and *Director of Public Prosecutions, North Gauteng*:

² See *S v Zinn* 1969 (2) SA 537 (A)

³ *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 60.

Pretoria v Gcwala and Others.⁴ He submits that cumulatively the personal circumstances of the first appellant coupled with the time spent in custody warrants interference with the sentences imposed by the court *a quo*.

[6] The second appellant represented by Mr *Pillay*, submits that the court *a quo* committed a misdirection in failing to find substantial and compelling circumstances to exist, having regard to:

- 6.1 his young and tender age, he being 18 years and eight months old at the time of the commission of the offences;
- 6.2 he being a first offender;
- 6.3 the fact that he had been in custody for three years and six months after his arrest in August 2010.

[7] He submitted in addition that the probation officer's suggestion that the second appellant suffered from post-traumatic stress disorder, coupled with the recommendation of correctional supervision given his unfortunate personal circumstances, namely, that his parents had passed away when he was a young and tender age, warranted a deviation from the prescribed minimum sentence.

[8] Mr *Magwaza* who appeared for the respondent submitted that the court *a quo* did not commit a misdirection and was correct in concluding that no substantial and compelling circumstances existed given the serious nature of the offences and the circumstances under which they were committed. He submitted that to a large extent there were aggravating factors which warranted the imposition of the prescribed minimum sentences.

⁴ *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others* 2014 (2) SACR 337 (SCA) para 28.

The judgment of the court *a quo*

[9] The following circumstances were placed before the court at the time it gave consideration to the imposition of the appropriate sentences:

- (a) The first appellant was 28 years old, had completed standard seven, was employed as a taxi driver earning R500 per week, had no previous convictions, was a first offender, was a father to three children aged 13, 11 and eight years old and had been in custody since 2010.
- (b) The second appellant was 23 years old at the time of sentence although he was 18 years and eight months old at the time of the commission of the offences, was unmarried with no children and had been in custody since 2010 as well.

[10] At the instance of the court *a quo* a probation officer's report was obtained in respect of the second appellant, and the same probation officer also testified in the court *a quo*. Regrettably, neither the full report of the probation officer nor the evidence of the probation officer has been incorporated into the record for consideration by this court. All that this court can have regard to are certain pages of the probation officer's report which confirm the unfortunate circumstances of the second appellant. The recommendation of the probation officer was that of correctional supervision.

[11] The court *a quo* appears to have considered the probation officer's report and the evidence given by the probation officer but was not persuaded to follow such recommendations. Instead, it was of the view that the probation officer had not had the benefit of hearing the evidence given during the course of the trial relating to the circumstances under which the offences had been committed. It is trite that the sentencing court is not bound by the recommendations of the probation officer.⁵

[12] Apart from the submissions made from the bar by the first and second appellants' attorneys of record, the court *a quo* also considered the evidence of the deceased's father in aggravation of sentence. Based on the totality of the evidence that was

⁵ *S v Botes* 2011 (1) SACR 439 (GNP) para 17; *Essop v S* [2021] ZASCA 66 para 14.

presented to it, the court *a quo* was of the view that although the youthfulness of the appellants was a motivation for the crime, neither one of them had displayed any remorse. What the court *a quo* found particularly aggravating was that despite his youthfulness, the second appellant actively played a role in the stabbing of the deceased during the commission of the robbery, and subsequently in the murder of the deceased.

[13] Having regard to the evidence presented, it was the second appellant who was the aggressor and who took the knife and stabbed the deceased whilst he sat in the vehicle even after he had been injured from the initial stab wounds which had been inflicted on him. It was the second appellant who took a lighter and set the vehicle alight. It is common cause that the court *a quo* relied on the evidence of two s 204 witnesses who were present at the time the robbery and murder took place and who it regarded as testifying frankly and honestly thereby discharging them from prosecution.

[14] The court *a quo* when sentencing the appellants was aware that the starting point was the prescribed minimum sentences and further that it had the discretion to deviate from the imposition of such sentences if it found substantial and compelling circumstances to exist. The court had regard to the personal circumstances of both the appellants at the time of sentencing. In addition, the court had regard to the fact that it had to individualise the sentences when making a decision to impose an appropriate sentence and had regard to the triad of *Zinn* and specifically the personal circumstances of the appellants.

