**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**Case number: A591/2017**

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

SIGNATURE

30 August 2020
DATE

In the matter between:

**PATRICK SESEDINYANE** **FIRST APPELLANT**

And

**THE STATE** **RESPONDENT**

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**JUDGEMENT**

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**MOSOPA, J**

**INTRODUCTION**

1. Appellant was convicted of murder read with the provisions of *Section 51 (1) of Act 105 of 1997* in the Fochville Regional Court and sentenced to life imprisonment.

2. Appellant appeal to this court is a result of automatic right to appeal he has as a result of life imprisonment imposed by below court. *Section 309 of the Criminal Procedure Act 51 of 1977 ("CPA")* was amended by *Section 10 of the Judicial Matters Amendment Act 42 of 2013* to provide for people sentenced to life imprisonment under *Section 51 (1) of Act 105 of 1997* to note appeals against such a sentence without having to apply for leave in terms of *Section 309 B of the CPA*. Current appeal is only against sentence.

3. Appellant was through his trial legally represented.

4. This appeal is heard in terms of *Section 19(a) of the Superior Court Act 10 of 2013,* which authorizes appeal court to dispose the matter on paper. Heads of arguments were obtained from both parties in this matter.

**EVIDENCE**

5. The appellant and the deceased were at the time of the death of the deceased in a love relationship, and were staying together. A night before the incident the deceased did not sleep at their place and appellant was aggrieved of such fact. On the day of the incident appellant and deceased together with other people were drinking alcohol at a certain tavern. There, at the tavern, appellant was repeatedly asking deceased friend to ask the deceased where she slept the previous night and referring to the deceased as a "whore".

6. The deceased had money with her and bought her friend alcohol and refused appellant to drink from the beers she bought. Appellant then grabbed the deceased by her neck and pushed her against the wall and she fell down. When she woke up, appellant pointed her with a finger and uttered the following "I am going to kill you" and deceased responded by saying "you are

used to talking like that" and that angered the appellant a lot. Appellant then said "I am going to kill you, you cannot survive the following day".

7. Appellant had a fight with the deceased at their place, and I must pause to mention that no one witnessed such fight and the deceased was found by the police the following day already dead. The deceased was inside the bedroom lying on top of a bed on a supine position wearing clothes and covered with a blanket.

8. Post-mortem reflected the cause of death as "multiple injuries.

**POINT IN LIMINE**

9. Appellant raised a point *in limine* that the court below was not properly constituted and lacked jurisdiction to deal with the matter on the basis of failure to enquire from appellant that whether or not he required the use of assessors in his trial as it is a requirement in terms of *Section 93 ter (1) of the Magistrates Court Act 32 of 1944* which provides;

"93 ter (1) – The Judicial Officer presiding at any trial may, if he deems it expectant for the administration of justice –

(a) Before any evidence has been led, or

(b) .....

Summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him a assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the Judicial Officer may in his discretion summon one or two assessors to assist him".

10. From the above is apparent that where the accused person elects not to have assessors in his trial and the court proceeds on that basis it does not amount to any irregularity and the court will at that instant been properly constituted.

11. The point raised lacks merit for the following;

10.1 On the 25 November 2015 and at that stage appellant was already legally represented and it was placed on record that no assessors are requested and it was before evidence was led in the matter;

11.2 On the 14 March 2016, appellant still legally represented it was recorded by the court below that no assessors are requested;

11.3 On the 13 October 2016, below court again recorded that no assessors requested;

11.4 10 February 2017 it was again recorded that no assessors are requested for trial purposes;

11.5 On the 30 May 2017 on the day of the commencement of the trial proceedings, court below recorded the trial is proceeding without assessors and no objection or request for assessors was made, and

11.6 That was again repeated by court below when delivering judgement on the merits.

12. The point *in limine* stands to be dismissed and it is found that the below court was properly constituted and had the necessary jurisdiction to deal with the trial of appellant.

**SENTENCE**

13. It is trite that sentencing is pre – eminently within the discretion of the trial court and that a court of appeal will not lightly interfere with the exercise of such discretion (See *R v Mapumulo and Others 1920 AD 56)*. Secondly that

such discretion should not be eroded unless not judicially and properly exercised.

14. Khampepe J in the matter of *S v Bogaards 2013 (1) SACR (1) (CC) when dealing with appellate courts' power to interfere with sentences imposed by the courts below observed;*

"Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, the court below misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused on another".

15. Bosielo J in the matter of *S v PB 2013 (2) SACR 533 at para 20 (539)* when dealing with the correct approach the appeal court must adopt in dealing with sentence under *Act 105 of 1997* observed;

"...The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.

16. *Section 51 (1) of Act 105 of 1997* prescribes a minimum sentence for life imprisonment for murder when planned or premeditated amongst others. An accused has a constitutional right to be properly and adequately apprised that the state might seek to invoke the minimum sentence provision. (*S v Makatu 2014 (2) SACR 539 (SCA)*. In *casu* appellant was adequately apprised of his

rights and the fact that the state intends to invoke the provisions of minimum sentence at the commencement of the proceedings.

17. The below court correctly convicted appellant under *Section 51 (1) of Act 105 of 1997* mainly because of the utterances he made at the tavern that "I am going to kill you, you cannot survive the following day".

18. Now what is left is for this court to determine is, whether or not substantial and compelling circumstances are existent in the case of appellant (*S v GK 2013 (2) SACR 505 (WCC)*. Main contention by appellant is that no sufficient personal circumstances of appellant were placed before court for consideration, as appellant's legal representative or court did not request the probation officer's report. Mr Kgagara on behalf of the appellant did not amplify his contention by indicating what was left out in respect of personal circumstances placed before below court, but indicated that court's failure to order that a probation officer be obtained in favor of appellant amounts to irregularity.

