IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: A330/2016

(1) REPORTABLE: ~~No~~/Yes ✓
(2) OF INTEREST TO OTHERS JUDGES: ~~No~~/Yes ✓
(3) REVISED

10 November 20`7

DATE SIGNATURE

In the matter between:

RAMOLEFI PULE ANDREW **APPELLANT**

And

THE STATE **RESPONDENT**

Summary: Criminal appeal. Appellant convicted and sentenced to 15 years imprisonment for murder. Principles governing appeal on sentencing restated. Principles governing provocation as a mitigating factor discussed and applied to the facts. Magistrate ignored the extent of the provocation when assessing that the attack by the deceased was for no apparent reason. The murder occurred in the context of utmost and severest provocation by the deceased.

JUDGMENT

Molahlehi, J

Introduction

[1] The appellant in this matter, Mr Ramolefi, was charged, convicted and sentenced to 15 years of imprisonment in terms of the minimum sentencing legislation, s.51 of the Criminal Law Amendment Act 105 of 1997 (the CPA). He is now appealing against the sentence imposed by the Regional Court for the Regional Division of Wynberg, sitting at Randburg. He was legally represented throughout the trial. He pleaded not guilty to the charge.

[2] The incident that led to the death of the deceased occurred on 27 April 2014 at a car wash in Midrand. The court accepted that the deceased had attacked the appellant and in the course of the struggle the appellant stabbed him twice and the fatal blow was the one to the neck. The court further found that in stabbing the deceased the appellant did so wrongfully and with the intention of killing him.

[3] The appellant sought leave to appeal against both the conviction and the sentence. Leave to appeal was granted to appeal against the sentence only. His petition to appeal against the conviction was refused by this court on 18 February 2016. He subsequently petitioned the Supreme Court of Appeal for leave to appeal which was apparently refused.

[4] The essential issue in this matter is whether the court below exercised its judicial discretion properly and fairly in imposing the 15 years sentence on the appellant. In particular, the question is whether the court below should have found the presence of substantial and compelling circumstances justifying a deviation from the sentence prescribed by the minimum sentencing legislation.

[5] The respondent opposed the appeal and in its submission emphasized the fact that the court below in imposing the sentence as it did correctly applied the minimum sentencing legislation.

[6] Mr Hlatswayo, for the respondent, made several compelling but not persuasive points as to why the decision of the court below should not be interfered with. He pointed out that while deviation from the minimum sentence is permissible it should not be done on flimsy and unsubstantiated bases.

[7] He further argued that the appellant showed no remorse and was clearly intent on murdering the deceased particularly when regard is had to his comment that he "wanted to finish him up." He also contended that the fact that the appellant offered compensation to the family carries very little weight because of the timing of its making.

The brief background facts

[8] The brief background in this matter is that on the day of the incident that led to the death of the deceased, the appellant and his wife took their cars to a car wash. As it happened, at the same time the deceased also took his car to the same car wash, apparently completely unrelated to the attendance there of the appellant and his wife. The appellant parked his car and after taking his personal belongings out of it, including his Swiss army pocket knife, left. It appears that the same happened with the deceased. He left his car to be washed. They all seemed to have come back soon before the incident in question to collect their

respective cars. The deceased's car was not yet ready. The cleaners were still busy cleaning it inside.

[9] The appellant's car was ready to be collected. He left his wife at the cleaning bay and went to pay. Whilst waiting to pay he felt someone touching him on his shoulder and when he looked up to see who it was, he found that it was the deceased. The deceased thereupon punched him in the face without saying anything. The appellant fell down as a result of the force of the punch. The deceased then attacked him whilst the appellant was lying on the ground facing up.

[10] During the course of the struggle with the deceased, whilst both were on the ground, the appellant managed to kick the deceased, as a result of which the deceased moved backwards. The appellant then managed to open his pocket knife and when the deceased attacked him again whilst on the ground the appellant stabbed him. The deceased immediately left the appellant and ran away.

[11] The appellant chased after him up to the robot where he (the deceased) fell and the appellant stabbed him again on the neck.

[12] The first witness to testify on behalf of the defendant was Mr John Oni, the supervisor at the car wash. He testified that the deceased came back to collect his car after two hours. The car was not yet ready as they were still washing it inside. As he was busy cleaning the car he heard a noise and when he came out of the car he saw the appellant chasing the deceased. He followed them and

caught up with them outside the gate of the car wash. He then separated them and brought the appellant back into the yard of the car wash.

[13] The second witness of the defendant was Mr Maduna. He testified that he heard a scream and when he went to check he saw the appellant chasing the deceased. The deceased fell down and the appellant stabbed him on the neck.

