IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

2016.04.29
DATE

SIGNATURE

CASE NUMBER: A360/15
DATE: 29 April 2016

SOLOMON NENDANGWANA OUPA MASHILE — Appellant

V

THE STATE — Respondent

JUDGMENT

MABUSE J:

[1] This is an appeal against sentence only. The appellant, Mr. Solomon Nendangwana Oupa Mashile, appeared before the regional court sitting in Brakpan where he was arraigned on a charge of murder, in count 1, read subject to the provisions of s 51(1) of the Criminal Law Amendment Act No. 105 of 1997 (the Minimum Sentence Act) and, in count 2, on attempted robbery with aggravating circumstances as contemplated in s 1 of

the Criminal Procedure Act 51 of 1977 ("the CPA"). The appellant pleaded not guilty to both counts and through its legal representative, one Mr. Kathrada, made a plea explanation in terms of the provisions of s 115 of the CPA. In his plea explanation he denied that he had shot and killed the deceased in this matter. Furthermore he told the Court that it was a certain Collin who at all material times hereunto was in possession of a firearm and who fired the shot at the deceased. According to him it was the said Collin who killed the deceased by shooting him.

[2] Again through his legal representative, the appellant made certain admissions in terms of s 220 of the CPA. Those admissions were captured by the Court a quo and read into the record. In terms of the said admissions the appellant admitted that the deceased died at Pholosong Hospital due to the injuries sustained as per the post mortem report on the very day, 19 December 2012; that the photo album compiled by one Mpho Buti Nkosi could also admitted; it was also admitted further by the appellant that the body of the deceased was pointed out to Dr. Nkosana by Sidwell Oradise Rabopape who is a forensic pathology officer; that prior, the body of the deceased was conveyed from the hospital, had been received by warrant officer Jansen and conveyed to the pathology services by one Modjudi MacDonald Molife.

[3] The charges against the appellant arose from the following circumstances. The incident in question took place on 19 September 2012 between 11h00 and 12h00. This day was described by Goodwill Mnisi, the state's first witness, as clear and hot. It took place in or at a shop owned by one Allum, the second state witness. On the said date and before the incident took place, Mr. Mnisi parked his motor vehicle next to the second state witness's shop. Seemingly Mr. Allum and the deceased had just returned from buying stock for Mr. Allum's shop. At a corner of the street where the shop was located he saw

three adult males sitting on the ground. These adult males were Vusi, Buti and Collin. Buti was the appellant in the matter. After he stopped there and while the appellant and his companions were still at the spot where he had seen them initially, Allum and the deceased unloaded the stock from his motor vehicle and took it into the shop.

[4] After they had finished unloading the stock, he drove away slowly. As he drove away he saw the appellant and his companions rise from where they were sitting. He drove his motor vehicle slowly, as he was driving and approaching his parents' house which is located seemingly in the same street as Allum's shop, he heard a gunshot. The appellant then appeared and he saw them walk in the street in which his parents' house was situated. As they approached he saw the appellant tuck a firearm away in the right pocket of his jacket. At this stage he was already at his parents' house.

[5] He then got a call from Allum who reported to him that the deceased had been shot. He got into his motor vehicle and drove back to Allum's shop. He conveyed the deceased from Allum's shop to the hospital where he was certified dead on arrival. He described the firearm as being 30mm long. Before this incident he did not know the appellant.

[6] The State's second witness, one Massum Allum, described the shooting in his testimony as follows. While he and the deceased, whom he called Madala, were in the shop packing the stock, he asked the deceased if he wanted to eat. When the deceased answered positively he left the fridge, where he had been busy packing the colddrinks, open. He opened the door of the shop, let the deceased in and then had someone instructing the deceased to open the door. When he turned to look around, first he saw a gun and immediately thereafter heard someone demanding that the door be opened.

[7] He stood up from where he was sitting and took a proper look. He saw a gun that was pointed at the deceased. He ordered the deceased to open the door. When the deceased tried to open the door, the appellant shot him and thereafter fled out of the shop. The deceased fell and he started to scream and to cry. He knew the appellant well but not his name. The appellant was one of his customers. He regularly came to his shop to buy this and that. He had seen him many a time. While he saw the appellant clearly on that fateful day, he was unable to see if the appellant was in the company of other people.

[8] After the shooting incident, he called Mnisi and made a report to him about the incident. Mnisi came back, picked up the deceased and took him to the hospital where he was certified dead on arrival.

[9] The appellant testified in his defence but called no witness to testify in his defence. In his testimony he stuck to his plea-explanation. Firstly he admitted that he was present at the scene when and where the incident took place. He denied, however, that he shot the deceased. According to his testimony, he was never in possession of a firearm on that fateful day, but one Collin was in possession of the firearm. The imputation is that it was Collin who shot and killed the deceased.

[10] The Court *a quo* was satisfied that the respondent had succeeded to prove, beyond reasonable doubt, that the appellant had committed the offences he had been charged with. It rejected the version of the appellant on the fundamental ground that it was not reasonably possible true. It accordingly convicted the appellant as charged and sentenced him, upon conviction, to life imprisonment in respect of count 1 and to 10

years imprisonment in respect of count 2. In terms of s. 103(1) of the Firearms Control Act 60 of 2000, it declared the appellant unfit to possess a firearm.

[11] It is the aforegoing sentences that the appellant, on grounds that have been fully set forth in his application for leave to appeal, challenges. The appeal is brought in accordance with the provisions of s 309 of the CPA read with s 10(3) and s 43(2) of the Judicial Matters Amendment Act 42 of 2013. The Appellant's appeal against the sentences imposed on him was predicated basically on the following grounds. The grounds are firstly, that the term of life imprisonment in respect of count 1 and a further 10 years imprisonment in respect of count 2 are shockingly inappropriate. It is contended by the appellant that the said sentence is shockingly inappropriate in the following respects:

11.1 it is out of proportion *vis-a-vis* the totality of the accepted facts.

[12] In this regard Ms. van Wyk, after conceding that the Court had, during sentencing procedures, taken all the mitigating and aggravating factors into account, indicated that she could not take this aspect any further. She had in her heads of argument, and in support of this issue, cited the case of **S v Dyantyi 2011(1) SACR 540 ECG**, in which the court dealt with disproportionality of sentence. Ms. Van Wyk had not indicated whether the said matter was heard by a single judge or a full bench or a full court. Whatever the court that heard the matter, we were told, that in deciding whether substantial and compelling circumstances exist, all factors traditionally considered are to be taken into account, including mitigating and aggravating factors. This re-statement of the principle of law is a repetition of what the Court stated in the famous case of **S v Malgas 2001(2) SA 1222 SCA** ("Malgas").

[13] On the other hand, Ms. Makgwatha, counsel for the respondent, submitted that the court a quo had committed no misdirection as it took all the relevant factors into consideration when it sentenced the appellant. Furthermore she submitted that the sentence so imposed on the appellant is appropriate in the circumstances of this case.

[14] That the court *a quo* in effect disregarded the period of time which the appellant spent in custody while awaiting trial.

It was stated in the appellant's heads of argument that in imposing sentence on the appellant, the court *a quo* failed to take into account the period of two years and three months that the appellant had spent in custody while awaiting the finalisation of the matter. The argument was made despite the authority of **S v Radebe and Another 2013(2) SACR 165 (SCA)** on which the court *a quo* relied. In that case the court had stated in paragraph 13 that:

"[13] In my view there should be no rule of thumb in respect of the calculations of the weight to be given to the period spent by an accused awaiting trial. (See also S v Seboko 2009(2) SACR 573(NCK) par 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentences proposed should be reduced.

[14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified; whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of

robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance but whether the effective sentence proposed is proportionate to the crime or the crimes committed; whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."

What is emphasized here, firstly, is that there is no definition of what *"substantial and compelling circumstances"* are. The mere fact that, considered in isolation, the appellant spent a certain period in custody before the case against him has been finalised does not constitute *"substantial and compelling circumstances"*. It is clear from the said authority that the Court must look holistically at the circumstances of an individual accused in order to assess the presence or absence of *"substantial and compelling circumstances"*. The Court, in the abovementioned authorities, disapproved of the approach adopted in **S v Brophy 2007(2) SACR 56W**. This is how the Court put it in S v Malgas supra:

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

The assessment of the circumstances of an individual accused must be done upon the consideration of the entire evidence.

[15] The issue raised by the appellant that the period that an appellant spent in custody while awaiting the finalisation of his matter should be taken into account is fraught. In the first place the appellant has not, with any particular clarity, explained whether the period should have been considered or taken into account in respect of the sentence imposed in respect of count 1 or count 2 or both. Secondly it is, in my view, difficult to imagine how, in sentencing the appellant to life imprisonment, a Court could accommodate, in such a sentence, the period that the appellant spent in custody before finalisation of his matter.

