HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

30/06/17

CASE NO: A401/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

MANDLA SOLOMON SANGWENI Appellant

and

THE STATE Respondent

Heard: 24 March 2017
Delivered: 30 June 2017
Coram: Makgoka and Ranchod JJ and Shirilele AJ
Judgment: Makgoka J (unanimous)

Summary: Murder - whether the facts leading to death established intention to cause death - Question of fact.
Sentence - appellant convicted of rape of an elderly woman - sentence of life imprisonment imposed - whether substantial and compelling circumstances present.

JUDGMENT

MAKGOKA,J

[1] The appellant, Mr. Mandia Sangweni, was convicted of two counts, namely murder and rape, by the local circuit court of this Division, sitting in Ermelo (Prinsloo J). On 19 November 2013 he was sentenced to life imprisonment in respect of both counts. With leave of the trial court, he appeals against the conviction only in respect of the murder count, and against both the conviction and sentence in respect of rape count.

[2] The circumstances leading to the conviction of the appellant can be summarized as follows. The deceased, Mrs K S, 69 years old, was found murdered in her house on 18 June 2011. It was later established that before she was killed, she had been raped. When she was discovered by a neighbor, her hands were tied around the neck with a belt from her bath gown. There was blood coming from her private parts. Some of the deceased's chickens were missing from a fowl cage. The appellant was seen by one of the witnesses carrying a chicken which resembled that of the deceased. This was reported to the police, on the strength of which the appellant was arrested.

[3] According to the post mortem medico-report, the deceased died of acute anoxia - lack of oxygen. The doctor who conducted the post mortem examination on the body of the deceased testified that the manner in which the deceased had been tied up - described by the trial court as a ' foetus position' - would lead to acute anoxia or loss of oxygen, particularly in a grossly obese person, of which the deceased was. According to the doctor, the manner in which the deceased was tied up caused the foodstuff in her stomach to move up her throat where it caused anoxia.

[4] The appellant's semen was found inside the deceased's vagina through DNA testing and analysis. The trial court was satisfied about the integrity of the

collection, sealing, referencing, transportation and analysis of the genital specimen swabs from the body of the deceased, as compared with the control blood sample obtained from the body of the appellant.

[5] The appellant's version was largely a bare denial of the state's case. The trial court, correctly in my view, rejected it as not being reasonable possibly true. This, the trial court observed, especially in the face of overwhelming DNA evidence.

[6] In this court, counsel for the appellant fairly conceded in his written submissions that given the proven facts, no argument could be presented to challenge the rape conviction. This concession makes it unnecessary for us to consider this aspect any further. The appeal against the conviction on the count of rape would therefore stand.

[7] I turn to the conviction for murder. In this regard, counsel for the appellant did not place in dispute the facts leading to the conviction of murder. In other words, it was common cause that the state had also proved those facts beyond reasonable doubt. The only issue before us is whether the facts proved murder by dolus eventualis.

[8] In arriving to its conclusion that the appellant was guilty of murder with dolus eventualis, the trial court reasoned as follows:

> 'In this case one must look, as in every other case, at the evidence in its totality. The 69 year old, abnormally obese, lady was cruelly raped and also stabbed with a knife in her upper leg. There was blood in her nasal cavities and in her mouth. The matter is visible on Exhibit A. There were scars on her wrist and ankles because of the abnormal foetus-like position in which she was tied up. The doctor said that the manner in which she was tied up, would have led to anoxia and her death through lack of oxygen.
>
> I am satisfied that in treating the deceased in the manner he did and as I briefly described, the state proved the necessary *dolus eventualis* on the part of the accused so that he falls to be convicted on the murder charge as well. In my view**,** the only reasonable inference to be drawn in terms of the principles laid

down in the well-known case of *Rex v Blom,* 1939 (AD) 188, is that *dolus eventualis* was present in this case.'

[9] Counsel for the appellant submitted that the trial court erred in finding that the state had proved that the appellant had murdered the deceased with *dolus eventualis*. To consider this aspect, the starting point must be the definition of *dolus eventualis* as a form of *mens rea*. The learned author Snyman in his work *Criminal Law*, Lexis Nexis, 5ed, explains *dolus eventualis* in the following terms at 184:

'A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful act result is not his main aim, but:

(a) He subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused;

(b) He reconciles himself to the possibility.'

[10] The learned author continues to explain at 185 that dolus eventualis is absent if the perpetrator foresees the possibility only as 'remote or far-fetched'. In the present case, the established facts are these. The appellant raped the deceased, after which he tied her hands and feet as earlier described, and left her in that position. Counsel for the state submitted that the deceased was tied in such a position that not only would it be difficult for her to breathe but the normal biological processes would be compromised. This, according to the state, was evidenced by blood oozing from her mouth when she was discovered. The appellant had therefore left the deceased in a life-threatening position, considering also the deceased's obesity and her age. Accordingly, the state contended that the appellant was correctly convicted of murder.

