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

CASE NO: AR139/2023

In the matter between:

MLUNGISI GOODMAN SOSHA MTHEMBU **Appellant**

and

THE STATE **Respondent**

ORDER

On appeal from: the High Court of South Africa, KwaZulu-Natal North Eastern Circuit Local Division, Mtunzini (Chili J, with an assessor presiding):

1. The appeal against the sentence of 25 years imposed for Murder (Count 1) is upheld;
2. That sentence is set aside and replaced with a sentence of 20 years imprisonment;
3. The sentence of 5 years imprisonment on count 2 is confirmed with that sentence to run concurrently with that imposed on count 1.
4. The sentences are ante-dated to 3 May 2021.

JUDGMENT

Henriques J (E Bezuidenhout J and Mchunu AJ concurring):

Introduction

[1] This is an appeal against the effective sentence of 25 years' imprisonment imposed by the high court in respect of the convictions for murder and theft of a motor vehicle handed down on 3 May 2021.

[2] The appellant was indicted on two counts in the North Eastern Circuit Local Division, Mtunzini. Count 1 as reflected in the charge sheet was murder read with the relevant provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the Act'), in that the appellant was alleged to have killed Tholokele Maureen Sithole ('the deceased') on 13 or 14 January 2019 in circumstances where the murder of the deceased was planned or premeditated. Count 2 related to the theft of the deceased's Renault Sandero motor vehicle.

Grounds of appeal

[3] The appellant advances two main grounds of appeal. In respect of the first ground of appeal, he submits that the court *a quo* erred in imposing a sentence of 25 years' imprisonment in respect of the murder count in light of the fact that the minimum prescribed sentence of 15 years' imprisonment was applicable given the trial court's finding that the murder was not premeditated.

[4] Although the appellant concedes that the court *a quo* had unlimited sentencing jurisdiction, the appellant submits that the court *a quo* misdirected itself in not finding substantial and compelling circumstances to have existed given that this was a crime of passion and the court did not properly consider the appellant's personal circumstances, especially that he was a first offender.

[5] The court committed a misdirection in that s 51(2) of the Act provides for a sentence of 15 years' imprisonment for first offenders convicted of murder and there is nothing in the judgment of the court *a quo*, which justified a marked deviation of ten years from the prescribed minimum of 15 years imprisonment to 25 years. No grounds of appeal are advanced in relation to count 2, save that it was appropriate for the court *a quo* to order the sentences to run concurrently.

Submissions

[6] At the hearing of the matter, *Mr Thengwa*, who appeared for the appellant, submitted that the sentence imposed by the court *a quo* does not reflect an element of mercy nor does it give proper recognition to the fact that this was a crime of passion. He submitted that the court *a quo* overemphasised the aggravating circumstances surrounding the commission of the offence and made no mention of the fact it was a crime of 'passion'.

[7] Mr *Magwaza*, for the respondent acknowledged that the court *a quo,* when sentencing the appellant, was greatly influenced by the aggravating features of the matter. He further acknowledged that although the court *a quo* also accepted that this was a crime of passion, it did not, when sentencing the appellant, indicate why it still was of the view that a sentence of 25 years' imprisonment was justified.

Background facts

[8] The appellant, who was legally represented at the time, pleaded not guilty to both counts. In amplification of his plea, he prepared a detailed written statement, referred to by the court *a quo* as a 'thesis' in which he detailed the circumstances under which the deceased met with her untimely death. In summary, he indicated that they were in a love relationship and he discovered that she had been unfaithful.

[9] When he discovered this, he confronted the deceased and they argued. Sometime later, whilst at the deceased's house, he was in the bedroom and the deceased in the kitchen when she called out to him and asked for his assistance having accidentally dropped hot water on herself. He poured cold water over her. As he did that she took hold of and squeezed his genitalia as to inflict pain on him. They tussled as a consequence.

[10] During the course of this tussle, he put his hands around the neck and began throttling her. She lost consciousness and when she regained consciousness she cried out the word ‘clinic’ indicating by that that she needed medical attention. They left the deceased’s home with him driving her vehicle so as to obtain medical assistance. The deceased, who was seated in the front passenger seat of the vehicle, slumped over after a short while and hit her head on the dashboard. It was then that he noticed that she was no longer breathing.

[11] He panicked and drove to his home where he covered her and left her seated in a slumped position on the back seat. He remained seated in the car for a while. He subsequently drove around and returned home with the body of the deceased and transferred it into boot of the vehicle. He attempted to solicit the assistance of his friend Andile Mahaye (Mr Mahaye) to help him dispose of the body of the deceased to no avail. The body of the deceased remained in the boot of the vehicle. A few days later, he drove to a sugar cane field in the Nyoni area where he discarded the body of the deceased.

