REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: A390/2016
DPP REF NUMBER: SA95/2016

- REPORTABLE: YES/ NO
- OF INTEREST TO OTHER JUDGES: YES/NO
- REVISED.

07/11/2017 : Mangena
DATE SIGNATURE

In the matter between:

SIPHIWE NKOSI First Appellant

SIZWE DLADLA Second Appellant

and

THE STATE Respondent

JUDGMENT

MANGENA, AJ:

[1] The appellants appeared in the Regional Division, Gauteng held at Benoni on charges of murder read with provisions of sections 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997, robbery with aggravating circumstances as intended in section 1 of Act 51 of 1997, unlawful possession of a firearm and unlawful possession of ammunition in contravention of the provisions of sections 3 and 90 respectively read with

sections 1, 103, 117, 120(1)(a), section 121 read with Schedule 4 and section 151 of the Firearms Control Act, 60 of 2000 and further read with section 250 of the Criminal Procedure Act 51 of 1977.

[2] They pleaded not guilty to all the charges and after considering the evidence, first appellant was found guilty on all 4 (four) counts, and second appellant was found guilty of robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977. The trial court sentenced them as follows:

First Appellant

- Count 1: Murder – 20 years imprisonment
- Count 2: Robbery – 20 years imprisonment
- Count 3: Possession of firearm – 15 years imprisonment
- Count 4: Possession of ammunition – 5 years imprisonment

It was ordered that sentences on counts 3 and 4 would run concurrently with sentence on Count 1.

It was further ordered that 10 years imprisonment on Count 2 would run concurrently with the sentence on Count 1. The effective sentence was therefore 30 years imprisonment.

Second Appellant

Count 2: Robbery – 20 years imprisonment.

[3] The appellants applied for leave to appeal in respect of sentence only and same was granted on 29 April 2016. The record does not show any basis upon which the application for leave was made nor the reasons for granting it. All that counsel for the appellants said was that:

"*All the facts are before the court and it is my opinion that another court could come to a different sentence. I will ask that the leave be granted.*"

The court in its "*judgment*" on application for leave to appeal said the following:

"*I have listened to the application for leave to appeal against sentence only and I listened to the arguments raised by the state as well. However I would like to offer you an opportunity to proceed with your application for leave to appeal against sentence.*"

[4] I am constrained to remark briefly on both the conduct of the attorney and the magistrate regarding the leave to appeal. It is an established rule of practice that a party applying for leave to appeal should furnish grounds upon which the application is based, and the magistrate hearing the application should furnish reasons why leave is granted or refused. The importance of giving reasons for the decision is not difficult to comprehend. It is to protect the integrity of the court in the eyes of the public. The public needs to know why other people are granted leave to appeal whilst others are refused.

[5] The Constitutional Court expressed the position succinctly in *Strategic Liquor Services v Mvumbi and Others*, 2010 (2) SA 92 (CC) when it said the following:

"*[14] It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigant's rights, and an impediment to the appeal process. In Botes and Another v Nedbank Ltd, Corbett JA pointed out that 'a reasoned judgment may well discourage an appeal by the loser.*

The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did.

...

[16] Judges (Magistrate as well) ordinarily account for their decision by giving reasons ... and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons – explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions ... And finally, it provides guidance to the public in respect of similar matters."

GROUNDS OF APPEAL

[6] The appellants attack the sentence imposed broadly on two fronts, namely that, the sentences imposed by the trial court are shockingly harsh and inappropriate, and that the Regional Magistrate erred in imposing the maximum sentence without informing the legal representative of the

appellants of his/her intention to do so, and further by not providing reasons for imposing the maximum sentence.

