IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No.: A107/2016

In the appeal between:-

MOSEBETSI PETRUS MKHWANAZI Appellant

And

THE STATE Respondent

CORAM: REINDERS, J *et* HINXA, AJ

HEARD ON: 1 AUGUST 2016

JUDGMENT: REINDERS, J

DELIVERED ON: 19 AUGUST 2016

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[1] On 30 September 2013 in the Regional Court for the district of Witsieshoek held at Phuthaditjhaba the appellant was charged with murder and robbery with aggravating

circumstances. After the appellant pleaded guilty to both charges he was convicted and sentenced to life imprisonment and 15 years imprisonment respectively. The appellant appeals against the sentence imposed upon him by virtue of his right of automatic appeal in terms of section 309 (1)(a) of the Criminal Procedure Act 51 of 1977 (the "CPA").

[2] The facts of the case appear from the appellant's statement in terms of section 112 (2) of the CPA. The appellant was in the company of the deceased on 25 February 2012 when he made a request to the deceased for payment of an outstanding amount that was due to him. The deceased refused. The deceased was busy chopping vegetables with a knife, and after putting it on the table, the appellant took the knife and stabbed the deceased in his chest. The deceased fell to the ground and died later. After stabbing the deceased the appellant robbed the deceased of his two cell phones.

[3] Heads of arguments on behalf of the appellant were prepared by Adv JS Makhene, but Ms Kruger appeared before us when the appeal was heard. She aligned herself with the submissions advanced by Mr Makhene in the written heads of argument. The main thrust hereof was that the court a quo erred in sentencing the appellant in terms of section 51(1) and not in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the "Act"). Mr Maphumulo supported the sentences imposed by the court a quo and submitted that the appellant was correctly

sentenced in that the murder was committed in the execution of robbery with aggravating circumstances.

[4] The partially unpaginated record contains the indictment to which the appellant pleaded. In terms of count 1 the appellant was charged with murder read with the provisions of section 51(2) of the Act. In terms of count 2 he was charged with robbery with aggravating circumstances read with the provisions of section 51(2) of the Act. To these charges the appellant pleaded guilty, a plea which was accepted by the prosecution. The learned regional magistrate in his judgment indicates that, after having read the appellant's section 112 (2) statement, he is "convinced that appellant intended pleading guilty" and accordingly found him guilty on both counts.

[5] After the prosecution did not prove any previous convictions, Ms Tinder appearing on behalf of appellant in the court a quo, placed his personal circumstances on record as follows: He is an unmarried 31 year old who passed grade 10. Prior to his arrest he was employed as a brick manufacturer, earning R 1000 per month. With this income he maintains his 2 children aged 12 and 6 years as well as his grandmother who takes care of the children. He has been in custody awaiting trial for 7 months.

[6] Ms Tinder pressed hard upon the learned regional magistrate to consider the following when imposing a sentence: appellant went to the deceased's residence

unarmed, indicating that he was not the aggressor on the day in question and that the murder was not premeditated. Appellant was provoked by the deceased who refused to pay him his money and the appellant pleaded guilty which is indicative of his remorse.

[7] The prosecutor did not place any aggravating circumstances on record and merely indicated that “the deceased lost his life to cell phones where two cell phones were robbed” and that “minimum sentences are applicable.” When prompted by the learned regional magistrate about minimum sentences to be imposed, life sentence in respect of the murder charge and 15 years imprisonment in respect of the robbery charge were advanced. The court a quo then proceeded to ask Ms Tinder whether she agrees that “both the offences merit life imprisonment”. Ms Tinder indicated that she was unsure about the sentences but elected not to adjourn in order to consult authorities.

[8] The learned regional magistrate proceeded to hand down sentencing. Even in doing so, he confirmed that the two charges were read with the provisions of sec 52(2) of the Act. He indicated that in sentencing he was bound by the Act but should the court find substantial and compelling circumstances, he might deviate therefrom. However, the learned magistrate merely stated that there is “very little before me in respect to what truly and specifically and precisely happened on the day in question” and later “(A)s stated before there is very little placed before me in respect

to what precisely had occurred on this fateful day so I cannot venture into the arena of guessing and speculating." The learned magistrate did not deal with any mitigating circumstances advanced by Ms Tinder or any aggravating circumstances in order to arrive at a conclusion as to whether substantial and compelling circumstances were found by him which would prompt him to deviate from the prescribed minimum sentences. He proceeded to sentence the appellant to life imprisonment in respect of count 1 and 15 years imprisonment in respect of count 2, indicative thereof that he sentenced appellant in terms of sec 51 (1) in respect of the murder charge and in terms of sec 51 (2) in respect of the robbery with aggravating circumstances.

