IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 25/8/15

Case No: A122/15

NOT REPORTABLE

In the matter between:

MAHLANGU JACKIE **Appellant**

And

THE STATE **Respondent**

Bench: N.B Tuchten J and M Madima AJ

Heard: **24 August 2015**

Delivered: **25 August 2015**

Summary: Appeal against sentence of 15 years for Murder-trial court had before it enough facts to pass sentence-not always imperative to have pre-sentence report-trial court not committed irregularity- appeal dismissed.

ORDER

Appeal from: Brakpan Regional Court (Mr. Du Plessis sitting as a court of first instance):

(a.)The appeal is dismissed.
(b.)Sentence of 15 years is confirmed.

JUDGEMENT

M Madima AJ (N.B Tuchten J concurring):

M Madima AJ (N.B Tuchten J concurring):

[1.] The appellant was arraigned in the Regional Court of Gauteng held at Brakpan on two charges namely: Murder read with the provisions of Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 (Hereinafter referred to as 'Act 105 of 1997') and Assault with intent to do grievous bodily harm. All offences were committed on the same date but on different persons namely Lindiwe Mnadlantse (the deceased in the first count) and Themba Abram Mthethwa (complainant in the second count).

[2.] The appellant was, on the 11 September 2014, ultimately convicted as charged and sentenced on the 26 September 2014, to undergo 15 years imprisonment on first count in line with Act 105 of 1997 and one year imprisonment on second count. Sentences were ordered to run concurrently.

[3.] On reading the heads of argument and hearing oral arguments advanced for the appellant, it is evident that contest in the appeal squarely lies against the imposed sentence of 15 years imprisonment only.

[4.] The matter is before us after leave to appeal, limited exclusively to sentences, was granted by the trial court, *per* learned regional court magistrate Mr. Du Plessis (Hereinafter referred to as the 'learned Magistrate') on the 23 October 2014.

[5.] At this juncture, I deem it convenient to highlight the factors, both extenuating and aggravating, relevant for sentence. The mitigating factors picked up from the record are as follows: appellant was 29 years old; unmarried and had a child aged seven (7) years. However the child is under immediate care of the grandmother; the appellant was gainfully employed, earning a salary of R280.00 per week; he also had been in custody since 27 December 2011 until he was sentenced on the 26 September 2014 (The total period is two (2) years and nine (9) month in custody prior to finalization of the matter). The learned magistrate also touched on a factor of intoxication while analyzing presented facts for purposes of sentence.

[6.] The factors aggravating the sentence are the following: The crime was domestic violence related in that the deceased and the appellant were involved in love relationship which at the time of incident had lasted for about three years; the deceased was a defenseless person and sustained multiple injuries as evidenced by medico-legal examination document handed up to court by consent and appellant displayed no remorse. Lack of remorse is inferred from his behavior during the time of crime. After injuring the deceased and before knowing that she was dead, he did not even care to call for help to save her dear life. He was good at displaying selfishness by running for his life and spending the whole night in his bed while the deceased remained lying in the street. In court, despite the presence of overwhelming evidence pointing towards his guilt, he continued to relentlessly shift the blame to the complainant in the second count for the death of the deceased. He has streams of previous convictions of housebreaking cases. They are unrelated to the present offence forming the subject matter of appeal. Nevertheless the learned magistrate, I dare venture, rightly considered those previous convictions for purposes of sentence.

[7.] The appeal court will not lightly descend and interfere with sentence unless it appears that one or more of the following grounds exist namely:

(i.) that the sentence is vitiated by irregularity; and/or

(ii.) that there was misdirection, and/or

(iii.) that the sentence is disturbingly inappropriate.

S v Rabie 1975 (4) SA 855 (A)[1]

[8.] The legal representative for the appellant laid the following grounds to challenge the sentence of 15 years imposed on the appellant:

(i) That the trial court erred by not finding that substantial and compelling factors existed;

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[1] See also *S v Mtungwa en in Andere 1999 (2) SACR 1 (A)*

(ii) Alternatively, the learned magistrate erred by not obtaining further information or pre-sentence report to enable himself to pass an appropriate sentence. I understand the submission to mean that, the learned magistrate was not furnished with enough mitigating factors for purpose of considering appropriate sentence. In short he was not well placed to consider sentence.