[12] The respondent did not accept the facts as contained in the appellants written plea explanation and presented evidence to the contrary. In essence, the evidence presented was from Mr Mahaye who testified in terms of s 204 of the Criminal Procedure Act 51 of 1977 and who painted a different version of events. It emanated from his evidence the appellant had reported to him that the deceased and the appellant had an altercation on the night of her death during which he strangled the deceased with a cord from a kettle. He thereafter attempted to enlist the assistance of Mr Mahaye to dispose of the body of the deceased but Mr Mahaye avoided the appellant for a number of days. Eventually, Mr Mahaye relented and assisted the appellant to dispose of the body of the deceased in the sugar cane field.

[13] Mr Mahaye’s evidence was corroborated by that of Ms Natalie Linda (Ms Linda), a traditional healer, who confirmed his explanation as regards the circumstances under which the deceased met her untimely death, but she also shed light on the fact that she performed a ritual cleansing on Mr Mahaye, the appellant and the appellant’s daughter shortly after the body of the deceased had been disposed of. In addition, she accompanied the appellant to Mr Malcolm Naidoo on

the day the appellant attempted to sell the deceased's motor vehicle. She subsequently confirmed that after they had disposed of the car of the deceased, both of them returned home separately. She subsequently learnt of the appellant's arrest.

[14] An application for the discharge of the appellant in terms of s 174 of the Criminal Procedure Act was refused. The appellant testified and called no witnesses. His evidence in essence confirmed the contents of his written plea explanation and discounted the version of the respondent's witnesses where their evidence did not align with the contents of his plea explanation.

The judgment of the court a quo

[15] When convicting the appellant the judgment of the court concluded as follows: 'The accused is according found GUILTY AS CHARGED OF MURDER of Tholakele Sithole COUNT 1. The accused is also found GUILTY AS CHARGED ON COUNT 2 theft of a motor vehicle belonging to the deceased Tholakele Maureen Sithole.'

[16] During the sentencing phase of the proceedings, the legal representatives presented argument as to whether the murder was planned or premeditated and thus whether life imprisonment applied. This was done at the request of the court. One is not certain why this was done at this stage of the proceedings given the finding referred to in paragraph 15 above.

[17] The appellant's legal representative submitted that in the absence of premeditation, the maximum sentence applicable would be that of 15 years imprisonment as the offence fell within the parameters of s 51(2), and Part II of Schedule 2 of the Act. The respondent's representative submitted that the murder was premeditated but argued in the alternative, that if the court agreed with the appellant's legal representative that the maximum sentence was 15 years imprisonment, the court ought to deviate upwards from such sentence given the aggravating circumstances which prevailed.

[18] There appeared to be confusion with the sentencing jurisdiction of the high court compared with that of the regional court in relation to the applicable sentence for murder in circumstances where same was not premeditated.

[19] When sentencing the appellant, the court *a quo* was of the view that the respondent had not established that the murder of the deceased was premeditated and hence the prescribed minimum sentence of life was not applicable. It held as follows:

'There is no evidence to suggest that he either planned or premeditated the killing of the deceased. All evidence points in one direction only: that the ultimate killing of the deceased was a result of a prolonged heated argument between the deceased and the accused. I am therefore not persuaded that it was sufficiently established that the killing of the deceased was premeditated.'

[20] The court *a quo* expressed the view that the evidence suggested that the deceased's persistent denial that she was cheating on the appellant in the face of proof is what infuriated him and the 'killing of the deceased was as a result of a prolonged heated argument'.

[21] When sentencing the appellant the court *a quo* was alive to the fact that the prescribed minimum sentence was 15 years' imprisonment and that it had to consider whether substantial and compelling circumstances existed warranting a deviation from the prescribed minimum sentence if it found such to exist. The court *a quo* considered the appellant's personal circumstances, and found favour with the fact that the appellant was a first offender and faced no pending charges. An aggravating feature, which weighed heavily with the court, was the fact that the offence was a serious one (murder) and that the appellant had killed his lover and the mother of his child.

[22] It relied heavily on the evidence of Ms Linda that the appellant had reported to her that he had unsuccessfully tried to kill the deceased twice by strangling her with the cord. The events, which occurred in relation to the disposal of the body of the deceased was also a factor, which weighed heavily with the court.

[23] Having considered all the factors cumulatively the court *a quo* remained unpersuaded that there were substantial and compelling circumstances warranting the imposition of a lesser sentence than that prescribed by law. In fact, the court *a*

quo was of the view that the aggravating circumstances warranted the imposition of a sentence in excess of that prescribed by the minimum sentencing legislation. It remarked:

'Instead, I hold the view that there exists aggravating circumstances that warrant imposition of a sentence in excess of that prescribed by law.'

