



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A 197/2013

In the matter between:

UNATHI JEJISE

Appellant

and

THE STATE

Respondent

Court: Blignault J et Dlodlo J et Boqwana J

Heard: 27 January 2014

Delivered: 03 February 2014

JUDGMENT

BOQWANA, J

- [1] The appellant and his co-accused were charged with attempted robbery (Count 1), robbery with aggravating circumstances (Count 2), murder (Count 3), illegal possession of firearms (Count 4) and illegal possession of ammunition (Count 5). He appeared before Allie J at trial and was legally represented. He pleaded not guilty to all the charges and was convicted on

all counts together with his co-accused on 26 February 2007. On 27 February 2007 he was sentenced to 6 years imprisonment for attempted robbery; 12 years for robbery with aggravating circumstances; 16 years for murder (all of which were to run concurrently); and 5 years imprisonment for illegal possession of firearms and 2 years for illegal possession of ammunition (which also ran concurrently). The effective term of imprisonment was 21 years.

- [2] Charges brought against the appellant arose from an incident that occurred on the evening of 07 October 2004 in Khayelitsha where a police officer, Constable Chumani Lucwaba ('the deceased') was shot, killed and robbed of his firearm and his police identity card. The deceased had been travelling with his wife, their three children and his colleague, Constable Base ('Base') in a police van when they were attacked. The assailants attempted to rob Base who managed to escape. The *court a quo* found that the appellant and his co-accused committed acts of association with each other in consort with the common purpose to rob and if necessary to kill.

- [3] In sentencing the appellant the *court a quo* found that substantial and compelling circumstances existed which warranted deviation from the minimum sentences prescribed in respect of counts 2 and 3. The court took into account the appellant's youthfulness, (appellant was 21 years old at the time the offence was committed), the lesser role he played in the commission of murder, in that the fatal shot was fired by the appellant's co-accused and the appellant's lack of previous convictions. The judge however found that deviation could not be so drastic so as to send a wrong message to the society particularly because these crimes were committed against police officers.

- [4] Leave to appeal against sentence only was granted on the basis that another court could reach a different conclusion on the cumulative effect of the

sentences taking into account the two years spent by the appellant in custody before sentence was finally imposed.

- [5] It appears from the record the appellant also admitted for the first time at the hearing of his application for leave to appeal that he committed the offences and apologised for his actions. This was however not done before the sentence was imposed.

- [6] As a ground of appeal it was submitted on behalf of the appellant that whilst the trial judge found that there were substantial and compelling circumstances to deviate from the minimum sentences prescribed she did not give sufficient weight to the appellant's personal circumstances.

- [7] In considering an appropriate sentence on appeal, one must not lose sight of the established principle of law that sentencing is pre-eminently a matter for the discretion of the trial court. However the appeal court may interfere with the sentence imposed provided the trial court materially misdirected itself or where the sentence imposed is shockingly inappropriate or where discretion has been improperly or unreasonably exercised. **See S v Malgas 2001 (2) SA 1222 (SCA) at paragraph 12 and S v Pillay 1977 (4) SA 531 (A) at 534H – 535A.**

- [8] Personal circumstances of the offender are indeed important and were indeed taken into account by the *court a quo*. These must however be weighed against substantial aggravating factors. Serious crimes were committed against law enforcement officers who played an important role in combating crime in the community. The deceased was murdered in the presence of his wife and children and robbed of his firearm and identity card which could undoubtedly be used to perpetuate further crimes by the appellant and his co-accused. Base was rendered powerless in the presence of community members. The rate at which police officers are murdered in

South Africa is quite high. They are murdered and robbed by criminals with the high level of impunity.

- [9] I am in agreement with Eksteen JA's sentiments in **S v Mokoena 1990 (1) SACR 296 (A) at p 299a to 299b**, where he said the following:

'The interests of the community must be stressed. Criminals cannot have the licence to kill policemen in the performance of their duties. Respect for the law and for the police will disappear if those murderers are not properly punished. The community will lose respect for the Courts. ... The crime, in my view, was certainly a vicious one, and the fact that the deceased was a policeman killed in the execution of his duty does seem to me to be an aggravating factor which clearly has a bearing on the interests of society.'

- [10] Given the serious nature of the crimes and the circumstances under which they were committed, I am of the view that the trial court took a balanced view in this instance. The Court recognised the fact that the appellant presented better chances of being rehabilitated than his co-accused. He was a young first offender who was enrolled at college as an electrical engineering student when he committed the crime. It is inexplicable that the appellant who could make a meaningful contribution in a country in need of engineers would involve himself in such criminal actions. It is unfortunate that he only showed remorse after he had already been sentenced. It would in my view be improper for the appeal court to interfere with the sentence on this basis.

- [11] Turning to the period spent in prison awaiting finalisation of the trial. This is a relevant factor to be considered when sentencing. This does not mean that the Court would automatically deduct this period when sentencing. The extent to which a Court may interfere with sentence on this basis depends on the facts of each case. The cumulative effect of the sentence imposed is a key consideration. There may be instances where a lengthy period spent in prison weighs heavily as a factor that ought to be taken into account and

failure to do so might be viewed as a material misdirection. This is however not one of those cases. The cumulative effect of the sentences in this case is not shockingly inappropriate to warrant the interference of this Court.

[12] In any event, the effective sentence imposed by the *court a quo* demonstrates that the judge properly considered the cumulative effect of the sentences. She ordered sentences to run concurrently which effectively reduced the effective period of imprisonment. Even if the 2 years spent in prison was not in the trial judge's mind when she imposed sentence, I am not persuaded that she misdirected herself nor exercised her discretion improperly or unreasonably in any way. There is accordingly no reason to interfere with the sentence that she imposed.

[13] In the circumstances, I would make the following order:

1. The appeal is dismissed;
2. The sentence imposed by the *court a quo* is confirmed with effect from 27 February 2007.

N P BOQWANA
Judge of the High Court

I agree.

D V DLODLO
Judge of the High Court

I agree and it so ordered.

A P BLIGNAULT
Judge of the High Court