REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **A324/2015**

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

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

Nkuna, Andrew **Appellant**

And

The State **Respondent**

JUDGMENT

Van der Linde, J:

[1] This appeal is against sentence only by leave of the regional court sitting at Protea. That court convicted the appellant of murder, and sentenced him to 15 years imprisonment on the basis of s.51(2)(a)(i) of the Criminal Law Amendment Act, 105 of 1997 ("the Act"), often referred to as the minimum sentencing legislation. The appellant was thus convicted of

murder *"… in circumstances other than those referred to in Part I."* Murder in circumstances referred to in part I, is a reference to planned or premeditated murder.

[2] The facts of which the appellant was convicted were that one evening, when he arrived home, he was locked out of the home where he and his partner and her two children had been living. He left and returned in the early hours of the morning. There he found his partner and another man sitting at the table. A scuffle ensued which resulted in the appellant stabbing his partner; she bled to death. The appellant's own version of the scuffle exculpated him, but was rejected by the court a quo. Leave to appeal against the conviction was refused.

[3] The murder of which the appellant was convicted, compels a court to sentence (*"shall sentence"*) the offender to 15 years imprisonment. There is an exception; s.51(3)(a) provides: *"If any court referred to in subsection (1) or subsection (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: …".*

[4] In this case the court a quo did not find that substantial and compelling circumstances existed, and none such was recorded on the record. In submissions before us the appellant pointed out that the court did not even refer to *"substantial and compelling circumstances"* in its judgment on sentence, and the proposition was that the court imposed 15 years without referring to or considering whether these existed at all. But it is clear from the record that the appellant was told at the outset of the trial that he was being charged with murder which upon conviction would lead to the imposition of the minimum sentences; the charge sheet makes that expressly plain.

[5] Further, when the prosecutors made submissions on sentence, the State expressly asked for a sentence as was intimated when the charges were put to the appellant. The inference is

unavoidable that the magistrate imposed the sentence of 15 years because the Act compelled him to do so.

[6] But of course, if the magistrate did not actually bear the provisions of the Act in mind when imposing the sentence, and thus arrived at a sentence of 15 years imprisonment free of those statutory constraints, that does not afford this court greater power to interfere in the sentence. The fact remains that absent substantial and compelling circumstances the minimum sentence must be imposed. And if the magistrate determined that 15 years imprisonment was appropriate, without actually bearing the provisions of the statute in mind, the implication is in any event that he found that there were no circumstances justifying a lesser sentence.

[7] As it happens, this point was expressly abandoned by counsel for the appellant during the hearing of the appeal. In argument, however, it was contended that there were substantial and compelling circumstances that justified the imposition of a lesser sentence. These were that the appellant was 29 years old when the offence was committed; he was a first offender; he had a grade 11 education; he was employed at the time of the offence; he was providing for his father; he had been in custody for 11 months awaiting finalization of the trial; and the offence was committed on the spur of the moment.

[8] The appropriate application of the Act was discussed in S v Dodo:[1]

> "*A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).*
>
> *B Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.*

[1] 2001(3) SA 382 (CC) at [11], adopting S v Malgas, 2001 (2) SA 1222 (SCA).

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (''substantial and compelling'') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I 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.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

[9] In supplementary heads of argument submitted after the hearing had been concluded, Adv. Cosyn of the Johannesburg Justice Centre on behalf of the appellant elaborated on the factors listed above. She stressed the appellant's first offender status; that he was remorseful; and the period awaiting finalization of the trial. In each instance helpful references to applicable authorities were supplied, and we are grateful for the assistance afforded by counsel.

[10] Having considered those factors, we are not able however to conclude that they constitute substantial and compelling factors in this case, viewed either individually or cumulatively. In our view the factors taken individually are, without intending to belittle them, of a generic nature. And we do not believe they become less so, in this case, when they are aggregated. It seems to us that the factors listed are of the kind that are present virtually inevitably at the textbook-case of murder, specifically murder that was not planned or pre-mediated.

[11] In this latter regard we believe that Mr. Ndou is correct when he submits that the minimum sentence of 15 years is specifically prescribed for an unplanned murder by a first offender.

[12] In the circumstances the appeal cannot succeed and the following order is made:

The appeal is dismissed.

WHG van der Linde
Judge, High Court
Johannesburg

I agree.

HW Sibuyi
Acting Judge, High Court
Johannesburg

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Date of hearing: 21 April 2016
Date of judgment: 29 April 2016