[14] The third witness of the defendant was Dr Mapunda of Kirsten Hospital. The witness testified that the deceased had two wounds on the left side of his neck. The witness tried to resuscitate him to no avail.

[15] The case of the appellant on the other hand in relation to the sentence was that he was provoked by the deceased. He testified that he knew the deceased as the former co-employee of his wife. The two had had an adulterous relationship which resulted in an incident where he caught them in a bed at a flat. He was at the time armed with his licensed firearm. He did not do anything to them but simply locked the door from the outside and left them. The incident at the car wash occurred after he reconciled with his wife and he had not in that period of about two years seen the deceased.

Magistrate's decision

[16] The magistrate in convicting the appellant accepted the version of the state witnesses and rejected that of the appellant as a lie, in particular with regard to his contention that he stabbed the deceased only once. The court below

accepted as self-defense the first stabbing of the deceased on the back by the appellant whilst he was lying on the ground.

[17] In relation to the second stabbing the court found that there was no justification because the danger to the appellant was over. In this respect the court below regarded the appellant as an aggressor because he chased the deceased and stabbed him after he fell down.

[18] The court below further found that the second stabbing was carried out wrongfully and with the intention to kill the deceased. It was for this reason that the court found that the defendant had proven beyond reasonable doubt that the appellant was guilty of murder.

[19] As concerning the sentence, it is apparent that the court below took into account the personal circumstances of the appellant and that included the fact that he was 50 years of age, married with children, and is a senior pilot by profession. The appellant's apology to the family of the deceased which was conveyed through the representative of the appellant was not given much consideration as a mitigating factor. It appears that the reason for this is because it was not conveyed by the appellant himself.

[20] In relation to the aggravating factors the court below noted that the appellant had a previous conviction of fraud and that he did not show any remorse for what he had done. It also noted that after stabbing the deceased he said that he "will finish him up."

[21] The court below was further influenced in its decision by the fact that: "When he (the deceased) was helplessly on the ground, you dealt him that fatal blow."

The law

[22] It is trite in our law that sentencing is a matter of discretion best left to the trial court and thus the appeal court will as a general principle only interfere if the discretion is not properly exercised.[1] The general test to apply in considering whether there is a basis for interfering with the sentence is whether the sentence is vitiated with irregularities, misdirection or is disturbingly inappropriate.[2] This means that the power of the appeal court in dealing with sentencing is limited. In this respect the Supreme Court of Appeal in Malgas, supra at para 12 said the following:

> *"[12] . . . A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not*

[1] See S v Rabie 1975 (4) SA 885 (A), S v Pieters 1987 (3) SA 717 (A) and S v Kgosimang 1999 (2) SA 238 (SCA).

[2] See S v Malgas 2001 (1) SACR 469 (SCA) at page 478D-G and S v Obisi 2005 (2) SACR 2050 (W).

substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

[23] As concerning the sentence of imprisonment the courts have emphasized that it should be resorted to after other appropriate forms of punishment that have been considered and excluded.[3] In this respect s.51(3)(a) of the Criminal Procedure Act (the CPA),[4] provides as follows:

"*(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."*

[24] In the present matter the issue of whether the court below exercised its discretion properly, in particular as to whether it should have found the presence of substantial and compelling circumstances, is to be determined in the context of the approach it adopted in dealing with the issue of provocation as a mitigating factor.

[25] This issue received attention in S v Ndzima,[5] where Plasket J at paragrph [30] of his judgment said:

"[30] While it is a feature of provocation as a mitigatory factor that the criminal act that resulted from it is usually committed immediately after the provocative act, the extent to which it is mitigatory depends, essentially, on whether the

[3] See S v R 1993 (1) SA 476 (A).
[4] Act number105 of 1997.
[5] 2010 (2) SACR 501.

accused's loss of control as a result of his or her anger would be regarded by an ordinary reasonable person – "n gewone redelike mens' – as an excusable human reaction in the circumstances. In this matter, a reasonable person would baulk at the suggestion that the appellant's acts of executing his incapacitated victims were understandable in the circumstances, even though he was justifiably and understandably angry at having been assaulted and, no doubt, fearful when he fired the first shots. That he was provoked, and that the provocation was severe, is not in dispute. That the anger evoked by the provocation led him to shoot the deceased who was running away is also understandable. But then to execute both of the deceased, when he ought to have been able to reflect on what he had done and to realise that he was no longer in any danger, cannot be regarded as an excusable human reaction to the provocation."

[26] In S v Mnisi,[6] Boruchowitz AJA sitting with Cloete and Maya JJA held that:

"[5] Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His ipse dixit may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively. The fact that an accused acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others. What matters for the purposes of sentence are the circumstances that give rise to the lack of restraint and self -control.

