REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

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

16/8/2013
DATE

SIGNATURE

Case No: A885/12

16/8/2013

Coram: The Hon Mr Justice AML Phatudi, J; The Hon Mr Justice A De Vries; and, the Hon Mr Justice AA Lamprecht, AJJ

In the matter between:

NHLANHLA SOLOMON DLAMINI **APPELLANT**

versus

THE STATE **RESPONDENT**

JUDGMENT

LAMPRECHT, AJ:

Introduction

[1] Appellant was originally one of three accused persons charged with murder, robbery with aggravating circumstances, kidnapping, unlawful possession of a fire

arm and unlawful possession of ammunition. The other two accused, in different proceedings pleaded guilty (accused no 2 only on the counts of unlawful possession of a fire arm and ammunition and accused no 3 on all five counts); and, they were sentenced separately (accused no 2 to a term of imprisonment wholly suspended for 5 years and accused no 3 to an effective term of imprisonment of 35 years).

[2] The trial of appellant was then separated and he was arraigned before Hussain J on all five counts. He pleaded not guilty and, after a trial on the merits, he was convicted on all counts and sentenced as follows:

(a) Count 1 - murder: Life imprisonment;

(b) Count 2 - robbery with aggravating circumstances: 15 years imprisonment;

(c) Count 3 - kidnapping: 5 years imprisonment;

(d) Count 4 - unlawful possession of a fire arm: 5 years imprisonment; and

(e) Count 5 - unlawful possession of ammunition: 2 years imprisonment.

[3] His appeal to the Full Court lies against sentence only - leave to appeal having been granted on petition by the Supreme Court of Appeal.[1] Counsel for the appellant has not argued that any of the sentences for kidnapping or the unlawful possession of a fire arm and ammunition are inappropriate, and attacks only the sentences of life and 15 years imprisonment imposed on counts 1 and 2 respectively.

[1] Navsa JA and Plasket AJA.

[4] Sentencing, famously, is a matter pre-eminently falling squarely within the purview of the trial court's discretion, which should not lightly be interfered with.[2] A sentence should only be interfered with on appeal where, (i) an irregularity occurred; (ii) the trial court materially misdirected itself on the question of sentence; or, (iii) the sentence could be described as so disturbing that it induces a sense of shock. The mere fact that any or all the judges sitting on an appeal would have imposed another sentence, be it heavier or more lenient, if he presided in first instance, is not enough reason for a court of appeal to interfere with the sentence imposed. This much is trite.[3]

The facts - nature (seriousness) of the crimes

[5] The facts upon which appellant was convicted can be summarised as follows:

5.1 Deceased, one Reforce Smith Masuku, himself a notorious character (awaiting trial in a hijacking matter and a person known to buy stolen goods and illicit fire arms) apparently told appellant, whom he knew, that he was interested in buying a fire arm.

5.2 Appellant and the former accused no 3 then approached the former accused no 2 who had a fire arm and ammunition for sale. This is the fire arm and the ammunition that form the subject matter for the charges of unlawful possession thereof - a 7.65mm pistol and ammunition.

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[2] See *S v De Jager and Another* 1965 (2) SA 616 (A); *S v Rabie* 1975 (4) SA 855 (A); *S v Petkar* 1988 (3) SA 571 (A) at 574C

[3] See *S v Pillay* 1977 (4) SA 531 (A) at 535E-G; *S v Holder* 1979 (2) SA 70 (A). See also *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA).

5.3 On 12 October 2001, appellant and his two former co-accused went to deceased's home. Deceased let them in because he knew appellant. According to the former accused no 2, who testified for the prosecution, appellant was the one who took possession of the fire arm and had it in his possession all along when deceased was approached.

5.4 They then took deceased to an outside building, where appellant showed deceased the fire arm. Deceased took the pistol in his hands and then said that he was actually looking for a bigger calibre.

5.5 The former accused no 3 then took the pistol from his hands and struck the deceased against his head so that he fell. Deceased was then tied up and the three accused persons went back to the main house to take whatever they wanted to rob from deceased. It appeared that their intention from the outset was to rob the deceased and not to sell him a fire arm.

5.6 When they entered the house, they grabbed and bound the wife or partner of the deceased, Tammy Sithole. According to her evidence, it was appellant who tied her up and placed her in a bedroom; and, appellant is the one who had a fire arm which he carried on his hip beneath the belt in his pants. None of the other two were armed.