[9.] I regret to state that the above criticisms are devoid of substance. Above, I have outlined the personal factors presented by the appellant's legal representative during trial proceedings to mitigate sentence and all those factors are encompassed in the judgment of the court *a quo*. The learned magistrate had before him enough facts and was best placed to decide on appropriate sentence.

9.1. At sentencing stage, there appears to be a notion that once a person is convicted of a serious offence, such a person is eligible to pre-sentencing report. This is the notion legal practitioners should be disabused of. Where the convicted person is the primary care-giver or is a child, but not limited exclusively to that, it is very important that pre-sentence report should be obtained. However as to whether in a given case, pre-sentence report is necessary, it will depend on the facts of the case.

In ***S v Chetty***[2] the Court said that:

" The purpose of a probation officer's report in a case such as this, in which the magistrate's concern was whether the appellant was the primary caregiver of his daughter and the impact of the sentencing of the appellant on her best interests, was dealt with in S v M 2007 (2) SACR 539 (CC) (Centre for child' law as Amicus Curiae) Sachs J stated that, while a trial court should find out whether a convicted person is primary caregiver whenever there are indications that there might be so, it was not necessary to obtain a probation officer's report in every case: the accused could be asked for the necessary information or be required to lead evidence if needs be."

[2] 2013(2) SACR 142 (SCA) at para [10]

In the case before us, the appellant was not a primary care giver of his child. The grandmother is taking care of the child. The legal representative who appeared for the appellant at the trial proceedings was commended by the learned magistrate for doing sterling work in the execution of his duties by saying the following: "*There is something that I have great reservations about, Mr Kathrada is a respected and competent criminal court lawyer who has been serving this court at Brakpan and legal Aid South Africa with distinction at the time I have been at the Brakpan office*".[3] The legal representative has undoubtedly placed all relevant factors in mitigation of sentence.

9.2. The learned magistrate considered the mitigating factors as well as the aggravating factors at face value. In my view, the learned magistrate had in mind the *dictum* in the case of ***S v Siebert***[4] which enjoins the courts to be inquisitive at sentencing stage and not to proceed to sentence before receiving all facts relevant to sentencing.

[10.] There was further submission that the trial court erred by not taking into consideration the period spent by the appellant in detention while awaiting finalization of the trial. The following constitute the factors I assured to deal with:

10.1. The appellant was out on warning in this matter but in custody on other cases.[5]

10.2. On the 11 September 2014 the appellant was then kept in custody in respect of this matter whose sentence he now appeals. The above date is the date on which the appellant was convicted.[6]

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[3] Paginated record line 21 of page 146
[4] 1998 (1) SACR 554 (A)
[5] Paginated page 4 and 5 (Court Appearance)
[6] Paginated page 6 (Court Appearance) and Paginated pages 140-150 of record (Judgment)

10.3. The above explains why the appellant was kept in custody on 11 September 2014.

10.4. The crimes giving rise to this appeal were committed on the 17 December 2010 *as per* annexure of charge sheet.

10.5. The appellant's legal representative submitted that the appellant was kept in custody from 27 December 2011. His detention on the above date followed a year after this crime forming subject matter of appeal was committed. This explains that his detention on the above date is unrelated to this appeal matter but other charges.

10.6. When analyzing the above, I am satisfied that the appellant, in respect this appeal matter, was outside custody from the year 2010 until his detention in 2011.

10.7. On reading the record, appellant was sentenced in respect of other crimes long after charges related to this appeal had been laid.[7]

10.7.1. On the 11 December 2012 the appellant was sentenced to 6 years imprisonment.

10.7.2. On 16 May 2013, he was sentenced to undergo 7 years imprisonment.

[11.] The submission that the appellant had been in custody since 27 December 2011 till he was sentenced in the year 2014 is not relevant to this case. In this

[7] Paginated page 55 (Record of previous conviction)

matter the appellant was out on warning and that submission probably played a pivotal role prior to sentencing the appellant in respect of those matters for which he was detained.