19. In support of his contention Mr Kgagara relied on the decision of *S v Mokgara 2015 (1) SACR 643 (GP)* in which *S v Van der Venter 2011 (1) SACR 238 (SCA)* was quoted with approval. In the matter of *Mokgara* the defense placed only the following personal circumstances of the appellant;

    19.1 That the appellant was 27 years of age;
    19.2 that he is a first offender and
    19.3 that appellants' attorney further requested the *court a quo* to be merciful to the appellant (para 6 at p 636).

20. In *casu* the following was placed in favour of appellant;
    20.1 That he is 38 years old;
    20.2 that he has two children;
    20.3 taking care of the family members;
    20.4 he was not married to the deceased, but lived with the deceased as husband and wife;

20.5 he is unemployed, but did odd (temporary) work;

20.6 he has several previous convictions.

21. In *Mokgara (supra)* at para17, De Vos J stated;

"In the present case the appellant was legally represented. The normal rule is that, once an accused has placed his or her case in the hands of a legal representative, the representative normally has full control over the case and accused cannot afterwards repudiate the conduct of the representative. See in this regard *R v Matonsi 1958 (2) SA 450 (A).* This, incorporates an accused's rights to be involved in and to make decisions in connection with a legal representative, or an accused insists on acting against the latter's advice, the representative might have to withdraw from the case. It is further common cause that before the start of the trial the appellant was properly warned and was aware that upon a conviction he could be sentenced to life imprisonment, unless he proved substantial and compelling circumstance".

22. It is trite that the primary duty to submit considerations in mitigation rests with the appellant (*S v Gray 1947 SA 557 (A) AT 559).* Equally, it is not necessary to obtain a probation officer's report in every case as the accused can be asked for necessary information. In *S v Van der Venter 2011 (1) SACR 238 at 244 A,* Ponnan JA observed; quoting from *S v Siebert 1998 (1) SACR 554 (SCA) at 558 – 59;*

"Sentencing is a judicial function *sui generis.* It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court".

23. *Section 274 (1) of the CPA,* as correctly pointed out by Mr Kgagara, enjoins court to receive evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. However, the inquisitorial role of a court in the process of gathering information or evidence must of necessity be limited to

procedures which are fair in terms of common law rules and principles, statutory provisions and constitutional requirements.

24. Appellant as already indicated in this matter, was legally represented and it is our view that he placed his case in the hands of his legal representative. His legal representative presented his case according to the instructions from appellant and they exercised their discretion not to use the probation officer's report. Appellant was forewarned by below court that he faces the possibility of life imprisonment in the event of conviction. We see no misdirection on the side of the court and further that the court had sufficient evidence before it for purpose of determination of a proper sentence.

25. It was further contended by Mr Kgagara that the below court misdirected itself by not taking a period of two years appellant spent awaiting finalization of his trial as a compelling and a substantial factor. This factor alone cannot in our view stand as a compelling and substantial factor, it must be considered with other factors presented.

26. In the matter of *S v Radebe 2013 (2) SACR 165 at 110 para 14,* Lewis JA observed;

"[14] – A better approach, in my view, is that the period of 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 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 crimes

committed: Whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing is a just one".

27. The deceased in this matter died a brutal and a painful death. It is not clear from the record, simply for the fact that appellant never mentioned it, what was used to cause the injuries the deceased sustained which consequently caused her death. The deceased sustained injuries in almost every part of her body as indicated in the post – mortem report. This necessitated and justified appellant to be denied bail and to attend his trial whilst kept in custody. Appellant has also previous convictions which might be one of the reasons why appellant was not admitted to bail, even though we do not have the record of bail proceedings.

28. No reasons were given which necessitated the prolonged incarceration of appellant pre – sentencing. The sentence imposed in our view, is proportionate to the crime committed, and the period of detention awaiting finalization of trial cannot on its own stand as substantial and compelling circumstance.

29. Appellant showed no form of remorse, and tried to blame the death of the deceased on the deceased herself, that while he was in the bedroom he heard the deceased falling twice in the bathroom. Appellant tried to destroy evidence by wiping off blood of the deceased which was in the kitchen. He went on to change the clothes of the deceased which were blood stained and clothed her with clothes not having blood. The tracksuit jacket worn by the deceased was found on top of the roof with blood stains.

30. Appellant has a string of previous convictions as already alluded some with violence as an element. Despite serving sentences for such previous convictions, appellant proceeded to commit the current offences. For example he has a previous conviction of rape which is a humiliating and degrading offence and in most instances violently perpetrated. We are therefore of the view that appellant is not a candidate of rehabilitation.

31. In *S v Malgas 2001 (1) SACR 469 (SCA)* Malgas JA said (para 25);

"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."

32. The sentence imposed in our view, is not unjust it is actually proportionate to the crime committed, the criminal, and the needs of the society and need not be interfered with.

33. In the consequence the following order is made;

**[1] Appeal is dismissed.**

**MOSOPA J**
**JUDGE OF THE HIGH COURT, JOHANNESBURG**

**I agree**

**PHAHLANE AJ**
**ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG**

**APPEARANCES**

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| For Applicant: | MB Kgagare |
| Instructed by : | Pretoria Justice Centre |
| For Respondent: | Adv M Molatudi |
| Instructed by : | Director of Public Prosecution |
| Date of hearing: | 17 June 2020 |
| Date of delivery: | 20 August 2020 |