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

CASE NO: A85/2017
DPP REF NO: JPV 2008/0166
DATE: 1 SEPTEMBER 2017
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED:NO
18 SEPTEMBER 2017

In the matter between:

MAKHANYA, VUMANI THALENTE **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU J

[1] The appellant, Mr Vumani Thalente Makhanya was on 14 October 2010 convicted of one count of robbery with aggravating circumstances and another count of murder by this court (per Satchwell J). The appellant was accused 2 during the trial, enjoyed legal representation at all relevant times and sentencing proceedings. Subsequently he was sentenced to 21 years' imprisonment for the aggravated

robbery and 32 years' imprisonment on the murder charge, the trial court having found that substantial and compelling circumstances exist justifying a departure from imposing the mandatory minimum sentence of life imprisonment as required by section 51 (1) of Act 105 of 1997 for the murder charge.

[2] The court also ordered that the 32 years' imprisonment imposed in respect of the murder charge run concurrently with the sentence imposed in respect of the aggravated robbery charge. The appellant was accordingly sentenced to an effective period of 33 years' imprisonment. Aggrieved with this sentence, the appeal against sentence only is with leave of the sentencing court.

[3] The salient facts leading to the conviction of the appellant are as follows: On 19 March 2008 a body of a man, later established to be that of Mr. T [....] E[....] O[....] M[....], a Nigerian national, was found inside his car at a disused Shell garage in Doornfontein, Johannesburg. There was a rope tied more than once around his neck. From the photographs it was evident that a great deal of pressure was exerted on the neck by the rope. The doctor who performed the post-mortem examination on the deceased, Dr Moeng, concluded that the death of the deceased was consistent with hanging. The cause of death in such circumstances was found to be loss of oxygen to the brain.

[4] The appellant and four others were charged for the murder of the deceased and aggravated robbery regarding this incident. The evidence established that the appellant and others used to wash cars at the disused garage where the deceased's body was found. He was implicated in the murder and robbery by the evidence of an eyewitness, Mr M[....]2. He witnessed the robbery and the killing taking place. Mr M[....]2 placed the appellant at the scene of the crimes on the date and time of the incidents.

[5] The appellant played an active role in the commission of the offences for he grabbed the deceased outside his vehicle. The deceased was forced into his car. The rope was brought by one of the co-perpetrators to those inside, including the appellant; the deceased thereafter was bound by his hands, legs and neck. The appellant was also implicated by his statement that he made to a magistrate shortly

after he was arrested in KwaZulu–Natal which the trial court found to be admissible in evidence after holding a trial within a trial.

[6] In his statement before the magistrate, the appellant implicated himself in the robbery of the deceased and that each of them shared in the money stolen from the deceased during the robbery. The trial court also found that the appellant and his co-perpetrators who were with him inside the vehicle with the deceased used the rope to restrain the deceased. The rope was tied around the deceased's neck more than once. The motive it seemed, the deceased being a suspected drug dealer, he would have with him a lot of cash inside his car. The appellant blamed his co-perpetrators for the murder, but did not testify in his defence. The version of the appellant was correctly rejected as false by the court *a quo*. It follows that the appellant was correctly convicted.

[7] It is an established approach in our law that this court's power to interfere with the sentence is limited as the passing of punishment lies in the discretion of the sentencing court. A court of appeal may not simply substitute a sentence because it prefers it and will only be entitled to interfere if the sentencing court materially misdirected itself or if the disparity between its sentence and the one which this court would have imposed had it been the trial court is 'shocking', 'startling' or 'disturbingly inappropriate'[1].

[8] In this case, the appellant's sentencing attracted a mandatory minimum sentence of life imprisonment in that the murder of the deceased was committed in the course of an aggravated robbery and secondly, because the offense was committed 'by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy'.

[9] The appellant was 22 years and seven months of age when the offences were committed. He had been in custody for approximately one year and 11 months when sentence was imposed. There were no records of previous convictions proved against him. The court also found that he came from a deprived family background. He had not completed his schooling. Neither had he any trade or skill and was for

[1] See *S v Malgas* 2001 (1) SACR 469 (SCA) at 478F-G

that reason not formally employed. The trial court found that the personal circumstances of the appellant did not contribute towards a finding of substantial or compelling circumstances justifying the imposition of lesser sentences than those prescribed.

[10] As to the crime itself, the trial court found that it was both brutal and violent. Furthermore, that it was brazen as it was committed in public. The court could not find that the offences were planned, but instead found that the murder was committed with "reckless intention, that is with *dolus eventualis*". For this reason alone, the trial court was of the view that since a planned or premeditated intention to kill was not established, that alone constituted substantial and compelling circumstances in respect of count 2, the murder charge, to impose a lesser sentence than the mandatory life imprisonment. In this regard, it would seem to me respectfully, that the trial court erred as there was no apparent consideration of the fact that the deceased died during or after the commission of an aggravated robbery. Counsel for the appellant and the respondent were inclined to agree.

[11] After dealing with the personal circumstances of the appellant as detailed above, the nature of the offences committed, as well as the interests of society, the trial court was of the view that the offences were of a serious nature to warrant the sentences it imposed.

[12] It was contended on behalf of the appellant that the trial court erred in that there were no reasons given for the 21 years imposed in respect of the robbery charge, and for that reason an appropriate sentence would have been 25 years' imprisonment. Whilst the reasons for the sentence imposed in respect of the robbery charge were not singled out, the court expressed a view as indicated above that this was a brazen criminal incident and correctly so in my view. To my mind, it is implicit in the court's reasoning that this was motivation for the sentence imposed. However, to ameliorate the effective sentence, a portion of the sentence imposed in respect of the murder charge was ordered to run concurrently with the sentence imposed for the robbery charge.

[13] In this case there is no cross-appeal by the respondent. This court therefore is not at liberty to deal with the question of an increased sentence without a cross-appeal.[2] The effective sentence of 33 years imprisonment is not equivalent to life imprisonment. Taking into account all substantial considerations, the effective sentence imposed does not provoke in me any sense of shock. I cannot find that the trial court has erred in not imposing a lesser effective sentence or that the sentencing discretion was in this regard improperly exercised. It accordingly follows that there are no reasons for interfering with the sentence imposed on the appellant.

[14] The appeal again sentence is dismissed.

MUDAU T P
[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree

MOKGOATLHENG R
[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree

DU PLESSIS D J F
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Hearing: 1 September 2017

[2] See *S v Nabolisa* 2013 (2) SACR 221 (CC).

Date of Judgment:	18 September 2017
APPEARANCES	
For the Appellant:	Adv. J Henzen-Du Toit
Instructed by:	Legal-Aid South Africa Johannesburg
For the Respondent:	Adv. W Vos
Instructed by:	Office of the Director of Public Prosecutions Johannesburg