[7] It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appellate court's power to interfere with the sentences imposed by the lower court is circumscribed. The Constitutional Court in S v Bogaards 2013 (1) SACR 1 stated the position as follows:

"Ordinarily, *sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could impose it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another".*

[8] The appellants were convicted of serious offences upon which the legislature has prescribed minimum sentence. The provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 have to be taken into account in the determination of the appropriate sentence. These provisions provide for the imposition of a minimum sentence. The court can only deviate from imposing the prescribed minimum sentences if it is satisfied that there are substantial and compelling circumstances justifying a lesser sentence.

[9] Counsel for the appellants submitted that the trial court misdirected itself on matter of law with regard to a finding that the Criminal Law Amendment Act is applicable when the charge sheet did not reflect that the state is relying on section 51 (2) of Act 103 of 1997 on charge 3 (possession of a firearm).

[10] There is merit in this contention. The Constitutional Court held in Ndlovu v S, 2017 SACR 305 (CC) that magistrates court are creatures of statute and have no jurisdiction beyond that granted by the magistrate's court Act and other relevant statute. Accordingly the sentencing jurisdiction is limited to the charge which was complete and not defective. The magistrate was therefore not competent to impose a sentence upon reliance on section 51 (2) of Act 105 of 1997 when same was not disclosed to the accused prior to conviction. This finding applies with equal force in this case. The imposition of fifteen years on count 3 constitutes a misdirection.

[11] Counsel further urged us to find that the trial court erred by not ordering sentences to run concurrently in respect of the first appellant. However a careful reading of the record shows that the robbery count is not linked to the murder in any way. The established principle relating to multiple offences was stated in S v Muller, 2012 (2) SACR 545 (Leach JA as follows:

> "When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be

imposed, in order to ensure that the aggregate penalty is not too severe".

In S v Mthethwa; 2015 (1) SACR 302, para 21-22, Makgoka J expressed the same view when he said the following:

"When the accused person is convicted of more than one offence, it is a salutary practice for a sentencing court to consider cumulative effect of the respective sentences. An order that the sentences should run concurrently may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment. An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and importantly the fact that they were committed with one common intent".

[12] The trial court took into account the above considerations and arrived at the conclusion that 40 years may be too long and ordered 10 years of the 20 year sentence to run concurrently with sentences on count 1. The two offences were not related in terms of time, location and protagonist nor were they committed with single intent. In the premises I am not persuaded that there was a misdirection in this regard.

[13] The last and final leg of the submissions related to the imposition of a 20 year sentence on robbery. Counsel urged us to find that 20 years is inappropriate and induces a sense of shock. She submitted that an appropriate sentence would be 12 years in view of the fact that the victim

recovered his items and he was not injured in the course of robbery. She further argued that the prescribed minimum sentence for robbery with aggravating circumstances is 15 years. Consequently the trial court erred by imposing 20 years. I agree that 20 years is disproportionate to the offence.

[14] Counsel for the appellants further sought to persuade us to deviate from the prescribed sentences on the basis that the appellants have favourable personal circumstances and that they spent 2 years in custody awaiting trial. It should also be taken into account that the victim was not harmed during robbery and had recovered all his items. Consequently the above should be considered to constitute the substantial and compelling circumstances justifying a deviation from prescribed minimum sentences on a charge of robbery. (see S v Ndlovu, 2007 (1) SACR 535 SCA para 13.

[15] Counsel for the respondent on the other hand argued that although the sentences can be said to be harsh, they are not shockingly inappropriate such that there should be an interference by the appellate court.

[16] In *S v Malgas*, 2001 (2) SA 1222 SCA), the court said that the prescribed sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

[17] The correct approach to an appeal on sentence imposed in terms of the Act is different to an approach to other sentences imposed under the ordinary sentencing regime. This is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. See *Bailey v S* 2013 (2) SACR 533 (SCA).

[18] The trial court has considered the personal circumstances of the appellants, took into account the interests of the society as well as the nature of the offence committed. The court described the callousness at which the first appellant killed the deceased and arrived a decision that an appropriate sentence will be as it has ordered.

