

✓ 9/11/2017



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

CASE NO: A206/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

09/11/17
DATE

SIGNATURE

In the matter between:

BAFANA ELLIOT MNOMEZULU

Appellant

and

THE STATE

Respondent

JUDGMENT

Baqwa J

- [1] The appellant was arraigned before the Regional Court, Nigel on two counts, namely assault with intent to do grievous bodily harm (count 1) and murder (count 2).
- [2] He was sentenced in 13 May 2015 to 6 months imprisonment on count 1 and 15 years imprisonment on count 2.

- [3] He was granted leave to appeal when he petitioned the Judge President of the Gauteng High Court against sentence only.
- [4] Briefly summarised, the conviction of the appellant was based on the testimony of one Sophie Shobethe (Sophie) who had had a heated exchange with the appellant. As a result thereof the appellant armed himself with a knife and an iron bar. He forcibly entered the house of the Shobethes and injured Sophie with a knife on her head and thereafter stabbed Sophie's brother, the deceased, with an iron bar which resulted in his death.
- [5] The appellant submits that the effective sentence of 15 years and 6 months imprisonment is shockingly harsh and that the court **a quo** misdirected itself in not finding substantial and compelling circumstances.
- [6] In support of his submission he makes reference to the period that elapsed between the commission of the offence and sentence and to the failure of the court to order the sentences to rank concurrently.
- [7] The applicant also seeks support in the determinative test as laid down in **S v Malgas** 2001 (1) SACR 469 SCA as follows:

"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 society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

- [8] Whilst conceding the seriousness of the crime, the appellant submits that he did not have a direct intent to kill thus pleading **dolus eventualis**.
- [9] The respondent opposes the appeal and submits that it is apparent from the record that the Magistrate took all the relevant factors into account in sentencing the appellant.
- [10] I am inclined to agree with the respondent's submissions especially with regard to the approach adopted by the court **a quo** in deciding sentence. The court appears not only to have considered the personal circumstances of the appellant in to consideration but also those of society and the victims of the crimes charged.
- [11] The court expressed itself, **inter alia**, by referring not only to the fact that the appellant was a first offender but also that when an offence is so serious as to involve the loss of life of a human being, the sentence must be reflective of that otherwise the next of kin might be prone to losing confidence in the justice system and take the law into their own hands. The court **a quo** went on to mention that this cannot be allowed as it would in turn lead to anarchy.
- [12] The court **a quo** also properly contextualised the advent of the Minimum Sentencing regime and the fact that absent the substantial and compelling circumstances, the court is compelled to impose the minimum sentence which is what it did in the present case.

[13] Given the circumstances of this case it can hardly be said in my view that the prescribed sentence is “*unjust*” or “*disproportionate to the crime, the criminal and the needs of society.*” That notion was properly and firmly dispelled by the court **a quo**.

[14] The appellant forcibly entered the residence of the victims of his crimes whilst armed to the teeth with lethal weapons. It is quite apparent that he was on a warpath and the consequences of his actions speak for themselves. It is difficult if not impossible to view them in any other way.

[15] This case represents what was referred to in **Malgas (supra)** when the following was stated:

“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.”

[16] Having said that the appellant does make out a case for a concurrence of sentences. I accept that the offences are linked in terms of locality, time and perpetrator. In the circumstances the court **a quo** ought to have made an appropriate order.

See **S v Mokela** 2012 (1) SACR 431 (SCA) [2011] ZASCA 166

S v Mate 200 (1) SACR 552 (T)

[17] In the circumstances, I propose that the following order be made:

17.1 The sentence handed down by the trial court on 13 May 2015 is set aside and substituted with the following sentence:

Count 1: six (6) months imprisonment

Count 2: fifteen (15) years imprisonment

17.2 It is further ordered that the sentences run concurrently in terms of section 280 (2) of the Criminal Procedure Act 51 of 1977 (the Act).

17.3 The sentence is antedated to 31 May 2015 in terms of section 282 of the Act.



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.



P. PHAHLANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:

09 November 2017

Delivered on:

09 November 2017

For the Applicant:

Advocate R. du Plessis

Instructed by:

Legal Aid

For the First Respondent:

Advocate A. J. Fourie

Instructed by:

The Director of Public Prosecutions, Pretoria