[9] When it comes to interfering with the sentence imposed by the court *a quo*, it is trite law that the powers of the court of appeal are limited, as was stated in **S v Pieters** 1987 (3) SA 717 (A). Interference is only warranted where the sentence is disproportionate, harsh or where the sentencing court committed a material misdirection.

[10] From the facts before the trial court (and accepted as such), it can be gleaned that the unarmed appellant went to the deceased with the intention to request money owed to him by the deceased, not with the intent to commit either a robbery or a murder. After the deceased refused to adhere to the appellant's request the appellant, ostensibly being provoked by the deceased's refusal to adhere to his request, grabbed the knife that was put down on the table by the

deceased. Appellant stabbed the deceased in the chest. Hereafter the appellant robbed the deceased of his two cell phones. This would mean that the appellant first committed the crime of murder, and almost as an afterthought, robbed the deceased of the two cell phones, presumably with a view of compensation for the money owed. I am of the view that these actions did not constitute murder as is envisaged in Schedule 2 Part I (c)(ii) where the death of the victim was caused by the accused in committing or attempting to commit or **after** having committed or attempted to commit robbery with aggravating circumstances. Even if I am wrong in my conclusion, the prosecutor in accepting the plea, indicated that the "the facts as contained in the plea statement are in accordance with the facts contained in the docket." It follows that the prosecution was satisfied that the facts to their knowledge (and advanced by the appellant in his section 112(2)-statement) warranted a charge of murder read with section 51(2) and not section 51(1), and the appellant was consequently charged as such. Section 51(2)(a)(i) prescribes the minimum sentence for a first offender convicted of an offence referred to in Part II of Schedule 2, as imprisonment for not less than 15 years. Murder in circumstances other than those referred to in Part I as well as robbery when there are aggravating circumstances, falls under Part II.

[11] It is our view that the trial court misdirected itself materially in sentencing the appellant in terms of section 51(1) of the Act to life imprisonment in respect of the murder charge. As such

we are at large to interfere and consider the sentence in regards to the murder charge afresh. The trial court does not indicate the absence of substantial and compelling circumstances to justify the imposition of a lesser prescribed sentence in respect of both counts. It can, however, be derived from the sentences that no such circumstances were found to exist. We hold the view that the trial court misdirected itself materially in regards to the sentence imposed in respect of count 2 to the extent that it is unclear from the record that the learned regional magistrate in handing down sentence applied his mind to the factors placed before him in order to arrive at a conclusion that no deviation from the prescribed minimum sentence is warranted. We are consequently at large to interfere and consider the sentence in respect of count 2 afresh as well.

[9] No doubt, the crimes of which the appellant was convicted, are very serious. The deceased not only lost his cell phones, he also lost his most priced possession, his life. It has been stressed by our courts that murder is a serious crime, involving as it does, the loss of life.

Vide: **Director of Public Prosecutions,Transvaal v Venter** 2009 (1) SACR 165 (SCA) at 175g-1771 par [19].

[10] The appellant is a first offender at 31, which is indicative of the fact that he might be a good candidate for rehabilitation. It seems that he is good human material, a family man labouring to take care of his two children and grandmother. The fact that appellant pleaded guilty to the charges and took the court into his confidence, shows that he had remorse for the crimes that he committed. Appellant could easily have opted to claim that he acted in self-defence, yet he elected to play open cards with the court. All factors traditionally taken into account in sentencing should be considered and none is to be excluded. To my mind the factors mentioned above constitute compelling and circumstantial circumstances which would warrant a deviation from the prescribed minimum sentences.

See: S v Malgas 2001 (2) SA 1222 (SCA)

[11] In **S v Dodo** 2001 (1) SACR 594 (CC) Ackerman J held as follows at paragraph [38]:

> "To attempt to justify any period of penal incarceration…without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the very heart of human dignity".

[12] To my mind sentences of 8 years' imprisonment on count one and 3 years' imprisonment on count two, to be served concurrently, are proportionate to the crime, the criminal and the legitimate interests of society.

[13] In the result, the appeal is upheld and the sentences on Counts 1 and 2 are set aside and replaced with the following:

1. Count 1: eight years imprisonment.
2. Count 2: three years imprisonment.
3. The sentence imposed on Count 1 shall run concurrently with that on Count 2.

[14] This sentences must be deemed to have been imposed on 30 September 2013.

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C. REINDERS, J

I agree.

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M.D. HINXA, AJ

On behalf of appellant: Ms S Kruger
Instructed by:
Bloemfontein Justice Centre
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:	Adv R.B. Maphumulo Instructed by: Director of Public Prosecutions BLOEMFONTEIN