[24] The court appeared to draw an analogy with s 51(2) of the Act, which empowers a regional court to increase the sentence by no more than five years, if circumstances permit. It held:

'Section 51(2) of the Criminal Law Amendment Act, 105 of 1997, entitled the Court to impose a higher sentence than that prescribed by law in given circumstances. It specifically confines the Regional Court, **not the High Court,** to increase sentence by no more than five years if circumstances permit.' (emphasis in original)

This appears to be the reason why it sentenced the appellant to 25 years' imprisonment on count 1 and 5 years' imprisonment on count 2, directing the sentences to run concurrently.

Analysis

[25] The powers of an appellate court to interfere with the sentence imposed by a lower court are circumscribed. This is consistent with the principle that the imposition of an appropriate sentence resides pre-eminently within the discretion of the trial court. The appellate court may interfere with the sentence imposed in circumstances where there are material misdirections, which vitiate the exercise of its discretion and an appellate court is then entitled to consider the question of sentence afresh. In the absence of a material misdirection, the appellate court may interfere with the sentence imposed if the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed is so marked that it can be described as shockingly, startlingly or disturbingly inappropriate.[1]

[26] Our courts have taken to impose heavy sentences on accused persons in circumstances where the deceased is the victim of domestic abuse or violence. Courts have emphasised that they have an obligation to impose appropriate

[1] *S v Malgas* [2001] ZASCA 30; 2001 (1) SACR 469 para 12; *Director of Public Prosecutions v Mngoma* [2009] ZASCA 170; 2010 (1) SACR 427 (SCA) para 11.

sentences in circumstances where violent crimes are committed especially by men against women as domestic violence has become pervasive and endemic.[2]

[27] Marais JA in *S v Roberts*[3] said the following:

'It [the sentence] fails utterly to reflect the gravity of the crime and to take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships.'

[28] The appellant's personal circumstances in my view are not out of the ordinary. I accept that he is a first offender and that the circumstances under which he found himself when he committed the offence do evoke a measure of sympathy. His trust in the deceased was utterly shattered as a consequence of her unfaithfulness. Mr Mahaye testified that they both found the deceased with her lover in compromising circumstances. I accept that the appellant was emotionally distressed by the conduct of the deceased and in all likelihood felt seriously betrayed by her. However, whatever sympathy one may have for him, that should not unduly influence an objective and dispassionate consideration of an appropriate sentence.

[29] The court *a quo* accepted that the prescribed minimum sentence was that of 15 years given that the murder was not premeditated. It found no substantial and compelling circumstances warranting a deviation from imposing such sentence. What it did was deviate from imposing the prescribed minimum sentence but upwards.

[30] Whilst I acknowledge that there is no limit to the sentencing jurisdiction of the high court, what is not evident from the judgment of the court *a quo* are the aggravating circumstances it found to exist warranting a deviation from the prescribed minimum sentence of 15 years, save for the following:

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[2] *Mudau v S* [2014] ZASCA 43 para 6, *Maila v The State* [2023] ZASCA 3 paras 59-60.
[3] *S v Roberts* 2000 (2) SACR 522 (SCA) para 20.

‘The conduct of the accused amounted to a gross disregard of human life. He dumped the body of the deceased as if he was disposing of trash. He subjected the body of the deceased to scavengers and that, in my view, is despicable.’

[ ] I accept that the conduct of the appellant was not excusable but given the failure of the court a quo to deal with the aggravating circumstances which warranted the imposition of the sentence imposed, we are of the view the court *a quo* committed a misdirection, and we are at large to impose sentence afresh. It warrants mentioning that given the facts presented by the respondent’s witnesses and the court’s rejection of the appellant’s version, it is not clear why the court found the murder to not have been premeditated. The evidence of Ms Linda and Mr Mahaye was unchallenged that the appellant attempted to strangle the deceased on two occasions with a cord and that he had time to ‘cool down’ from the time he and Mr Mahaye observed her with her lover earlier on during the day.

Order

[31] In the result the following order will issue:

1. The appeal against the sentence of 25 years imposed for Murder (Count 1) is upheld;
2. That sentence is set aside and replaced with a sentence of 20 years imprisonment;
3. The sentence of 5 years imprisonment on count 2 is confirmed with that sentence to run concurrently with that imposed on count 1.
4. The sentences are ante-dated to 3 May 2021.

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HENRIQUES J

CASE INFORMATION

Date of Hearing:	14 June 2024
Date of Judgment:	18 September 2024

For Appellant:	Mr Thengwa Legal Aid The Marine Building 22 Dorothy Nyembe Street Durban Email: MzothandoT@legal-aid.co.za
For Respondent: Instructed by:	Mr D S Magwaza DPP 286 Pietermaritz Street Pietermaritzburg Tel: 033 845 4485 Email: Dmagwaza@npa.gov.za