

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

CASE NO. CA & R 207/2018

In the matter between:

THEMBANI LUNINGO

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

Bloem J.

[1] The appellant was charged in the regional court at East London with one count of assault with intent to do grievous bodily harm and one count of murder. He was convicted on both counts and sentenced to three years' imprisonment on the first count and imprisonment for life on the second count. He now appeals in terms of section 309 (1) (a) of the Criminal Procedure Act¹ against the conviction of premeditated murder and sentence of life imprisonment.

[2] The allegations against the appellant were that on 8 October 2014 and at Newlands, East London he unlawfully and intentionally killed Ntontozayo Zakade (the deceased). The appellant admitted in terms of section 220 of the Criminal Procedure Act that on 8 October 2014 the deceased died as a result of a gunshot wound to his head. He also admitted the contents of the report that was compiled by Dr Claude Hannah on 10

¹ Criminal Procedure Act, 1977 (Act No. 51 of 1977).

October 2014 after he had conducted a post-mortem examination on the deceased. Although the appellant did not explain his plea of not guilty, his attorney put to the state witnesses that there was an attempt by the deceased to disarm him of a firearm as a result of which a struggle over the possession of the firearm ensued during which a shot went off which killed the deceased.

- [3] Nthombekho Ngqingco testified that on 8 October 2014 and while he was at his mother's house, the appellant arrived, sat down and enquired how he was doing. While they were exchanging greetings, the appellant drew a firearm and asked where his pots were. The appellant used a firearm to hit him several times on his head as a result of which he sustained a cut on his head and his right upper arm was injured. The appellant took him to the deceased's house where he saw the deceased and Mzwamadoda Peter. The deceased's daughter, Amanda, was also present. The appellant asked them about his missing pots. He assaulted the three men with the firearm. The appellant pointed the firearm at the deceased's forehead and shot him at close range. He testified that he ran away and hid himself behind a rock until the police arrived. The appellant was arrested and taken to the police station while he was taken to hospital where he was treated and discharged on the same day.

- [4] When Mr Peter testified he confirmed that on the day in question he and the deceased were sitting at the deceased's house when the appellant and Mr Ngqingco arrived. Amanda was also in the house. Mr Ngqingco took a seat next to him. The appellant drew a firearm and asked the three of them, as well as Amanda, about his missing pots. He assaulted the three men with the firearm whereafter he fired a shot at the deceased.

[5] The appellant testified that at the time of the incident he was employed as a security guard. When he arrived at home from work on 8 October 2014 he discovered that his house had been broken into and many things, including his pots, had been stolen. He went to Mr Ngqingco to enquire whether he knew anything about the housebreaking. He and Mr Ngqingco seemed to have been good neighbours because they left their respective house keys at the other's house when they needed to leave home for a short while. Upon his arrival at Mr Ngqingco's house he was invited inside. He told Mr Ngqingco about the housebreaking. Mr Ngqingco asked him why he was telling him about the housebreaking, became angry and took a knife from the table. The appellant testified that he drew a firearm and hit Mr Ngqingco with it who then undertook to take him to the stolen goods. They went to the deceased's house where they found the deceased and Mr Peter. While he was demanding his missing pots from the three men, Mr Ngqingco jumped at him and held him from behind. He drew his firearm. There was a struggle between him and the deceased over the firearm. A shot went off during the struggle. He pulled the trigger because he wanted to fire a warning shot in the air.

[6] The facts upon which the appellant was convicted were that, without lawful justification, he hit Mr Ngqingco with the firearm on his head as a result of which he sustained a cut from which he was bleeding and he shot the deceased who died as a result of a gunshot wound.

[7] Mr Geldenhuys, counsel for the appellant, conceded that the state proved its case

against the appellant beyond reasonable doubt and that his conviction on the count of murder should be confirmed. That concession was correctly made in my view. The only issue before us was whether the magistrate correctly found that the murder was premeditated. The magistrate sentenced the appellant to imprisonment for life because he found that there “*can be no doubt in my mind that his actions were premeditated from the very word go*”. That finding is important insofar as an appropriate sentence is considered. In terms of section 51 (1) of the Criminal Law Amendment Act² a person who has been convicted of murder when it was planned or premeditated shall be sentenced to imprisonment for life unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. If the deceased’s murder was premeditated, then there would be no reason to interfere with the sentence³ but, if the murder was not premeditated, then the sentence of imprisonment for life would be disproportionate to the offence and the appellant, therefore unjust and should be set aside.

- [8] The circumstances in which the offence was committed will determine whether or not the appellant murdered the deceased with premeditation. It must be considered whether or not he weighed-up his conduct either on a thought-out basis or an arranged-in-advance basis, or whether or not he rationally considered the timing or method of the killing, or prepared a scheme or design in advance for achieving his goal of killing the deceased.⁴

² Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

³ The magistrate found, correctly so in my view, that no substantial and compelling circumstances existed to justify the imposition of a lesser sentence than the minimum prescribed sentence.

⁴ *S v Taunyane* 2018 (1) SACR 163 (GJ) at 169e.