5.7 The three accused persons then took and put various household items together in one room, which they clearly intended of removing at a later stage after first having dealt with the deceased.

5.8 Deceased was then put in the boot of his own car and was driven to an open veld nearby. Appellant was the driver of the vehicle.

5.9 Deceased was taken out of the vehicle and, although the former accused no 2 suggested that they abandon him there, appellant said that if they did, deceased would come back and kill them. The former accused no 3 then took the fire arm and shot the deceased in the head, execution style.

5.10 The three then returned to the house to collect their spoils. It appeared that Tammy Sithole managed to free herself and went for help. The three then heard police sirens and ran away when the police arrived.

[6] Most of the above facts were common cause, also having been embodied into appellant's plea explanation. In his plea and evidence, however, appellant denied that he was in possession of the fire arm when they approached the deceased, or that he played any leading role in the scheme of events. According to him, it was the former accused no 3 who had the fire arm and who forced him (and the former accused no 2) under threat of being shot to participate in the whole affair. In other words, his defence was that he acted under compulsion. The trial judge rejected his version, and rightly so, in the light of the evidence of Sithole and the former co-

accused no 2 which he accepted. Appellant also insisted on calling the former co-accused no 3 as a witness, who contradicted appellant's evidence.

[7] From the accepted evidence and the circumstances the trial judge accepted that the whole motive of their approaching the deceased was not really to sell him a fire arm, but to rob him. The resultant killing of the deceased also appeared to have been carefully planned and executed, in other words "planned or premeditated". It is further clear from all the accepted facts, that the killing of the deceased took place during or after the robbery with aggravating circumstances; and, that the killing was the result of the group of three acting in the execution of or in furtherance of a common purpose or conspiracy to kill him. This makes the particular offence of murder one that is defined in Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentencing Act) - three of the four defined categories being applicable to the current facts.

[8] The robbery with aggravating circumstances that appellant was convicted of obviously falls in the category of robberies defined in Part II of the same Schedule of the Minimum Sentencing Act, not only because there were aggravating circumstances, but also because it also involved the taking of deceased's vehicle.

[9] For these reasons, Husain J was enjoined in terms of sections 51(1) and 51(2)(a)(i) of the Minimum Sentencing Act to impose minimum sentences of, life imprisonment for the murder and 15 years imprisonment for the robbery. That is unless he was satisfied, which he was not, that there are "substantial and compelling circumstances" that justify the imposition of a lesser sentence in each case.

Appellant's personal circumstances

[10] The following were found to exist in appellant's favour:

10.1 Appellant is a first offender.

10.2 He was approximately 25 years old when he committed the crimes.

10.3 He spent approximately 2 years behind bars awaiting trial.

10.4 Appellant is single, but has one child to support.

10.5 He is relatively well educated - he has a matric and enrolled in a college for a national trade certificate. He was employed as a carpenter, earning R350.00 per fortnight.

[11] The following adverse aspects in appellant's personal circumstances appear from the record:

11.1 He has evidenced no remorse for his deeds. Unlike his co-accused, he chose to plead not guilty in all respects and tried to shift the blame onto former accused no 3, despite the fact that he knew that all evidence against him would point in another direction altogether.

11.2 Since he had an education, was still receiving training and was working as a carpenter at the time, he committed the crime out of greed, not need. It would appear as if his knowledge of the deceased (from when the deceased

enquired about the buying of a fire arm) has led to his knowledge of the relative wealth of the deceased; and, it was most probably him who provided the other accused persons with the information that inspired the planning of the robbery.

Interests of society

[12] The trial Court correctly observed that violent crime has escalated beyond control in this country, and that "[a]rmed robbery and murder" is a daily occurrence, which is the very reason why "the legislature deemed it necessary to try and intervene with [prescribing] very harsh minimum punishment[s]" in the Minimum Sentencing Act.

[13] As I remarked barely two weeks ago in another appeal before the Full Court,[4] violent crime like murder, rape and robberies appear to have become akin to a disease that has spread and gotten out of hand countrywide and that, therefore, the courts are left with little choice but to punish such crimes mainly with a view to provide victims with retribution and to deter convicted and other would be criminals so as to try and prevent crime. The courts need to act heavy-handed in cases like the current, lest rapacious violence is to be allowed to flourish and anarchy ensues. Ever since the abolishment of the death penalty, which I am sure could have been an option the trial Court would have considered in this matter had it still been admissible, life imprisonment is the harshest sentence that can be imposed for murder committed under these circumstances.