[16] It is highly unlikely that that can be done. There is therefore no merit, in my view, in the argument that the trial court did not, in the circumstances of this case, attach sufficient weight to this factor.

[17] That the court *a quo* should have found that there were substantial and compelling circumstances is another factor on the basis of which it is contended by the appellant that the sentence imposed on him was disproportionate. Once a court has not found any substantial and compelling circumstances, it is compulsory for it to impose the ordained sentence. In this regard the court was referred by the respondent's counsel to two authorities: **S vs Malgas** supra where the court referred to "flimsy reasons" and **S v Matyityi 2011(1) SACR 40 SCA**. It is trite that there is no definition of "*substantial and compelling circumstances*". It will be recalled that depending on each case, a factor or a combination of them, may amount to such *"substantial and compelling circumstances"*. What the court should do or is called upon to do is to assess the circumstances of each individual case and to determine whether, in its view, such circumstances establish *"substantial and compelling circumstances"*. If the court has done these and made a

particular finding, it cannot be faulted if it finds in a particular way. We are satisfied that the court *a quo* had adopted a proper approach in assessing whether the facts placed before it established *"substantial and compelling circumstances"*. The court was therefore, in our unanimous view, correct in finding that no such circumstances existed.

[18] The second ground of appeal by the appellant was that the court *a quo* erred in not imposing a shorter sentence. This ground has not been crafted properly. It is the same as the preceding issue that the court should have found that there were *"substantial and compelling circumstances"*. A shorter sentence could only have been imposed by the court *a quo* if it had found *"substantial and compelling circumstances"*. As the court had found none, it felt obliged, and rightly so, to impose the ordained sentence.

[19] Furthermore, the appellant has not explained how his age could be used as a factor that would mitigate his sentence. In the case of Matyityi supra, the court made quite clearly that age was a neutral factor. Unless evidence is placed before the court to show how age of a particular appellant could be used as a mitigating factor to the advantage of such an appellant, it will remain a neutral factor.

[20] The court *a quo* took into account, and it was entitled to, the seriousness of the offence the appellant had been convicted of, the appellant's previous convictions and the purpose of sentence. The court was disinclined, because of those factors, to impose a reformative sentence on the appellant.

[21] The appellant had previous convictions. He was not deterred by previous punishment or sentences from committing further offences. The approach of the court when it is faced with previous convictions is to analyse them in order to establish whether or not they

relate to the current charges. Similar or related previous convictions are aggravating because they indicate that the appellant has the proclivity to commit a certain type of offences. It is also imperative for the court to establish the seriousness of the previous convictions. See in this regard **R v Zonele 1959(3) SA 319(A) at page 330**. Finally, the court must also establish the intervals that have elapsed between the last previous convictions themselves and the current conviction. A second or third conviction of a similar offence taking place shortly after a previous conviction, which constituted a grief warning to an accused person, merits a sentence of imprisonment. Accordingly in the absence of *"substantial and compelling circumstances"* a sentence of imprisonment was appropriate. This is what du Toit stated about previous convictions:

"Hierin lê vir die verhoorhof gewoonlik a groot bron van kennis rakende die beskuldigde opgesluit. Die hoeveelheid kanse wat hy gegun is, die tipe strawwe was aangewend is om die beskuldigde van misdadigheid te weerhou, is alles faktore wat van groot belang by die straftoemeting is." See **Du Toit Straf in Suid-Afrika, page 88**.

[22] The court *a quo* weighed all the three factors relevant in the assessment of sentence and distilled from them what it considered to be an appropriate sentence. It was entitled, in the circumstances, to find that the offences before it were serious and it has given reasons for its view.

[23] In our unanimous view, the court *a quo* did not, in its assessment of the sentence it imposed on the appellant, commit any misdirection. In the absence of any misdirection, the court is not at large to interfere with the sentences of the court *a quo*.

[24] In the result:

(a) the appeal against sentence is dismissed; and

(b) the sentences imposed by the court *a quo* on the appellant are hereby confirmed.

P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree,

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant:	*Adv. LA van Wyk*
Instructed by:	*Pretoria Justice Centre (Legal Aid Board)*
Counsel for the Respondent:	*Adv. MJ Makgwatha*
Instructed by:	*Director of Public Prosecutions*
Date Heard:	*25 April 2016*
Date of Judgment:	*29 April 2016*