[11] I disagree. Beyond what is common cause, there is no evidence to support the argument that the appellant had foreseen that the deceased would die as a result of the position she was tied up. And, as testified by the doctor, the cause of anoxia was the food moving from the deceased's stomach up her throat, coupled with her obesity. The appellant, being a lay-person, could certainly not make the deduction of death arising from the situation. If ever he did, such possibility would

have been 'remote or far-fetched' as explained by the learned author Snyman.
[12] It should also be borne in mind that except for a knife wound on her thigh, the deceased had not suffered any serious injuries during the attack, which would have caused the appellant to foresee death arising from him tying the deceased in the manner he did. Apart from the rape and the thigh wound, the appellant had not done anything life-threatening to the deceased. On these considerations, I conclude that the appellant should instead have been convicted of culpable homicide, which is the unintentional but negligent causing of death of a human being.

[13] I turn now to the sentence. In this regard the following should be borne in mind. With regard to the rape, the conviction stands. The murder conviction has been altered to a lesser one of culpable homicide. This conclusion of necessity affects the sentence imposed in respect of the murder count, which must now been altered to a suitable sentence for culpable homicide. In respect of the rape count, the default position remains that life imprisonment is the prescribed sentence to be imposed in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) unless there are substantial and compelling circumstances to deviate therefrom.

[14] I consider first, the appellant's personal circumstances. The appellant did not testify in mitigation of sentence. His personal circumstances were placed on record by his legal representative. They can be summarised as follows. He is a first offender. He was 24 years old at the time of sentencing and 21 when the offences were committed. His highest academic qualification is grade 8. He was unable to proceed with his studies because his father died, as a result of which he had to leave school to seek employment to assist with the maintenance of his family.

[15] At the time of his arrest, the appellant was self-employed as a bricklayer and could earn up to R8 000 per month, depending on whether he was contracted to work. He was staying with his mother and brother. The mother is a disability grant recipient in the amount of just over R2 000 per month. He is

unmarried, although he has a child who was aged 5. The mother of the child is unemployed, and did not receive a social grant due to the fact that her identity document was lost. At the time of sentencing the accused had spent a year and nine months in custody awaiting the finalisation of his trial.

[16] It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a 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. See generally: *S v Petkar* 1988 (3) SA 571 (A); *S v Snyder* 1982 (2) SA 694 (A); *S v Sadler* 2000 (1) SACR 331 (SCA); *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10.

[17] As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

> '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 is 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'

[18] As stated earlier, the rape conviction brought the sentencing within the purview of s 51(1) of the Act 105, which prescribes a sentence of imprisonment for life as it involved the infliction of serious bodily harm. Of course this is a prescribed, and not mandatory, sentence, in that the court may impose a lesser sentence if it finds, in terms of s 51(3) of the Act, that there are substantial and compelling circumstances. In the present case, the trial court found no such

circumstances, and accordingly imposed the prescribed sentence of imprisonment for life. The appellant is aggrieved with that finding. In this court, in his written submissions, counsel for the appellant submitted that on a proper consideration of the judgment on sentence, he could find no misdirection on the part of the trial court in its conclusion that there exist no substantial and compelling circumstances. Needless to say, that concession does not alleviate the duty on us to consider whether such circumstances in fact, exist. I turn to that enquiry.

[19] The proper approach where mm1mum sentences are applicable, was established by the Supreme Court of Appeal in the path-finding and seminal judgment of S v Ma/gas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220). The summary of the approach is conveniently set out in para 25 of that judgment, the effect of which is that the prescribed minimum sentences should ordinarily, and in the absence of weighty justification, be imposed. In para I of the summary, it is stated that the court may impose a lesser sentence if, on consideration of circumstances of the particular case, it is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence.

[20] In the present case, I am of the view, that the learned trial Judge considered carefully all the relevant factors for sentencing, and correctly applied the jurisprudential benchmark set out above. In particular, the court took into consideration the increasing scourge of rape, especially of women and children, as well as the fact that the deceased was an elderly woman. I do not find any misdirection of any type, let alone the one envisaged in *Pi/lay.* In the result the appeal against the sentence imposed in respect of the rape count, falls to fail.

[21] With regard to the sentence in respect of the altered count of culpable homicide, considering all the relevant circumstances - the factors which led to the deceased's death; the personal circumstances of the appellant - I am of the view that seven years' imprisonment would be a suitable sentence.

[22] Accordingly, the following order is made:

1. The appeal against the conviction and the sentence on the count of murder is upheld to the extent indicated below. The murder conviction and its resultant sentence are set aside and replaced with the following:

'The accused is found guilty of culpable homicide.
The accused is sentenced to seven years imprisonment.'

2. The appeal against the conviction and the sentence in respect of the rape count is dismissed. The sentence of life imprisonment is confirmed.

3. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the altered sentence in respect of the altered count of culpable homicide is ante-dated to 22 November 2013, being the date on which the appellant was sentenced.

TM Makgoka
Judge of the High Court

N Ranchod
Judge of the High Court

C Shirilele

Acting Judge of the High Court

APPEARANCES:

For the Appellant: JS Gaum

Instructed by:

Justice Centre of Legal Aid SA, Pretoria

For the Respondent: MM Mashuga

Instructed by:

Director of Public Prosecutions, Pretoria