[4] *Mzolisi Zolla Mahlatsi v S* - case no A396/2012 dated 26 July 2013.

Appropriateness of the sentence

[14] Although it would have been preferable for the presiding Judge to pertinently deal with the case law pertaining to minimum sentences[5] and to determine whether, having regard to all relevant features of the case, substantial and compelling circumstances existed justifying the imposition of a lesser sentence on each of counts 1 and 2 than life imprisonment and 15 years imprisonment, Hussain J proceeded to lay a basis for the sentences imposed as follows:

> "Counsel for the state argued that I am bound by the provisions of the General Law Amendment Act setting out minimum punishment (*sic*) for the offences in question, Indeed, the murder and the robbery in this case falls (*sic*) within the ambit of that act. That being the case the state has argued that I am obliged to impose the prescribed punishment. However, in a case of this nature it is not necessary for me to be compelled by any piece of legislation to send the accused to jail for a long time. I do not intent (*sic*) to set out various factors in order to consider whether in the circumstances there are substantial and compelling circumstances which warrant a lesser punishment than the prescribed minimum. Notwithstanding the provisions of this act, I would have no hesitation in this case to impose the maximum."

[15] We do not necessarily see anything wrong with this approach. It is doubtlessly the absence of such heavy-handed approaches in circumstances like the current that has inspired Parliament, as the chosen representatives of the people, to enact the Minimum Sentencing Act in the first place, which many judicial officers view as a thorn in their side. What the learned trial Judge is saying is, that even had the Minimum Sentencing Act not been passed, he would still in the light of all the circumstances have considered the sentences that he imposed as appropriate.

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[5] E.g., the *locus classicus*, *S v Malgas* 2001 (1) SACR 469 SCA at para [25]; and others.

[16] In the light of everything that has been said above, we are unanimously of the view that the sentences imposed cannot be faulted in any way. There was no material misdirection and, in the circumstances, the sentences do not tend to induce a sense of shock. They in fact represent sentences that are sensible and balanced, taking into account all relevant factors, and would therefore meet with the approval of the majority of law-abiding citizens.

[17] We are not entirely sure as to why the Supreme Court of Appeal granted appellant leave to appeal his sentences, especially the sentence on count 1, murder. Perhaps it is because his co-accused (former accused no 3) did not receive life imprisonment for his part in the whole incident. He, after all, is the one that pulled the trigger in order to kill the deceased. Perhaps there was some other reason, and we can only but speculate on that score. What we do know, however, is that the Supreme Court of Appeal had already set the standard in cases such as these in *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and Others*.[6] In that case, the three appellants were sentenced by the Court *a quo* to 18 years imprisonment for murder and 12 years imprisonment for robbery with aggravating circumstances in circumstances where the robbery and resultant murder were equally callous and brutal than the current. On appeal by the Director of Public Prosecutions, the Supreme Court of Appeal set aside those sentences and substituted them with life imprisonment for the murder and 15 years imprisonment for the robbery with aggravating circumstances.

[6] [2009] 4 All SA 295 (SCA) (1 June 2009).

[18] We have further considered the arguments advanced (and the case law, cited and not cited in the heads of argument)[7] on behalf of appellant that his period of awaiting trial incarceration should be regarded as a substantial and compelling circumstance that justifies the imposition of lesser sentences on both counts 1 and 2. Especially where the charge of murder is concerned, we are of the view that the intention of the trial Court (and of the legislature in section 51(1) of the Minimum Sentencing Act) is clear. The appellant should, ideally, be sent to prison for the rest of his natural life. The fact that he has spent two years in prison awaiting trial does not mean that the sentencing Court (or the Court of Appeal) should now impose another sentence than life imprisonment. For a trial court (or a Court of Appeal) to be able to properly compute a lesser sentence than life imprisonment, it will have to take parole legislation and policies into account to determine how long a sentence of life imprisonment would effectively be, before it can be adjusted downward. That is however the domain of the Executive, and courts should be wary to tread on the terrain of other arms of government in order to preserve the separation of powers doctrine.[8] In any event, "the test is not whether on its own that period of [awaiting trial] detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one".[9]

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[7] The first reported case in South Africa in this regard is *S v Stephen and Another* 1994 (2) SACR 163 (W) at 168f [referring to *Gravino* (70/71) Crim LQ 434 (Quebec Court of Appeal)] In *S v Vilakazi and Others* 2000 (1) SACR 140 (W) this approach was not followed. Then came *S v Brophy and Others* 2007 (2) SACR 56 (W) at paras [16]-[19], where *Vilakazi* was overruled. It would however now appear that *Brophy* has been overruled by the SCA, at least as far as minimum sentences are concerned. See *S v Radebe and Another* 2013 (2) SACR 165 (SCA) at paras [11]-[15].

