IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
29th February 2008 DATE
SIGNATURE

CASE NO: A487/2007

In the matter between:

TSEPO GERALD PHOOFOLO — Appellant (Accused 2)

and

THE STATE — Respondent

JUDGMENT

SALDULKER, J:

[1] The appellant was charged with the following counts:

1.1 Attempted robbery with aggravating circumstances;

1.2 Murder;

1.3 Murder.

[2] After having pleaded not guilty to all three counts he was duly convicted and sentenced to:

2.1 On Count 1: 10 years' imprisonment.

2.2 On Count 2: Life imprisonment.

2.3 Count 3: Life imprisonment.

[3] Effectively the appellant was sentenced to life imprisonment. The appellant applied for leave to appeal against his conviction and sentence and the same was refused by the court *a quo*. The appellant then petitioned the Supreme Court of Appeal and was granted leave to appeal against his conviction and sentence on 12 May 2006. However, this appeal is against sentence only as the appeal against the conviction is not being proceeded with by the appellant.

[4] The evidence which resulted in the conviction of the appellant can be summarised as follows:

4.1 On 24 July 1998 and at Galway Gardens, Germiston Mr Visser and his daughter Mrs Van Wyk were accosted by four men, one of whom was the appellant. They attempted to rob Ms Van Wyk of her Volkswagen Golf vehicle. Accused 1 was armed with a firearm.

4.2 The appellant (who was accused 2) , accused 3 and 4 were unarmed. In the course of the robbery accused 1 shot and killed both Mr Visser and Ms Van Wyk. Accused 1 was convicted of their murders with dolus directus.

[5] There is no evidence that the appellant physically participated in the murder of the deceased or tried to harm them in any way. The appellant's conviction was based on *dolus eventualis* . The court *a quo* found that all the accused acted in concert and actively associated themselves with the furtherance of the common purpose in attempting to rob Ms Van Wyk of her vehicle. This finding is not being attacked in the present appeal and is clearly correct.

[6] It is settled law that a Court of Appeal may alter or interfere with the sentence imposed by a trial court only when the sentence imposed is vitiated by irregularity or misdirection or is shockingly inappropriate.

[7] In its heads of argument the state has conceded that the trial court misdirected itself in the manner it applied the minimum sentence provisions as set out in section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act).

[8] It is not in dispute that the learned judge in the court a quo misdirected himself when he found that because of the provisions of section 51 he was precluded from taking certain mitigating factors into account. He stated that had he done so, he would have sentenced the accused to substantial periods

of imprisonment but not to life imprisonment as stipulated in the Act. The trial Judge expressed himself as follows: "*as I read the Act a number of mitigating features I would have taken into account does not appear open to me. Firstly, there is the youth of the accused ..... As can be seen from the provisions of Section 51, the section provides for life sentences for persons from the age of 18 upwards and, in my view, it is clear that the legislature did not regard youth as a mitigating feature for the purposes of sentencing.*" In addition to this the trial judge did not regard the fact that the accused had no previous convictions and that he had been convicted as a result of dolus eventualis, as mitigating factors.

[9] The learned judge went on to hold that *"there appears to be a very good reason for the legislature to have excluded what normally are regarded as mitigating circumstances ...".* The incorrectness of this view is fully demonstrated in a judgment by the Supreme Court of Appeal delivered about a year after that of the present case.

[10] In *S v Malgas* 2001 (2) SA 1222 (SCA) the question of minimum sentence legislation as expressed in the Act was specifically dealt with. In defining the meaning of the words "*substantial and compelling circumstances*", Marais JA who delivered the judgment of the court at page 1231A-H stated the following:

> "*Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin*

sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration.

[10] To the extent therefore that there are dicta in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (for example, age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling."

[11] In S v Tshisa and Another 2003(1) SACR 171 (O) , the Full Bench of the Orange Free State Provincial Division ,Van Coller, Hancke and Rampai JJ per Van Coller J at 175 commenting on the youthfulness of an accused who was a first offender, found that this was a substantial and compelling circumstance which had to be taken into account in sentencing the two

accused in that case. In Tshisa the two accused were 17 years and 8 months and 17 years and 5 months respectively at the time they committed the crimes with which they had been charged and convicted. The court held that despite a cold- blooded and repulsive murder having been committed by the two accused, in view of their youthful age, and the fact that they had not yet been caught up in wickedness and could still develop into responsible adults, it would be an injustice to sentence them to life imprisonment. In that case each sentence was reduced from life imprisonment to 22 years imprisonment.

[12] In *S v Nkosi* 2002 (1) SACR 135 (W), a Full Bench consisting of Blieden J, Cachalia J (as he then was) and Jordaan AJ, held that the youthfulness of the accused, a 17 year old youth , was a substantial and compelling circumstance which had to be taken into account. Cachalia J speaking for the court, at page 147(i) stated as follows:

> "*The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances will be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.*"

These sentiments were confirmed in two decisions in the Supreme Court of Appeal namely: Brandt v The State [2005] 2 ALL SA 1 (SCA) and in S v B 2006 (1) SACR 1 (SCA). In my view the sentiments expressed in all these cases is in line with that expressed in the full bench decision of the Orange Free State in Tshisa.

[13] However sentiments of a different nature were expressed in this division in S v Obisi 2005(2) SACR 350 , in a Full Bench decision per Goldstein, Makhanya and Tsoka JJ Makhanya J speaking for the court dealt with a sentence of life imprisonment on a 21 year old first offender and found that his relative youth was not a substantial and compelling circumstance sufficient to warrant a lesser sentence than that prescribed by the legislature ie life imprisonment for murder. Unfortunately that court appears not to have been referred to the dicta in either Tshisa or Nkosi in coming to the conclusion it did.

[14] In Obisi at page 354 (paragraph [15]) the learned judge stated :

"Moreover the appellant at the commission of these offences was no longer a youth or juvenile. At 21 years he was an adult, albeit a young adult. In any event , the gravity of the offence of murder in the circumstances of this case, including the fact that the crime was carried out for financial gain, militates against imposition of a lesser sentence."

[15] However this view was criticised by a later Full Bench judgment in the same division. In Nhlanhla Sibanda v State, Case No. A942/05 an unreported judgment of the Full Bench consisting of Blieden J, Goldblatt J and Malan J , delivered on 5 May 2006 , Blieden J speaking for the court stated as follows:

"The danger with this approach in categorising offenders as 'juveniles' or 'adults' and the focusing on age is that the effect of youthful immaturity may be overlooked. Age may be important in certain cases where legislation make certain consequences dependent on a specific age ... but the whole debate about juveniles really concerns immaturity (or the lack of ability to act properly

within the dictates of the law) due to youthfulness, irrespective of the age of the offender. This is made clear in Brandt, S v B, Nkosi and Tshisa."

[16] In my view the position of the appellant is different from accused 1 who fired the fatal shots that killed the two deceased. The appellant did not physically participate in the killing of the two deceased nor did he shoot them callously and cold-bloodedly like his co-accused , accused 1 did.

[17] The personal circumstances of the appellant were placed on record. The appellant himself did not testify in mitigation of sentence. The appellant was a young man 22 years old at the time of the offence with no previous convictions. The father of the appellant testified that the appellant was matriculated and had been once a student at the Germiston College studying Chemical Engineering.The father was employed at the South African Breweries for 20 years and had been planning to enrol the appellant for vocational guidance at the Wits University as he had not done well at the College. The appellant had been raised with good values and came from a fortunate and caring background.

[18] In view of all of the aforegoing, there are factors which may be regarded, cumulatively as substantial and compelling circumstances allowing this Court to deviate from the prescribed sentence of life imprisonment .As was stated by Blieden J in *Shibanda's* case (*supra*):

> *"[13] The objection to life imprisonment in the case of a youthful person as stated in the above quoted passage in Nkosi applies*

equally well to the case of a youthful person who is not a child, but by the very nature of his action is an immature person."

[19] We have been informed that accused 3 (in the court a quo),and who received a similar sentence as the appellant in casu, lodged an appeal against the sentence imposed on him and a Full Bench of this Division consisting of Schwartzman J, Van Oosten J and Tsoka J (April Xolile v S, Case no A1249/2004, judgment delivered on 11 February 2005) set aside his sentence and imposed the following sentence on him:

Count 1: 10 years' imprisonment.

Count 2: 25 years' imprisonment for the murder of Mr Visser.

Count 3: 25 years' imprisonment for the murder of Ms Van Wyk.

[20] Furthermore the sentences imposed on counts 1 and 3 were ordered to run concurrently with the sentence imposed on count 2 – an effective sentence of 25 years imprisonment. The sentence imposed was antedated to 15 May 2000.(The date upon which the sentences of life imprisonment were imposed).There appears to be no reason to deviate from this.

[21] The count of attempted murder appears to be part and parcel of a single course of criminal conduct and for this purpose I would order that the sentence on counts 1 and 3 run concurrently with the sentence on count 2.

[22] In the result I make the following order:

22.1 The appeal against the sentences imposed on the appellant is upheld.

22.2 The sentences imposed on counts 2 and 3 by the trial Court are set aside and in their place the following sentences are substituted and such sentences are to operate from 15 May 2000:

22.2.1 . 10 years' imprisonment on count 1 – attempted robbery.

22.2.2 25 years' imprisonment on count 2 – the murder of Lesley Visser.

22.2.3 25 years' imprisonment on count 3 – the murder of Belinda van Wyk.

22.3 The sentences imposed on counts 1 and 3 are to run concurrently with the sentence imposed on count 2. The appellant is sentenced to an effective 25 years imprisonment. The sentences so imposed are antedated to 15 May 2000 being the date upon which the sentences of life imprisonment were imposed.

H SALDULKER
JUDGE OF THE HIGH COURT

I agree:

P BLIEDEN
JUDGE OF THE HIGH COURT

I agree and it is so ordered:

Z L TSHIQI
JUDGE OF THE HIGH COURT