REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A300/2014

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

19/3/2015 MAHALELO
DATE SIGNATURE

In the matter between:

MALATJIE KODI **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MAHALELO A J:

[1] The appellant appeals against the sentence imposed upon him by the Regional Magistrate sitting at Alexander. The appeal is pursuant to leave having been granted by this court. The appellant was charged with housebreaking with intend to commit Murder and Murder read with the provisions of section 51(2) Act 105 of 1997 and Attempted Murder.

[2] The appellant was legally represented. He pleaded not guilty to both counts. On the 1 December 2011 he was convicted on both counts and

sentenced to 18 years imprisonment on count one and 15 years imprisonment on count two. In terms of section 103 (1) Act 60 of 2000 he was declared unfit to possess a firearm.

[3] The facts of the case as regards the merits can be summarised as follows:
The deceased was the accused's girlfriend. During the night of the 18 November 2008 she was in her bedroom. The accused broke open the door of her bedroom. He entered and attacked her. He stabbed her not less than 9 times with a knife all over her body. The deceased's brother came into the bedroom and witnessed the accused stabbing the deceased with a knife. The accused ran away. The deceased staggered out of the bedroom. She had multiple wound on her body including the head, the hands and arms. The ambulance was summoned and she was certified dead upon arrival. The accused was arrested for her Murder. He was later released on bail.

[4] On the 19 February 2011 the deceased brother, the complainant in the second count was at his place of residence. It was at night. He was in the company of his girlfriend. He was busy warming up the food when he heard a knock at his door. When he asked who it was he received no response. He switched on the outside light and went to open the door. He stood next to the burglar guard. When he lifted his head up he saw the accused standing in front of the door. The accused fired a shot at him. He drifted backwards and pushed the door to close. He was shot on the left side of his neck. His girlfriend summoned the ambulance. He was taken to Johannesburg hospital where he was admitted for three weeks. The accused was arrested and tried for the two offences.

[5] The appeal against sentence is generally focussed on the following grounds , that:
The seriousness of the offence, the interest of the society as well as the interest of the accused ought to be taken into consideration. The appellant's submission is that the court *a quo* overemphasised the seriousness of the offences and the interest of the society and did not give the necessary

consideration to the interest of the accused resulting in a sentence that is shockingly harsh and inappropriate.

[6] It is trite that imposition of sentence is pre-eminently a matter within the discretion of the trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed, had it been the trial court.

[7] As to the nature of a misdirection which entitles a court of appeal to interfere. The following was stated in S V Pillay 1977 (4) SA 531 (A):

"Now the word "misdirection" in the present context simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."

[8] In the present case, the trial court took into consideration the serious nature of the offences, and carefully balanced them against the appellant's personal circumstances which were placed on record as follows. He was 31 years old at the time of sentencing. He was unmarried but has one minor child. He was employed as a driver earning R10 000.00 a month. He has a previous conviction of malicious damage to property dated 6 September 2006.

[9] In our view there is nothing extra ordinary in the accused's personal circumstances. The trial court found that there are no compelling and substantial circumstances. We find no fault with that finding.

[10] The appeal also raises the issue that the learned magistrate did not inform the parties that he might consider a sentence of more that the prescribed minimum, and did not provide reasons for the departure from the minimum sentence.

[11] There is no merit in the submission for the following reasons;
The Learned Magistrate sets out various aggravating factors which led him to conclude that a more severe punishment other than the prescribed minimum sentence would be appropriate. These are the following:- The brutal manner in which the murder was committed, the fact that the appellant and deceased were involved in a romantic relationship, no less than 9 stab wounds inflicted upon the deceased by the appellant, lack of remorse by the appellant and the deceased being survived by two minor children aged 6 and 10.

[12] Having regard to all the conspectus of the matter we do not find any misdirection in the manner in which the trial court considered sentence in count one. There is no evidence to suggest that the sentence is vitiated by irregularity and the sentence is not shockingly disproportionate in the circumstances of the case.

[13] Counsel for the appellant contended as far as the sentence in count two is concerned, that the sentence of 15 years imprisonment is vitiated with irregularity and is disturbingly inappropriate in that the prescribed minimum sentence for an offence such as the present is not less than 5 years imprisonment for a first offender, not less than 7 years imprisonment for a second offender and not less than 10 years for a third and subsequent offender, provided that the maximum a regional court may impose is a term of imprisonment not exceeding 10 years.

[14] There is no merit in the submission calling upon the appeal court to interfere.

[15] Furthermore counsel for the appellant contended that the trial court did not take sufficiently into account the cumulative effect of sentences imposed.

[16] The cumulative effect of sentences is an issue that has received the attention of courts over a period of time. See *Mahlakaza and Another v S [1997] (2) ALL SA 185 A at 194-195. S v Mahlatsi 2013 (2) SACR 625 (GNP) and S V Muller 2012(2) SACR 545 (SCA).*

[17] In the present case the appellant killed and attempted to kill members of the same family. It was at different times. There are also a number of aggravating features in the conduct of the appellant, least of all the callous violence perpetrated upon the victims of his actions. It is clear that human life is of value to people like him. The appellant's conduct is definitely a social deviant one.

[18] The appellant was on bail for the offence in count one when the committed the offence in count two. A period in excess of two years elapsed in between the commission of the two offences, the complainant in the second count was to give material evidence against the appellant in respect of count one. Counsel for the state argued that the appellant is not remorseful of his actions. Non-admission of blame by the appellant need not be held against him per se. However it is my view that after the details of what he did as told by the surviving complainant, one would have expected the appellant to relent to what he was proven to have done. His own evidence according to the record did not cast any doubt on the truthfulness of the eyewitnesses account. This, in our view is an aggravating factor. It is therefore necessary that the particular circumstances of each case should be given consideration when an appropriate sentence is assessed. In S v Muller 2012 (2) SACR 545 (SCA) Leach JA said the following:

" *When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too* severe"

[19] In this case it is our view that appellant was fortunate to have escaped life imprisonment when one considers the gravity of his crimes.

[20] We have considered the possibility of postponing the matter to afford the appellant and the regional magistrate the opportunity to submit further reasons why we should not increase the sentence. As the procedure involves numerous complications we have decided against that.

[21] In the light of the fact that his offences would have attracted life imprisonment it would be difficult for us to find that a sentence of 33 years imprisonment for the two offences is "unduly harsh" and" inappropriate".

{22] We therefore find no reason to interfere with the sentence imposed by the regional magistrate.

[22] For the reasons stated above I propose that the following order be made:-

[22.1].Appeal against sentence is dismissed.

[22.2] The order declaring the appellant unfit to possess a fire–arm pursuant to the provision of section 103 (1) Act 60 of 2000 is confirmed.

M B MAHALELO
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

I AGREE

B VALLY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPELLANT : ADV M BOTHA
COUNSEL FOR RESPONDENT: ADV H. S RUBIN

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