[15] The court *a quo* also took into account what motivated the appellants to commit the offences and took a dim view of the fact that both appellants persisted in their denial of the roles they played in the commission of the offences and, furthermore, did not display any remorse. I acknowledge that the court *a quo* was cognisant of the fact that it had to find a balance between the recognised objectives of sentencing as well as the interests of society.

[16] It also considered the aggravating circumstances under which the offences were committed and that the appellants displayed a lack of compassion for the deceased. In addition, it took into account that the first appellant was “sly and manipulative” and the evidence of the witnesses that the first appellant was dangerous and feared in the community and whilst in custody made attempts to interfere with witnesses who would incriminate him in the commission of the offences specifically his co-accused and the 204 witnesses.

[17] The court *a quo* was of the view that the second appellant was “a brutal and heinous killer” and that there was nothing in his background to suggest that this would have caused him to commit the offences of which he was convicted. It found that the appellants were motivated by greed when they made a decision to rob and subsequently kill the deceased. In determining whether there were any prospects of the appellants being rehabilitated, the court was of the view that this was up to the Department of Correctional Services to determine after the appellants had served some period of their sentences. It took the view that there were no substantial and compelling circumstances and that because the actions of the appellants were brutal and merciless the prescribed minimum sentences were the only appropriate sentences to be imposed. The court imposed the prescribed minimum sentences and noted that the sentence imposed on count 2 would be served concurrently with the sentence of life imprisonment imposed on count 1.

[18] Although the imposition of sentence falls pre-eminently within the discretion of the sentencing court, a court on appeal can interfere with it in circumstances where the proceedings are vitiated by an irregularity, where there is a misdirection, and in circumstances where the sentence imposed was disturbingly, and startlingly inappropriate.⁶

⁶ *S v Kgosimore* 1999 (2) SACR 238 (SCA); *Director of Public Prosecutions, Gauteng Division, Pretoria v DMS and Another* 2023 (2) SACR 113 (SCA).

[19] In my view, the basis upon which the appeal ought to succeed relates to the misdirection committed by the *court a quo* in failing to find that the imposition of the prescribed minimum sentence on count 1 would be disproportionate having regard to the triad of *Zinn* and given the time that both appellants had spent in custody.

[20] It is trite that the *court a quo* can deviate from imposing the prescribed minimum sentence if to do so would be disproportionate having regard to the triad of *Zinn*. The judgment on sentence was silent as to whether the *court a quo* had taken into account the period of time that was spent by both appellants awaiting trial. The court summarised this as one of the factors submitted in mitigation of sentence but does not appear to have taken it into account in its reasoning when sentencing the appellants.

[21] Having regard to the judgment in *Vilakazi* at paragraph 60 the Supreme Court of Appeal (SCA) held:

‘...While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.’

[22] The period spent in custody awaiting trial has been considered as a factor which must be considered by a court to deviate from the prescribed minimum sentence as was confirmed by the SCA in *DPP, North Gauteng: Pretoria* at paragraph 28 where the court held the following:

‘I have already indicated that the four-year period spent by the respondents in custody awaiting trial must be regarded as a factor that requires this court to deviate from the prescribed sentence; life imprisonment is not proportionate to the crime in the circumstances...’

[23] In my view given that it is not evident from the record that the time spent in custody by the appellants was a factor considered by the *court a quo* when imposing the sentences, this court is entitled to intervene in the manner proposed by the legal representatives of the appellants.

Order

[24] In the result the following orders will issue:

1. The first and second appellants' appeals against the sentences imposed are upheld.
2. The sentences of the court *a quo* are set aside and replaced with the following:

In respect of the first appellant:

- 2.1 in respect of the count of murder, the accused is sentenced to 25 years' imprisonment;
- 2.2 in respect of the count of robbery with aggravating circumstances the accused is sentenced to 15 years' imprisonment;
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 - 2.6 the sentence imposed on count 2 will run concurrently with that imposed on count 1.
3. Such sentences are ante-dated to 24 February 2014.



HENRIQUES J

Case Information

Date of Argument	:	3 May 2024
Date of Judgment	:	11 September 2024
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This judgment was handed down electronically by circulation to the parties representatives by email. The date and time for hand down is deemed to be 09h30 on 11 September 2024.