[19] The trial court's decision cannot be faulted. Counsel for the appellants concedes in his heads of argument that the community should be protected from these kind of offenders and be free to roam the streets freely, without fear of being attacked and robbed of their hard-earned possessions. He further concedes that direct imprisonment is the only appropriate sentence (heads of argument p 8, par 15).

[20 Our courts have over the years expressed deep concern about the rising level of violent crimes in our society and endeavoured within its limited space to stem the tide but the violence is continuing uncontrollably. The courts shall, as they are duty bound continue, to send a message to the offending public that crime in general and violent crime in particular will not be

tolerated. In this regard, I align myself with the views of Plasket J (as he then was) when he says:

"*Society has a legitimate interest in seeing that those who devastate the lives of people through the use of violence, and who use violence to steal from others are appropriately punished and that the punishment imposed reflects societal censure and an appropriate measure of retribution.*" *S v Jaxa* unreported EC 10/2009 par 10 quoted in *S v Langeni* 2012 (1) SACR 413.

[21] The other ground of appeal related to the imposition of a sentence of 20 years in respect of robbery with aggravating circumstances. The appellants contend that they should have been forewarned of the intention by the magistrate to impose a sentence in excess of the 15 years prescribed by the Act. The Supreme Court of Appeal has already dealt with this issue and in keeping with the principles of *stare decisis*, this aspect should not detain us long. In *S v Mthembu*, 2012 (1) SACR 517 (SCA) the court said that:

"*[18] It may well be a salutary practice for a court if it holds a view adverse to a particular litigant to put that to the litigant or such litigant's representative during argument. But we cannot imagine that where a view is just in its embryonic stage, a failure to do so, without more, would constitute a defect in the proceedings ...*"

The same position was followed in *Shubane v The State* [2014] ZASCA 148 (26 September 2014) where it was stated that:

"*[7] It was contended on behalf of the appellants that the Regional Magistrate had misdirected himself by not forewarning the appellants that he contemplated imposing a sentence in excess of the minimum sentence of 15 years statutorily prescribed for this type of offence. The appellants' legal*

representative should have given an opportunity to make submissions on why a sentence in excess of the prescribed minimum should not be imposed. These contentions are misplaced. There is no duty in our law upon a sentencing officer to forewarn an accused person of such a contemplation or to grant an opportunity for submissions to be made in this regard. In Mthembu, this court endorsed the view that no such forewarning is required. And this court also upheld that full court (KZN) finding that Mbatha was wrongly decided."

[22] In the circumstances, it is my view that there was no misdirection or irregularity on the part of the trial court regarding the failure to forewarn the appellants of its intention to impose a 20 year sentence. This does not however mean that the 20 year imprisonment is appropriate. I have already pointed out elsewhere in this judgment that 20 years induces a sense of shock and is disproportionate to the offence. In my view there are substantial and compelling circumstances to deviate from the prescribed minimum sentence on robbery. Failure by the trial court to find substantial and compelling circumstances constitutes a misdirection.

[23] In view of the misdirections pointed out above regarding the sentence on count 2, 3 and 4, this court is justified to interfere with the sentences imposed. This will affect the cumulative sentence on appellant 1.

[24] In the premises the following order is made:

First appellant

1. The appeal on count 1 is dismissed.
2. The appeal against sentence on count 2, 3 and 4 is upheld.

3. The sentences imposed by the trial court on count 2,3 and 4 are set aside.
4. The appellant is sentenced as follows:

   Count 2: 10 years

   Count 3: 5 years

   Count4: 2 years

   Five years of the sentence on count 2 and the sentence on count 3 and 4 are ordered to run concurrently with sentence on count 1.

   The effective sentence is 25 years.

Second appellant

1. The appeal against sentence is upheld.
2. The sentence imposed by the trial court is set aside
3. The second appellant is sentenced to 10 years imprisonment.
4. The sentence in respect of both appellants are antedated to 29 April 2016.

M I MANGENA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

It is agreed and so ordered.

H J FABRICIUS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA