REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A890/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) ~~REVISED.~~

23/5/2018 .....

DATE MOKOSE SNI

In the matter between:

SEBATA EDWIN MOLOTSI Appellant

and

THE STATE Respondent

JUDGMENT

MOKOSE AJ

[1] The appellant, on petition was granted leave to appeal against sentence. The appellant was convicted on 24 June 2016 as charged, on one count of murder of Mabatho Emily Makhetha and sentenced to 20 years imprisonment.

[2] The appellant pleaded not guilty to the charge. The appellant's plea explanation was that he had had an argument with the deceased as she wanted to end the relationship. A scuffle ensued with her. She had a knife in her possession which the appellant tried to grab from her. In so doing, he inadvertently hit her on the head twice with a hammer.

[3] The offence fell within Part II of Schedule 2 of The Criminal Law Amendment Act 105 of 1997 ("the Act"). As such, the judge was obliged to sentence the appellant, as a first offender to a sentence of not less than 15 years imprisonment unless "substantial and compelling circumstances" existed in terms of S 51(3) of the Act, which justified the imposition of a lesser sentence.

[4] The appellant appeals against sentence on the ground that the sentence is vitiated by irregularity, misdirection or is one which no reasonable court would have come to. The appellant avers that the magistrate had misdirected himself in that he:

(i) failed to exercise his discretionary power to impose a lesser sentence in circumstances where the minimum sentence is applicable; and

(ii) failed to apprise the appellant of the fact that he was contemplating imposing a higher sentence than the minimum provided for in S51 of the Act.

[5] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was violated by misdirection. The trial court considers for the purposes of sentence, the following:

a. The seriousness of the case;

b. The personal circumstances of the Appellant;

c. The interests of society.

S v Zinn 1969 (2) SA 537 (A)

[6] The approach followed by the court of appeal when dealing with sentence was outlined by Makgoka J in the matter of **S v Mayisela 2013 (2) SACR 129 (GNP)** as follows:

"[13].....It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of the trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Petkar 1998 (3) SA 571 (A); S v Snyder 1982 (2) SA 694 (A); S v Sadler 2000 (1) SACR 331 (SCA) [2000] 2 All SA 121 and Director of Public Prosecutions, Kwazulu-Natal v P 2006(1) SACR 243 (SCA) [2006(3) SA 515; [2006 (1) all SA 446 para 10.*

[7] In terms of the proviso in Section 51(2) of the Act the maximum term of imprisonment that a Regional Court may impose shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than 5 years.

[8] Section 51(2) of the Act read with Part II of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 was explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are compelling and substantial reasons to deviate

from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.

S v Matyityi 2011 (1) SACR 40 (SCA) at 53 E-F

[9] In determining the sentence imposed, the *court a quo* considered the following mitigating circumstances:

a. The Appellant was 38 years old at the time of the commission of the offence;

b. The Appellant had four children aged 6, 10, 13 and 16 years respectively;

c. The Appellant's highest level of education was Grade 12;

d. The Appellant was employed at the time of the offence earning the sum of R4 100,00 per month;

e. The Appellant was a first-time offender.

[10] The Magistrate considered that this was a particularly savage attack on the deceased in which the appellant's sister tried to intervene on several occasions. When the deceased who had been stabbed with a knife by the appellant had tried to hide under a table, he pushed his sister out of the way to get at the deceased. He then took a hammer and bludgeoned her on her head. When the hammer was taken away from him, he took another hammer and hit her on her head again.

[11] The Magistrate acknowledged that the mitigating circumstances would ordinarily be taken into consideration in ascertaining whether there are substantial and compelling circumstances in departing from the prescribed minimum sentence but in this matter,

he imposed a higher sentence (the maximum sentence) because of the severity of the offence and the lack of remorse on the part of the appellant.

[12] The court's attention was brought to the judgment in the case of **S v Maake 2011 (1) SACR 263 (SCA)** at para 19, where it held that it was not only a salutary practice, but obligatory for judicial officers to provide reasons to substantiate their conclusions. The court went on to state in para 20:

"When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order that he did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice."

[13] However, the court in the matter of **S v Mthembu 2012 (1) SACR 517 (SCA)** held that the approach that the failure to apprise the defence of the fact that a higher sentence than the minimum provided for in S51 of the Act was in contemplation by the sentencing court constitutes, without more, a defect in the proceedings, cannot be endorsed.

[14] On a thorough reading of the record, it is evident that the magistrate contemplated imposing a higher sentence than the minimum provided for in the Act and that he gave reasons for his departure therefrom. As such, it cannot be said that there is a defect in the proceedings.

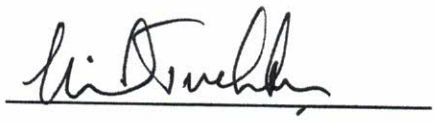
[15] In the premises I make the following order:

The appeal by the appellant against sentence is dismissed.

MOKOSE AJ

Acting Judge of the High Court of South Africa Gauteng Division, Pretoria

I agree and is so ordered



TUCHTEN J

Judge of the High

Court of South Africa

Gauteng Division,

Pretoria

For the Appellant:

Adv A Thompson instructed by

Legal Aid South Africa

Justice Centre

Pretoria

For the State:

Adv A De Klerk instructed by

The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 21 May 2018

Date of judgement: May 2018