[8] *S v Botha* 2006 (2) SACR 110 (SCA) at paras [25]-[26]. See also *S v Matlala* 2003 (1) SACR 80 (SCA). See also *S v Mthimkulu* 2013 (2) SACR 89 (SCA).

[9] *S v Radebe and Another supra* footnote 7 at para [14].

[19] As far as the charge of robbery with aggravating circumstances is concerned, we are of the opinion that a heavier sentence than the minimum of 15 years called for by section 51(2)(a)(i) of the Minimum Sentencing Act could justly have been considered and imposed in this matter. In these circumstances, awaiting trial imprisonment on its own does not provide for a 'substantial and compelling circumstance' that justifies the imposition of a lesser sentence than any minimum sentence called for by law.[10] The two years awaiting trial period could therefore also not have played a meaningful role to reduce the sentence on count 2. In any event, all the sentences of imprisonment imposed on counts 2 to 5, are automatically absorbed by the sentence of life imprisonment imposed on count 1, which is the most severe sentence that can be imposed in this country. In this regard, Mr Thompson, for the appellant, argued that it is not a valid argument that the sentence on count 2 has now become academic simply because it is absorbed by the sentence of life imprisonment. According to him, the sentence on count 2 will adversely affect appellant's position if he is later considered for placement on parole. We disagree. Firstly, as we have indicated above,[11] the practice of the Executive to release prisoners on parole and the legislation and policies regulating that practice should not be considered by trial courts and courts of appeal. Secondly, the fact that the murder has been committed during the commission of a robbery with aggravating circumstances, already places the murder in the category of murders mentioned in section 51(1) of the Minimum Sentencing Act,[12] which is something the Parole Board should in any event take into account, regardless of the sentence that appellant has received on count 2. Thus, in our view, the effect of the periods of imprisonment

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[10] See *S v Radebe and Another supra* footnote 7 at paras [13] - [16].
[11] *Supra* para [18], footnote 8.
[12] See para (c)(ii) of the category 'murder' in Part I of Schedule 2 of the Minimum Sentencing Act.

imposed on the other counts, particularly count 2 has become of academic value only, which is an issue that should not be entertained on appeal.

[20] In any event, as rightly pointed out by Ms Mahomed for the respondent, Hussein J made specific mention of the awaiting trial period in his reasons for sentence,[13] meaning that he did consider same before meting out sentence. In the light of what has been said above, we do not think that the period of 2 years awaiting trial imprisonment should have had the effect of adjusting downward the sentences of life imprisonment on count 1 or 15 years imprisonment on count 2.

[21] There is one further aspect of the arguments advanced by Mr Thompson that need be dealt with. Although no mention was made thereof in his heads of argument or in the papers before the Supreme Court of Appeal seeking leave to appeal, he drew our attention to the fact that, according to the case record handed to him by his instructing attorney, Hussein J did not only conduct the trial of appellant, but also that of the former accused no 2, who pleaded guilty on the charges of unlawful possession of a fire arm and ammunition. Referring to a case of *S v Witbooi* that was reportedly dealt with in the Supreme Court of the Ciskei in 1994,[14] he argued that it amounted to a misdirection by the sentencing court if the court has had information relevant to sentencing from another case and he continues sentencing the accused before court regardless. Although we do not properly understand the argument, it would appear that he is suggesting that, because Hussein J has also sentenced accused no 2, it was irregular for him to conduct the trial and / or sentencing proceedings in respect of the appellant because his mind could have been

[13] Vol 1, P 81 lines 25-6 of the appeal record.
[14] The reference that he gave us is *S v Witbooi* 1994 (1) SACR 529 (Csk). We could not find the relevant decision on that reference.

contaminated by facts that he was already privy to from another matter that he dealt with. We do not agree with his submissions for the following reasons:

21.1 This issue has not been disclosed to the trial Court when application was made for leave to appeal, and no request was made for a special entry in this regard. Nor has it been disclosed when petitioning the Supreme Court of Appeal.

