IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No AR 643/05

In the matter between:

NTOKOZO MAGWAZA **APPELLANT**

versus

STATE **RESPONDENT**

JUDGMENT

Delivered on:

GORVEN J:

[1] On 29 October 2002, the deceased, Bhekisisa Phillip Buthelezi, was walking home. He was the school principal at Mpumazi School. He was carrying groceries for his wife and five children and money in order to meet his household requirements. He was set upon by two assailants who demanded his money and cellphone. A struggle ensued between the deceased and one assailant. The other assailant, who was in possession of a firearm, shot him in the chest. He died on the scene from that wound. This resulted in the appellant, who was accused two at the trial, and another person, who was accused one at the trial, being arraigned on a count of murder and one of robbery with aggravating circumstances. They were both convicted as charged and the appellant was sentenced to a period of life imprisonment on count one and a term of 15 years

imprisonment on count two. An application for leave to appeal against his conviction was refused but leave to appeal was granted by the trial court on sentence. It is that appeal which serves before us.

[2] In imposing the sentence on count one, Moleko J invoked the provisions of s 51(1) read with part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (the Act). As regards count two, he invoked the provisions of s 51(2) read with part 2 of Schedule 2 to the Act. The first of these prescribes a sentence of life imprisonment unless substantial and compelling circumstances warrant a downward departure from that sentence. The second prescribes a sentence of between 15 years and life imprisonment unless substantial and compelling circumstances warrant a downward departure. It is clear that the crimes with which he was charged, and of which he was convicted, fall within the ambit of the sections invoked by Moleko J. It is also clear from the record that the first mention that these sections might be invoked was during the proceedings leading up to the sentencing of the appellant after he had been convicted.

[3] It has been authoritatively held in *S v Langa*[1] that in these circumstances, the reliance on those provisions by a trial court 'amount to a material misdirection, rendering the trial on sentence substantively unfair, and requiring the sentence on this count to be considered afresh'.[2] That is therefore the position in the present matter relating to the sentences on both counts. They are vitiated by misdirection and this court is at large to determine appropriate sentences*de novo* by considering 'the triad consisting of the crime, the offender and the interests of

[1]2010 (2) SACR 289 (KZP).
[2]*Langa* Para 35.

society'.[3]The sentences must be arrived at without reference to the provisions of the Act.

[4] The appellant was a first offender. He turned 21 on 5 April 2004. He had passed grade 12 and was studying sound engineering at Allenby College in Durban. He had obtained a learner driver's license. He had no children and was not employed.

[5] The two crimes took place in the same sequence of events. The robbery with aggravating circumstances turned into a murder. Both crimes were gratuitous, in the sense that there was no particular motive to attack the deceased other than that of greed. There was also no indication that either of the accused was at risk or in any way acted in self-defence. It resulted in the death of a productive member of society who was held in high esteem in his community. He was the breadwinner for his family and leaves behind a wife and five children. They can no longer rely on his support. They took his life in exchange for a Nokia cell phone and some money. It is of some importance that the trial court found that, as regards the murder of the deceased, there was no direct intention on the part of the appellant and his co-accused. Whilst this finding might not be fully supported by the evidence or the other findings, it has not been challenged and must stand for the purpose of the sentencing of the appellant.

[6] As regards the interests of society, the legislature has promulgated the Act which was referred to above. Whilst these provisions cannot be invoked, they give an indication as to the attitude of the elected members of this society to the crimes in question. They must be viewed in the most serious light. Every citizen should feel free to walk the streets with

[3] *S v Zinn* 1969 (2) SA 537 (A) at 540F-G.

groceries and money in their possession without fearing that they will be robbed or murdered. Society therefore demands some form of retribution for offences such as these. In addition, however, society has an interest in the rehabilitation of offenders so that, on the restoration to society, they become productive members and depart from lives of crime. Where there is a prospect of rehabilitation, therefore, the courts are required to pass sentences with a view to providing an incentive to become rehabilitated. Unduly lengthy sentences may well be counter-productive in this regard.

[7] Mr Barnard, who appeared for the appellant, referred us to the case of *S v Jibiliza*.[4] In that matter, the appellant, with two co-accused, had been convicted of housebreaking with intent to rob and to murder, of murder, of robbery with aggravating circumstances and with attempted murder. In respect of the murder charge the appellant was sentenced to death. Prior to the appeal being heard, the Constitutional Court had ruled that capital punishment is unconstitutional and the sentence of death imposed must therefore be set aside. The appellant in that case had previous convictions but none in the 12 years prior to committing the offences concerned. The murder was committed with *dolusdirectus*. It took place on the farm of the deceased, by breaking into the farmhouse and are costing the deceased and his wife. The appeal Court held that the fatal assault was prolonged, determined and merciless and was accompanied by the desire to kill. It was categorised as falling within the category of the most serious instances of murder. A sentence of 25 years' imprisonment was imposed for the murder charge which, with the other sentences being made to run concurrently to a certain extent, provided for an effective sentence on all counts of 30 years' imprisonment.

[4] 1995 (2) SACR 677 (A).

[8] In the light of the above mentioned case and taking into account the relative youth of the appellant, the fact that he is a first offender and his productive life up to the date of the commission of the crimes, it is my view that there are prospects for his rehabilitation. As mentioned, the crimes in question were gratuitous and arose purely from greed. They are therefore amongst the most serious of such crimes. They cannot, however, rank on the same scale as that in Jibiliza. This means that the ultimate sentence of life imprisonment is not appropriate in these circumstances. An appropriate sentence on the count of murder would, in my view, be 20 years' imprisonment. That on the count of robbery with aggravating circumstances would, in my view, be 10 years imprisonment. It would, in my view, be appropriate if the appellant was sentenced to an effective term of imprisonment of 25 years. Since the two crimes were committed during the same course of conduct, it is appropriate that five years of the sentence on the count of robbery with aggravating circumstances be made to run concurrently with the sentence on the count of murder.

[9] In the result the following order issues:

1. The appeal against the sentences imposed on the appellant is upheld.
2. The sentences imposed on the appellant are set aside and substituted by the following sentences:
    a. On count 1, the accused is sentenced to a period of 20 years' imprisonment.
    b. On count 2, the accused is sentenced to a period of 10 years imprisonment.
    c. Five years of the sentence on count 2 will run concurrently with the sentence imposed on count 1.

d. The sentences will run from 7 April 2004.

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GORVEN J

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PATEL JP

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PLOOS VAN AMSTEL J

DATE OF APPEAL: 6 September 2013

DATE OF JUDGMENT: 12 September 2013

FOR THE APPELLANT: L Barnard

FOR THE RESPONDENT: HM Zulu