[9] Mr Henning, counsel for the state, submitted that the evidence did not justify the magistrate's finding that the murder was premeditated. In my view the state failed to discharge the onus of proving that the murder of the deceased was premeditated, with the result that the concession was correctly made. The magistrate's finding in that regard seems to have been based firstly, on the fact that the appellant had armed himself with a firearm before he went to Mr Ngqingco's house; and secondly, on the fact that the appellant shot the deceased at point blank range. If he wanted to kill Mr Ngqingco the appellant had ample opportunity to do so when earlier they were alone. He could also have killed him and Mr Peter when he killed the deceased. He did not do so. It is unclear from the evidence why the appellant pointed the firearm at the deceased and not Mr Ngqingco and/or Mr Peter. The evidence showed only that the appellant assaulted the three men by using the firearm whereafter he shot and killed the deceased. There was no evidence as to what happened immediately before the fatal shot was fired. There was no direct evidence of premeditation. There was also no evidence from which the only reasonable inference could be drawn that the murder was premeditated. The fact that the appellant had *dolus directus* should not be confused or conflated with premeditation.⁵ The evidence was simply too scanty for the magistrate to have found that the murder was premeditated. The possibility that the appellant decided to kill the deceased in the heat of the moment is, in the circumstances, not far-fetched. The evidence suggests that he killed the deceased in a fit of anger. Sight should not be lost of the fact that the appellant was very agitated after he had discovered that his house had been broken into and many items stolen

⁵ Compare *S v Taunyane* (supra) where, although the appellant in that case pursued the deceased after the first shot and then fired four shots into the body of the deceased as he was lying on the ground, the court nevertheless found that it was unable to find "*that there is a deliberate cause of action which was so planned as to increase the likelihood of success or enable evasion of apprehension thereafter.*"

from it. The magistrate misdirected himself when he found that the murder was premeditated. That misdirection entitles this court to consider sentence afresh.⁶

[10] Mr Geldenhuys submitted that the appellant's personal circumstances constitute substantial and compelling circumstances justifying a lesser sentence than the minimum prescribed sentence of fifteen years' imprisonment. I do not agree that the fact that the appellant was 44 years of age at the time of the commission of the offences, that he is married, that he has two minor children aged 16 and 11 respectively when he was sentenced, that he was employed as a security guard and also ran a cleaning and security business to support his family, of which he was the breadwinner constitute, singularly or collectively, substantial and compelling circumstances justifying a lesser sentence. The magistrate also considered, as I have, that in 2010 the appellant was convicted of assault and sentenced to a fine of R900.00 or 90 days' imprisonment which was wholly suspended for a period of 5 years on condition that he not be convicted of assault or assault with intent to do grievous bodily harm during the period of suspension. That is an aggravating factor. The appellant's previous conviction is an indicator that he is unlikely to be rehabilitated because he committed the offences in the present matter during the period of suspension.⁷ The previous conviction and the offences in this appeal indicate that the appellant has a tendency to use violence on others, thereby infringing their rights to human dignity, security of person and, in the case of murder, the right to life. The previous suspended sentence obviously failed to have the desired results. His conduct in this matter calls for a harsh sentence. What aggravated the situation was that the

⁶ *S v Mokgalaka* 2017 (2) SACR 159 (GJ) at paras [33] and [34].

⁷ *Bhola and others v S* (800/18; 123/18; 346/18) [2018] ZASCA 121 (21 September 2018).

deceased was shot and killed inside his house where he least expected to meet his death.

[11] Murder is a very serious offence. The deceased lost his life at the hands of a person who, instead of protecting lives and property, took the law into his own hands. As a security guard the appellant should have known that he should not have used his firearm to settle his own private battles. Members of the community expect courts to impose harsh sentences on those who commit serious offences, like murder.

[12] Since no substantial and compelling circumstances exist to justify the imposition of a lesser sentence than the minimum prescribed sentence of 15 years' imprisonment and since the appellant was shot by a security guard in cold blood inside the safety of his home, a heavier sentence than the prescribed minimum sentence of 15 years' imprisonment is called for. In my view a sentence of 18 years' imprisonment would, in the circumstances of this case, fit the appellant, the offence of murder as well as the interests of the community, particularly the family members of the deceased. Since the offences were closely related in time and were committed for the same reason, namely the appellant's quest to retrieve his missing pots, the sentence on count 1 should run concurrently with the count of murder.

[13] In the result, it is ordered that:

13.1. The appeal against conviction on the count of murder is dismissed.

- 13.2. The appeal against sentence on the count of murder is upheld.
- 13.3. The sentence of imprisonment for life on the count of murder is set aside and replaced with the following:

“The accused is sentenced to 18 years’ imprisonment”.

- 13.4. The sentence of 3 years’ imprisonment on the count of assault with intent to do grievous bodily harm should run concurrently with the 18 years’ imprisonment imposed on the count of murder.
- 13.5. The sentences are antedated to 8 March 2018.

G H BLOEM
Judge of the High Court

Jaji J,

I agree

N P JAJI
Judge of the High Court

For the appellant:

Adv D P Geldenhuys of Legal Aid South Africa,
Grahamstown.

For the state:

Adv N Henning of the office of the Director of
Public Prosecutions, Grahamstown.

Date of hearing:

13 February 2019.

Date of delivery of the judgment:

19 February 2019.