[12.] All authorities that I have consulted are clear about the effect intoxication has on sentence. It should be borne in mind that it is not enough to just place on record that the person was under the influence of liquor and therefore the sentence should be light. In ***S v M***[8], Nienaber JA said: "*Liquor can arouse senses and inhibit sensibilities. It is for the state to discount it as a mitigating factor, to show that it did not materially affect the appellant's behavior*".

[13.] The effect the liquor had on the person of the appellant was not placed on record save to only place on record that he was under the influence of liquor. Appellant's reliance on liquor is a poor excuse. The appellant was able to chase the complainant in the second count and also able run away from the scene. The intoxication factor which the appellant seeks to rely on is not persuasive.

[14.] What also aggravates the sentence is that after he had committed the above crimes, whose sentences he now appeals, and before being sentenced, he continued, albeit unrelated, to commit other crimes to wit housebreaking charges. His continuous engagement in criminal activities after the commission of this appeal matter, tips the scale in favour of the prosecution. The submission that the previous offenses are unrelated to the current matter cannot persuade the court to turn a blind eye to them (previous convictions).

[15.] I have considered the triad in the case of ***S v Zinn***[9] and I have found that the aggravating circumstance are, by far, outweighing the mitigating factors. I am of the view that there was no misdirection or irregularity on the part of the learned

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[8] *1994 (2) SACR 24 (A) at 29g,*
[9] *1969 (2) SA 537 (A)*

magistrate at the sentencing stage. I am also of the view that the sentences were not disproportionate to crimes committed.

[16.] In the case of Machango v S[10] Shongwe JA said at para [16]:

"The *nature of the offense is no doubt serious. Murder is in my view, the most serious offense as the deceased cannot be replaced and no amount of compensation or punishment of any nature can substitute his life-hence s 11 of the Constitution protects life by providing that – 'everyone has the right to life'*".

It is for the above reason, to wit seriousness of the offence of murder and other serious offenses that the legislature promulgated Act 105 of 1997. The disputes between the appellant and the deceased could have been resolved by not resorting to far reaching actions which consequently resulted in the unfortunate incident of the loss of life.

[17.] In ***S v Malgas***[11] Marais JA said:

'*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'*

The trial proceedings, in particular at sentencing stage, were not affected by irregularities.

Marais JA (Malgas case) continued at 480a-b by saying:

'*It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so*'.

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[10] (20344/14) [2014] ZASCA 179 (21 November 2014

[11] *2001 (1) SACR 469 (SCA)* at 478d-e

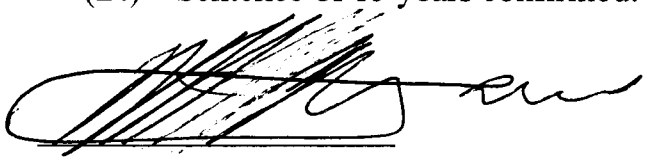
The appellant, through his records of previous convictions and particularly his continuation to commit further crimes for which he was ultimately sentenced before this matter which constitutes appeal was finalized, showed utter indifference to the laws of the country and the lives of other people. I talk of the disrespect for the lives of people because, had the complainant in the second count not blocked, by his hand which as a result thereof got injured, the knife aimed at his chest by the appellant, we would be talking of two counts of murder or attempted murder in respect of the second count.

At page 481c-d Marais JA warned that the courts should not lightly depart from prescribed sentences for flimsy reasons.

[17.] After careful assessment of all the factors which the court *a quo* assessed as well, I find no basis to fault the trial court in the exercise of its discretion in imposing the prescribed sentence of fifteen (15) years.

Having said the above I propose the following order:

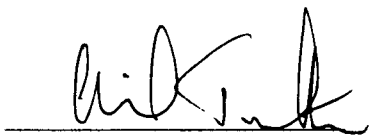
(A.) Appeal against sentence is dismissed.
(B.) Sentence of 15 years confirmed.



M MADIMA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

I agree and it is so ordered



N. B TUCHTEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

APPEARANCES:

For Appellant: M.B MOLOI

INSTRUCTED BY PRETORIA JUSTICE CENTRE

PRETORIA

For Respondent: Adv. Van Der Merwe

INSTRUCTED BY THE NATIONAL PROSECUTING AUTHORITY

PRETORIA