IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR 254/2014

In the matter between:

SIPHIWE BONGUMUSA SHEZI APPELLANT

and

THE STATE RESPONDENT

ORDER

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1. The appeal is dismissed.

JUDGMENT

Delivered on 17 February 2015

BEZUIDENHOUT, AJ

1. Appellant was convicted on a count of housebreaking with intent to commit murder and murder and sentenced to life imprisonment. He appeals against his sentence with leave of the court *a quo*.

2. Appellant was 21 years of age at the time, a first offender and a student. He had been in custody for approximately 18 months. There was friction at the time between the families of the

deceased and that of appellant who were taxi owners. The learned magistrate found that the substantial and compelling circumstances must be real and not deductions by the court. He considered the manner in which the attack took place and that appellant was not alone at the time. He considered the youthfulness of appellant and found that there were no substantial and compelling circumstances.

3. At about 10 o'clock in the evening appellant and two others approached the home of the deceased and informed them that they were members of the South African Police Services. When the occupants of the house saw that they were not police officers and refused to open the door, they broke down the front door of the house entered it and asked why they had been charged and shot the deceased where he was in his bedroom. The deceased sustained multiple gunshot wounds to the head and other parts of his body.

4. In **S v Malgas** 2001 (1) SACR 469 (SCA) it was held that the specified sentences should not be departed from lightly and for flimsy reasons. It further held that "if a sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal, and the

needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In **S v Matyityi** 2011(1) SACR 40 (SCA) it was held that parliament had ordained minimum sentences for certain specified offences and that these were to be imposed unless there were truly convincing reasons for the departure thereof. Further that a person of 20 years or more has to show by acceptable evidence that he was immature to the extent that the immaturity was a mitigating factor.

No such evidence was placed before the court *a quo*. On the contrary the conduct of appellant on the day in question showed the opposite. Appellant was upset because he had been charged. As a result he attacked and killed the deceased at his home together with his two accomplices. The manner in which the attack was conducted proves that it was indeed premeditated. It is clear that appellant together with two others approached the home of the deceased with the intention to kill him. It was a brutal attack upon the deceased, during the evening, at his home where he should have been safe. Appellant together with the others took the law into their own hands.

5. Mr Barnard appearing on behalf of appellant submitted that the learned magistrate misdirected himself by referring to the rehabilitation of appellant but then imposing a life sentence. Even if this is so it must still be established whether the sentence imposed by the court *a quo* was a just sentence in the circumstances. We were referred to the following cases where less than life imprisonment were imposed: **S v Sangweni** 2010 (1) SACR 419 (KZP) at 423F where it was held that the fact that appellant was relatively young being 30 years of age, was gainfully employed and a first offender, weighed in his favour. However, in the case of **Matyityi** referred to above at 53f the Supreme Court of Appeal held that courts should not resort to concepts such as "relative youthfulness".

In **S v Au and Another** 2014 (2) SACR 91 (GP) a sentence of 20 years imprisonment was imposed on a conviction of murder. It held at 97c "The third appellant had neither planned nor premeditated the murder of the deceased on count 2. Accordingly the sentence of life imprisonment in the circumstances was in my view not in terms of the law and should be set aside." It is distinguishable as in the present case the murder was premeditated. **DPP, North Gauteng, Pretoria v Gcwala** 2014 (2) SACR 339 (SCA), two hired killers were each

sentenced to 20 years imprisonment. This case is also distinguishable as the state conceded that there were substantial and compelling circumstances.

6. Reverting to the present case, appellant was 21 years of age at the time of the incident and attacked the deceased for no other reason that the deceased had caused him to be charged. Appellant and his cohorts conducted themselves that evening with utter disregard for the sanctity of human life. The age of appellant at the time of the commission of the offence together with the fact that he was a first offender in my view do not amount to substantial and compelling circumstances justifying a lesser sentence. In **S v Barnard** 2004 (1 SACR) 191 (SCA) it was held at 194d "A court sitting an appeal on sentence should always guard against eroding the trial court's discretion in this regard and should interfere only where the discretion was not exercised judicially and properly." In this case the prescribed minimum sentence is not unjust and is not disproportionate to the crime and the needs of society and the personal circumstances of appellant. It cannot be said that the magistrate did not exercise his discretion judicially and properly in determining the sentence. There is no justification for a deviation therefrom. The sentence is in my view appropriate in the circumstances.

I would accordingly propose that the appeal be dismissed:

ORDER:

1. The appeal is dismissed.

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BEZUIDENHOUT AJ

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K. PILLAY J I agree

APPEARANCES:

Date of Hearing:	12 February 2015
Date of Judgment:	17 February 2016
APPELLANT'S COUNSEL: Instructed by:	Mr L. BARNARD c/o PMB Justice Centre Pietermaritzburg Tel: 033 394 2190
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