[6] The State accepted the averments and facts set out in the appellant's written statement which accompanied his plea of guilty. These undisputed facts raise the reasonable possibility that the appellant was not acting completely rationally when he shot the deceased and that his actions were the product of emotional stress brought about by the conduct of the deceased and the appellant's wife. In my view the appellant's statement lays a sufficient factual foundation to support a finding that he acted with diminished responsibility when he committed the offence. Murder is undoubtedly a serious crime but the appellant's conduct is morally less reprehensible by reason of the fact that the offence was committed under circumstances of diminished criminal responsibility. This factor was not afforded sufficient recognition and weight by the trial court in imposing sentence on the appellant. Also in the appellant's favour, and not taken

[6] 20009 (2) SACR 227 at paragraphs 5 and 6.

into account by the trial court, was the fact that the appellant acted with dolus indirectus when shooting the deceased."

[27] In my view, these dicta apply to this case, and the court below failed to exercise its discretion appropriately when it imposed the minimum sentence of 15 years imprisonment, in that it afforded no weight to the issue of provocation as a mitigating factor. It should have held that in this case the extreme provocation was a substantial and compelling circumstance justifying deviation from the minimum sentence prescribed by legislation.

[28] Here the appellant was acting in circumstances of extreme provocation. The deceased was his assailant, and his wife's former lover, He had at one instance found the two in a compromising situation. This was two years before the fatal incident. Then, the appellant acted with remarkable restraint. It is not difficult to understand then that now, despite the past, when the deceased attacked him, the appellant should have lost his control over his emotions, and acted completely irrationally.

[29] These circumstances should not have been ignored when assessing the degree and the extent of the provocation by the deceased when he attacked the appellant for no apparent reason on that fatal day. There is no evidence that shows the appellant having said anything or done anything that would have made him touch him and suddenly punch him and furthermore attack him once he was on the ground.

[30] The court below correctly found that the first stabbing was in self-defense. The second stabbing in my view, occurred in the context of utmost and severest provocation by the deceased. It is not surprising and cannot be said to be unreasonable for the appellant to have acted in the manner he did. Society would in my view understand that he acted as he did in the face of unprecedented provocation.

[31] Considering the above together with the appellant's personal circumstances including the apology which he made, though through his legal representative, the court below ought to have accorded considerable weight to the issue of provocation in imposing the sentence, and in particular should have found that in the circumstances of this case, it constituted a substantial and compelling circumstance.

[32] In my view the above circumstances which gave rise to the appellant losing his restraint and control are such that on a proper evaluation and based on the undisputed facts, are such that there is a reasonable possibility that he was not acting rationally when he stood up from the ground, chased the deceased to the point where he (the deceased) fell and upon catching up with him, fatality stabbed him.

[33] The key point that needs to be made, lest a contrary impression is developed, is that murder is a serious crime that needs to be visited with a severe sentence that would win the confidence of the community in the criminal justice system. That is why the minimum sentencing legislation prescribes harsh sentences.

[34] However, in the present matter, the crime was committed in circumstances where in my view even the community would accept that the appellant acted with diminished responsibility when he committed the crime. This is an important factor which the court below ought to have accorded sufficient recognition and weight in the consideration of sentencing but failed to do so.

[35] The appellant in the heads of argument submitted that the appropriate sentence in the circumstances of this case ought to have been five years. In my view, in the circumstances described above the appropriate and fair punishment for the appellant ought to have been a wholly suspended sentence. In addition, in terms of s.103(1)(g) of the Firearms Control Act,[7] it is determined that the appellant is unfit to possess a firearm. .

Order

[36] In the circumstances I propose the following order:

1. The appeal against sentence is upheld, and the order of the court below is set aside.
2. The decision of the court below in relation to the sentence substituted with the following order:

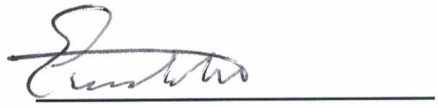
"(a) The accused is sentenced to a period of five years imprisonment, which sentence is wholly suspended for a period of five years on condition that the accused is not found guilty of an offence committed during his period of suspension for which he is

[7] Act number 60 of 2000.

sentenced to a period of imprisonment without the option of a fine.

(b) The accused is, in terms of s.103(1)(g) of the Firearms Control Act 60 of 2000, determined unfit to possess a firearm."

3 The order in (a) above is antedated to 21 April 2015.



E Molahlehi

JUDGE OF THE HIGH COURT,

JOHANNESBURG

I agree, and it is so ordered.

WHG van der Linde

Judge, High Court

Johannesburg

Appearances:

For the Plaintiff: Adv. Makoko

For the Respondent: Adv. Hlatshwayo

Heard on: 7 November 2017

Delivered on: 10 November 2017