REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) Reportable: YES/NO
(2) Of interest to other Judges: YES/NO
(3) Revised.

14 June 2018
DATE

SIGNATURE

CASE NO: A313/2017

In the matter between:

MBUZENI FREDDY MOTAUNG **Appellant**

and

THE STATE **Respondent**

Order

1. **The appeal against sentence is upheld.**
2. **On count 1 (Murder) the appellant is sentenced to 10 years' direct imprisonment.**

3. **The sentence is antedated to 9 February 2017 in terms of section 282 of the Criminal Procedure Act, 51 of 1977.**

JUDGMENT

COLLIS J (MOLOPA-SETHOSA J concurring)

[1] The appellant, Mr Mbuzeni Motaung appeared in the Klerksdorp Regional Court on one count of Murder. He was legally represented during the trial and upon conviction he was sentenced to 15 years' direct imprisonment. He was also declared unfit to possess a firearm.

[2] Pursuant to his conviction and sentence the appellant applied for leave to appeal both conviction and sentence and was granted leave to appeal only his sentence.

[3] The facts of this case can briefly be recounted as follows:
On 9 August 2014, the main state witness, Mr. Lebogang Legatisho was in the company of the appellant and three other friends. As they were standing at a street corner, relaxing and chatting they were then approached by the deceased who was clearly intoxicated. The deceased started swearing at them and made enquiries as to why they were all standing in an area which he considered belonged to him. He referred to himself as the "shaela" meaning the boss of the tsotsis of that street.

The deceased then became more aggressive, and then he grabbed the appellant by his clothes around his chest and he refused to let go of him. In retaliation, the appellant and one of his friends standing next to him then

took out their knives which they were carrying and proceeded to stab the deceased. The state witness was unable to say how many times that the deceased was stabbed.

The group then decided to walk away and in the process of doing so, the appellant and his friend who earlier participated in the stabbing of the deceased then ran back towards the deceased where he was standing at a gate and stabbed him again. The deceased tried to run away and the appellant followed and then he tripped him, and he fell to the ground. He ultimately succumbed to his untimely death and the post mortem report reflects that he sustained six stab wounds with one incision being inflicted on his chest area from which he bled to death.

[4] Prior to sentencing the appellant, the sentencing court considered the pre-sentence report in respect of the appellant and handed it into the record marked as Exhibit F. The sentencing court also took into account the address in mitigation of sentence placed before the court by the legal representative of the appellant. Apparent from the record however, the learned magistrate failed to afford the State an opportunity to address the court in aggravation of sentence,[1] and more specifically as to whether or not there were compelling and substantial circumstances present or not which would justify the imposition of a lesser sentence than the sentence prescribed.

[5] In sentencing the appellant, the sentencing court had taken into account the seriousness of the offence, the interest of the community and the personal circumstances of the appellant.[2] The sentencing court also took

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[1] Transcribed record pg 174 Lines 6-10

[2] Transcribed record pg 161-166

into account, the relative young age of the appellant, that he was only 19 years of age when he committed the offence and that he stood before the sentencing court as a first offender. As aggravation the court considered the fact that the appellant was once part of a gang and that he was carrying a knife, which he was prepared to use at the slightest of provocation. As regards the facts placed before the court, the court remarked that the appellant together with his accomplice returned to the deceased after having stabbed him initially to finish him off.

[6] In the present matter the applicable provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 needs mentioning. It provides as follows:

> "*(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in-*
>
> (a) *Part I1 of Schedule 2 in the case of-*
>
> (i) *a first offender, to imprisonment for a period not less than 15 years……..*
>
> *(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such lesser sentence in respect of an*

offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years." [3]

[7] Albeit, that sentencing is inherently within the discretion of the trial court, the powers of an Appeal Court to interfere with the trial court's discretion in imposing sentence are limited unless the trial court's discretion was exercised improperly. The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the trial court exercised its discretion properly and judicially. If the discretion was exercised improperly, the appeal court will interfere with the sentence imposed.

[8] In S v Mabuza and Others 2009(2) SACR 435 (SCA) Cachalia JA held at paragraph 23:

> *"So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it*

[3] Criminal Law Amendment Act 105 of 1997

would deny the youthful offender the human dignity to be considered capable of redemption.'

[9] In S v Williams and Others 1995(2) SACR 251 (CC) the Court found at paragraph 85:

"[85] Howie AJA, quite correctly in my view, warned against the idea that the accused should be sacrificed on the altar of deterrence. To this I would add that this is even more so when the court is dealing with a youthful offender."

[10] In the present instance the appellant was sentenced to an effective sentence of 15 years. In S v Malgas 2001(1) SACR 469 (SCA) at paragraph 12 Marais JA held:

"However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate."

[11] and at paragraph 22:

> *"Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterize them as substantial and compelling and such as to justify the imposition of a lesser sentence."*

[12] Murder is in my view the most serious offence as the deceased cannot be replaced and his life cannot be substituted. Section 11 of our Constitution protects life by providing that-

"Everyone has the right to life.'

[13] In imposing an appropriate sentence the interest of society also needs to be protected. Our courts must send a strong message that crime will not be tolerated. The sentence to be imposed by the court ought to be balanced without over-emphasising one part of the triad over another. The object of punishment, namely retribution, rehabilitation and deterrence also ought to be balanced.

[14] In this matter, however, we are of the opinion that the disparity between the sentence of the trial court and the sentence which this court would have imposed had it been the trial court is so marked that this court can describe the sentence imposed as *"disturbingly inappropriate"*. The court specifically takes into account the age of the appellant when he was sentenced, the fact that he was finalizing his schooling when the offence was committed and only 19 years old at the time thereof and also the fact that the evidence showed that he was provoked by the deceased before the altercation ensued and that the deceased was in fact the aggressor.

[15] In the result and consequently the following order is made:

15.1 The appeal in respect of sentence is upheld.

15.2 On count 1 (*Murder*) the appellant is sentenced to 10 years' imprisonment.

15.3 The sentence is antedated to 09 February 2017 in terms of section 282 of the Criminal Procedure Act, 51 of 1977.

C.J COLLIS

JUDGE OF THE HIGH COURT

I agree

L. MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

Appearances:

For the Appellant : MS. B. MOLOI
Instructed by : Legal Aid South Africa

For the Respondent : ADV. B.E. MOAKE
Instructed by : Director of Public Prosecutions
Pretoria
Date of Hearing : 31 May 2018
Date of Judgement : 14 June 2018