21.2 According to the record before us, the three accused were initially arraigned before Jajbay AJ, and he was the judge that convicted former accused no's 2 and 3 on their pleas of guilty, after which the matters of accused no's 1 and 2 were separated from that of accused no 3. There is nothing in the record before us suggesting that Hussein J dealt with both the sentencing of accused no 2 and the trial on the merit and sentencing of appellant.

21.3 Even if that was indeed the case, we are of the view that no irregularity occurred for the reasons that follow. But even if such could be regarded as an irregularity that vitiates the proceedings, this is not the correct *forum* to deal with such question, since we are mandated to deal only with the question of sentence on appeal. The correct route that should be taken is that application should be made to the trial Court for a special entry to be made and to take it from there on appeal. This is however only an academic observation since Mr Thompson informed us that he did take it up with the appellant, and that he does not want to take that route and only wants his appeal in respect of sentence be dealt with.

21.4 The mere fact that a court has taken cognisance of evidence in another matter than the one it is seized with, does not mean that the court is now barred from conducting the trial (or the sentencing proceedings). Judges are trained to leave out of consideration evidence that is inadmissible when determining a matter, whether on the merits or on sentence. A judge that has done a bail application during which cognisance was taken of an accused person's previous convictions is not automatically disqualified from doing the trial.[15] A court is not necessarily disqualified from conducting a trial or sentencing proceedings if, after conviction on a plea of guilty, the court takes cognisance of an accused person's previous convictions before recording a plea of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977.[16] Why should a court that sentences one accused on a plea of guilty now necessarily be barred from conducting the trial of another accused person in the same matter, or from sentencing him?

21.5 Lastly, from the record, it appears that Hussein J did indeed take into account that it would be dangerous to convict the appellant only on the evidence of the former accused no 2 and held that he does not trust Maluleka's evidence in every respect. Hussein J was only prepared to accept Maluleka's evidence in those respects where he was corroborated by other evidence, like the evidence of Sithole and of the former accused no 3 who was called by appellant himself.

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[15] See *S v Hlati* 2000 (2) SACR 325 (N).

[16] E.g., *S v Sass en Andere* 1986 (2) SA 146 (NC). Cf., however, *S v Fourie* 1991 (1) SACR 21 (T), which might be in need for reconsideration at an appropriate time in the light of what has been said here and in A Kruger *Hiemstra's Criminal Procedure* (LexisNexis, Loose Leaf) at 17-18, 17-20.

21.4 We do not think that there was any misdirection by the trial Court in this regard, at least as far as sentence is concerned.

[22] Lastly, Mr Thompson argued that the trial Court misdirected itself in referring to the appellant as "nothing but a thug", who is a danger to society that must be removed from society, whilst that is not the only inference that can be made; and, by referring to "acts of vigilantism" since this case had nothing to do with vigilantism. The short answer to this is that we cannot think of any other appropriate term with which appellant should be referred to than 'thug'. The deed was a callous and brutal one by an armed gang of which appellant was the obvious leader. What they did amounted to nothing else but sheer 'thuggery'. Finally, the reference to 'acts of vigilantism' was not intended to describe the facts before the Court of first instance, but to substantiate the Court's assertion that, if lenient sentences were to be imposed, the criminal justice system is bound to fall into disrepute with society resorting to taking the law into their own hands.

[23] We gave anxious consideration to all the arguments advanced by Counsel for the Appellant and Counsel for the state, as well as all the case law referred to in their respective heads of argument, which have been invaluable. We are however unanimously of the view that the appeal against sentence cannot succeed.

The order

[24] It is accordingly ordered that the appeal against sentences be dismissed and the original sentences be confirmed.

A A LAMPRECHT
ACTING JUDGE OF THE
NORTH GAUTENG HIGH
COURT

AML PHATUDI
JUDGE OF THE NORTH
GAUTENG HIGH COURT

A DE VRIES
ACTING JUDGE OF THE
NORTH GAUTENG HIGH
COURT

Representation for the applicant:

Counsel:	Adv Charles E Thompson
Instructed by:	

Representation for respondent:

Counsel:	Adv S Mahomed
Instructed by:	Director of Public Prosecutions High Court Pretoria