IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA 7 R 91/2014
Date heard: 6 August 2014
Date delivered: 8 August 2014

In the matter between

ANDILE YANTOLO **Appellant**

and

THE STATE **Respondent**

Criminal appeal – against conviction on charge of murder – evidence of identifying eyewitnesses – no basis to doubt credibility and reliability – version of appellant rightly rejected as false – conviction upheld
Criminal appeal – against sentence imposed – minimum sentence in terms of s51(2) of Act 105 of 1997 – charge sheet failing to state that minimum sentence applicable – not established that right to fair trial affected thereby - magistrate imposing 15 year sentence – sentence appropriate having regard to aggravating features – appeal dismissed.

JUDGMENT

GOOSEN, J.

[1] The appellant was convicted of murder and sentenced to 15 years imprisonment. He appeals against both conviction and sentence.

[2] On 1 January 2012 the accused, together with his uncle Zen Yantolo, who was the second accused at trial, and other friends gathered at the house of J. M. for a braai. They gathered there sometime in the late morning or early afternoon after Ms M. had attended church. The accused, his uncle and other persons were consuming alcohol around the braai fire. M. prepared salads and other eats and later in the afternoon went to wash and change. At approximately 6 PM that evening and at stage when the braai was well underway, C. M., the deceased, who was M.s' boyfriend, arrived at the house. At some stage thereafter Zen Yantolo asked the deceased to go outside because he wanted to discuss something with him. It seems from the evidence that Zen asked the deceased to lend him R50.00. The deceased however, said that he didn't have any money to lend to him. This, it seems, became the source of some friction and one thing led to another, resulting in a heated exchange between Zen and the deceased. M. tried to intervene and to calm matters down, but to no avail. Another woman who was present also tried to calm Zen down but she was shoved aside as Zen became increasingly threatening towards the deceased.

[3] During this altercation the appellant had remained seated on a couch in the lounge where the fracas was developing. At a certain point during the heated exchange that was taking place, the appellant got up and went outside. He returned moments later and before anyone could intervene he struck the deceased on the side of his head with a panga. He then left the scene. The police and an ambulance was summonsed but, unfortunately, the deceased died as a result of the wound inflicted upon him.

[4] The state presented the evidence of two identifying witnesses whose version of events corroborated one another's testimony. Their evidence was clear that it was the appellant who had played no role in the heated argument between his uncle, Zen, and the deceased, who had attacked the deceased with the panga and inflicted the fatal blow. The appellant's version was that he had been drinking, along with all of the other persons attending the braai during the course of that

afternoon and that he had at a certain stage “floored” or “passed-out” as a result of his consumption of alcohol. He woke up during the course of the altercation and he then left. He denied involvement in the assault and claimed no knowledge of how it had occurred.

[5] The magistrate accepted the evidence of the identifying witnesses as both a credible and reliable and rejected the evidence of the appellant as being false.

[6] The magistrate’s findings in respect of conviction, and in particular his findings regarding the credibility and reliability of the identifying witnesses, were not seriously challenged on appeal. It was not suggested that the magistrate had erred in any particular manner or committed any misdirection in regard to the approach adopted to the assessment of the evidence. A careful reading of the record and the magistrate’s judgment does not reveal any misdirection or error. There is in my view no basis therefore to interfere with the magistrate’s findings in regard to the facts and accordingly no basis to find that the conviction of the accused is tainted by error or misdirection.

[7] In respect of sentence it was submitted that the charge sheet did not make reference to the applicability of the minimum sentence legislation. This was noted by the magistrate when dealing with sentence. It was therefore submitted that the magistrate had erred in applying the minimum sentence legislation to the prejudice of the accused.

[8] Mr Obermeyer, on behalf of the state, conceded that the charge sheet does not refer to the minimum sentence legislation. He nevertheless argued that the sentence imposed by the magistrate was appropriate having regard to the seriously aggravating the nature of the offence. In this regard he pointed to the fact that the appellant had not been involved in and was not a party to the dispute giving rise to the heated argument and the conflict. Yet he had nevertheless gone outside to find a weapon and returned to the scene of the argument. Once there he, without any

provocation, launched a deadly attack upon the deceased by striking him with considerable force on the head with a panga. These were features, it was submitted, which warranted the imposition of a lengthy period of imprisonment and that the magistrate had exercised his discretion in that regard correctly. It was therefore submitted that this court ought not to interfere with the sentence of 15 years imposed upon the accused.

[9] In *S v Cunningham* 2004 (2) SACR 16 (E) the Full Bench of this Division said the following (at 19b – c) in regard to reference being made in the charge-sheet to the minimum sentence legislation applicable to a matter:

> Whilst the desirability of specific reference in a charge-sheet to any sentencing legislation upon which the State may seek to rely, and to the facts which the State intends to prove to bring the accused within the ambit of such legislation cannot be gainsaid, it is not necessarily essential (see *S v Legoa* 2003 (1) SACR 13 (SCA) in paras [19] – [22] at 22–4 and *S v Ndlovu* 2003 (1) SACR 331 (SCA) in paras [11] and [12] at 335–6) and, where there is no such reference, the issue is whether, despite the omissions, the accused has had a fair trial.

[10] It was not suggested in argument before us that that the appellant's right to a fair trial was in any manner compromised by the omission in the charge sheet.

[11] In regard to the term of imprisonment imposed, it was submitted on behalf of the appellant that the sentence was unduly harsh and that the magistrate had failed to take due cognizance of the appellant's personal circumstances and in particular that he was a first offender.

[12] The imposition of sentence by a trial court is a matter that falls within the discretion of that court. It is for this reason that a court of appeal will not readily interfere with a sentence imposed by the trial court and will only do so if the trial court has not properly and reasonably exercised its discretion (see *S v Ncheche* 2005(2) SACR 386 (W); *S v Obisi* 2005(2) SACR 350 (W); *S v Kgosimore* 1999(2) SACR 238 (SCA)).

[13] In this instance the trial court considered the personal circumstances of the appellant; that he was a first offender and assumed in his favour that the consumption of alcohol may have played a role in the commission of the offence even although the appellant had not testified to that effect. The trial court also took into consideration the fact that the appellant had spent approximately a year in custody awaiting trial. These factors were weighed against the gravity and seriousness of the offence and the aggravating features which are present. The trial court came to the conclusion that a sentence of 15 years imprisonment was appropriate.

[14] In my view there is no basis to suggest that the trial court committed any misdirection in its approach to the imposition of sentence. Nor is there any basis to find that the trial court did not exercise its discretion properly and reasonably. There is accordingly to interfere with the sentence imposed.

[15] In the result I make the following order:

The appeal is dismissed.

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G. GOOSEN
JUDGE OF THE HIGH COURT

MSIZI, AJ.

I agree.

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N. MSIZI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant
Adv. H. Charles
Grahamstown Justice Centre

For the Respondent
Adv. H. L. Obermeyer
Director of Public Prosecutions