IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR7/2015

In the matter between:

VUSI ISRAEL MADONDO — APPELLANT

and

THE STATE — RESPONDENT

Coram : Gorven, Seegobin et Olsen JJ
Heard : 27 January 2016
Delivered : 9 February 2016

ORDER

On appeal from the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Barnard AJ, sitting as a court of first instance):

The appeal against sentence is dismissed.

JUDGMENT

SEEGOBIN J (Gorven et Olsen JJ concurring):

[1] This is an appeal against sentence. The appellant was indicted before Barnard AJ in the High Court, Pietermaritzburg, on ten (10) counts. At the conclusion of the trial he was convicted on three (3) counts, viz on count 2, he was convicted of robbery with aggravating circumstances, on count 3, of murder and on count 4 of attempted murder. The nature of these offences brought the matter within the purview of s51 of the Criminal Law Amendment Act 105 of 1997 (the Act) which prescribes minimum sentences for certain serious offences unless substantial and compelling circumstances were found to exist. Having found that no substantial and compelling circumstances existed which warranted the imposition of lesser sentences than those prescribed by the Act, for the offences in question, the trial court imposed a sentence of 15 years imprisonment on count 2, life imprisonment on count 3 and five years' imprisonment on count 4. The present appeal is with leave of the court *a quo*.

[2] On behalf of the appellant it was contended that the sentences imposed by the court *a quo* induce a sense of shock and are grossly inappropriate in the circumstances of this case. It was argued that the court *a quo* failed to attach sufficient weight to the following personal circumstances of the appellant, viz (a) that he was 25 years old when the offences in count 2 was committed and 26 years old when those in counts 3 and 4 were committed, (b) that he was self-employed earning an amount of R2000.00 per month, (c) that he was single with two children aged 13 and 10 years respectively and who were supported by him, (d) that his highest level of education was matric, and (e) that he is HIV

positive and also suffers from meningitis. It was submitted that the court *a quo* should have found substantial and compelling circumstances by virtue of the fact that the appellant was a first offender, that he was HIV positive and suffering from meningitis.

[3] The State, on the other hand, submitted that the sentences are not unduly harsh nor are they shockingly inappropriate. It further submitted that there was nothing in the personal circumstances of the appellant (as outlined above) which amount to substantial and compelling circumstances. It contended that although the trial court remarked that the appellant had favourable personal circumstances, it correctly found that these had to yield to the seriousness of the offences committed.

[4] I do not consider it necessary to deal in any great detail with the evidence on the specific counts. I believe, however, that one needs a brief backdrop in order to appreciate why the court *a quo* considered the respective sentences to be appropriate in the circumstances.

[5] The incident involving the robbery with aggravating circumstances on count 2 occurred during the evening of 22 December 2005 at a house in the Mpolweni area in the district of New Hanover. The complainant Mr Cebo Gasa testified that he operated a spaza shop from one of the rooms in the house. On the evening in question he was in the company of one *Zakhele* and *Mlondozi*. They had already closed up the house and the shop and were preparing for bed when someone knocked on the door saying that he wanted to buy something. When Mr Gasa went to open the door it was suddenly pushed open and two persons entered. One of them was armed with a firearm and the other with a knife. Their faces were covered with balaclavas. The person armed with the firearm grabbed hold of Mr Gasa and demanded money and airtime. When Mr

Gasa responded that they did not have any of these items, other assailants were called in from outside. In the meantime Mr Gasa was being strangled and his companions *Zakhele* and *Mlondolozi* were instructed to lie under the bed. The other assailants who entered the house also had their faces covered with balaclavas. At some point Mr Gasa managed to break loose from his attackers. He ran to the main house to sound the alarm.

[6] The assailants stole a large quantity of cigarettes from the spaza shop and fled. Later Mr Gasa and his companions found packets of cigarettes lying both on the inside and on the outside of the premises. These were shown to the police. It was from one of these packets that a fingerprint belonging to the appellant was uplifted. Save for alleging that his fingerprint may have been planted there by the police, the appellant could offer no other explanation of how his fingerprint would have ended up on a cigarette packet which was found on the floor of the tuck-shop after the robbery was committed.

[7] As far as the offences on counts 3 and 4 are concerned these were committed during the late afternoon of 19 November 2006 at a tavern in Sobantu in the district of Pietermaritzburg. The evidence established conclusively that it was the appellant and another male person who entered the tavern and fired numerous shots at the deceased in count 3 killing him instantly. The complainant in count 4, who was in the company of the deceased and sitting close to him at the time, was also struck and injured when he tried to flee. The trial court further found on the evidence that the appellant and his co-assailant had first entered the tavern in order to ensure that the deceased was present. They then left the tavern and within a short time they re-entered armed with firearms and opened fire on the deceased. The trial court concluded that the appellant and his co-assailant exhibited a common purpose to kill the deceased in count 3 and that they were reckless as to whether or not anyone else

who was present at the tavern at the time would be killed or injured in the process.

[8] In imposing the prescribed minimum sentence of 15 years on count 2, the trial court reasoned that the offence was an extremely serious one. It considered that the complainants were doing their best to operate a simple business, namely, a tuck-shop in order to generate an income, only to be attacked in the privacy of their home, have firearms pointed at them and be manhandled and bullied by armed assailants including the appellant.

[9] As far as the sentences on counts 3 and 4 are concerned, the trial court found that the killing of the deceased was pre-meditated and appeared to be a revenge attack of some sorts. The photo album (Exhibit "A") showed that there were thirteen spent cartridges found on the scene. According to the post-mortem examination report which was admitted by the defence, the deceased had died of multiple gunshot wounds to his head and body. The trial court found, correctly in my view, that it was simply incredible that more people did not lose their lives. It was clear that the appellant and his co-assailant had shown a complete disregard for human life and were reckless as to whether or not other patrons frequenting the tavern at the time would also be injured or even killed.

[10] In deciding the issue of substantial and compelling circumstances the trial court adopted the approach set out by Nugent JA in the matter of *S v Vilakazi*[1] in which the learned Judge of appeal said the following at paragraph [15]:

> "It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a Court in every case before it imposes a prescribed

[1] 2009(1) SACR 552 (SCA).

sentence to assess upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is, indeed, proportionate to the particular offence."

[11] In light of the above the trial court then proceeded to carefully consider the circumstances surrounding the commission of each of the offences set out above. In respect of the robbery conviction on count 2, it reasoned that the appellant had shown a complete lack of respect for the property and well-being of others and that the prescribed sentence was, indeed, proportionate to the particular offence. As far as the convictions on counts 3 and 4 are concerned, it considered that society needed to be protected from a person who behaves in a manner as the appellant did in this case. It accordingly found that the appellant had failed to prove the existence of substantial and compelling circumstances which would have justified a legitimate deviation from the prescribed minimum sentences.

[12] In my view, the above approach and reasoning of the trial court cannot be faulted in any way. It is clear that the appellant showed a blatant disregard for people's lives and property. I am according not persuaded that the sentences imposed by the trial court are unduly harsh or shockingly inappropriate. In the result, the appeal against sentence falls to be dismissed.

ORDER

[13] The order I make is the following:

The appeal against sentence is dismissed.

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_____ _____ I agree

GORVEN J OLSEN J

Date of Hearing	:	27 January 2016
Date of Judgment	:	9 February 2016
Counsel for Appellant	:	Mr EX Sindane
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	Mr JM Khathi
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg