IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A271/2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~/NO	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO	
(3) REVISED :	
.....	.....
DATE	SIGNATURE

In the matter between:

DLAMINI BHEKI MNOTHO **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

SIWENDU J:

[1] The appellant was arraigned before magistrate's court sitting in Johannesburg two charges. The first charge was for a premeditated murder of Sizwe Kholani Makhathini on 21 September 2016, in terms of Section 51(1) of the Criminal Amendment Act 105 of 1997. The second charge was for the unlawful

intentional assault, with intent to do grievous bodily harm of Simphiwe Mthembu, a Police Officer who was effecting his arrest.

[2] The appellant was found guilty, after conviction, sentenced to a 25year term of imprisonment for premeditated murder. The charge of premeditated murder carries a prescribed minimum sentence of a life sentence. The trial court found there were substantial and compelling circumstances and reduced the life sentence. The appellant was also found guilty of assault with intent to do grievous bodily harm, and, was sentenced to a term of 5year term of imprisonment. The sentences were ordered to run concurrently leading to an effective term of 25 years.

[3] He appeals against the sentence with the leave of the trial court. He contends the term of imprisonment meted was in effect a life sentence as people who are sentenced to life imprisonment get parole after 25 years. The sentence for murder should be reduced to 15 years to run concurrently with the sentence of 5 years.

[4] The brief facts leading to the conviction are common cause. The appellant made Section 220 Admission that the deceased died on 21 September 2016 as a result of a penetrating incised wound of the right shoulder. He admitted the correctness of the facts in a post-mortem report by Dr Hansmeyer and the pathologist report of Dr Candice Geraldine Hansmeyer was read into the record in terms of Section 212 (4)(1) and (8) of Act 51 Of 1977.

.[5] The deceased at the appellant were neighbours, stayed in rooms 26 and 27 respectively. There had been an altercation between the appellant and the deceased, on two separate occasions, he got angry and fought back. Mr Makwaza, a neighbour, separated them. 30 minutes afterwards, the deceased

returned to him with a knife which he had pointed at the appellant. The appellant went to his room to get his own knife and stabbed the deceased once on the shoulder. He admitted the 17 milli-meter penetrating wound and that there was a single stab on the shoulder of the deceased. He had no intention to kill the deceased. He was apprehended two days after the incident.

[6] The state called Ayanda Mlunga, a friend of the deceased. The deceased and the appellant were employed by the same company, Mvula Security. He testified that tensions between the appellant and the deceased started that morning. At about 08:00 am they met the appellant at Wolmarans. The appellant insulted them as they walked past for no reason. After work, between 16:00 and 17:00, the appellant is alleged to have repeated the insults and a physical altercation between them ensued. The appellant had pushed the deceased and the deceased pushed the appellant out of the shop. Eventually the deceased ran away.

[7] Even though there is no appeal against the conviction, there are some inconsistencies in the evidence on who provoked the fight. The appellant claims to have been angry after he was insulted. Ayanda Mlunga called by the state claims the appellant insulted them. There are also inconsistencies on the evidence as to who provoked the continuation of the fight in the afternoon. Curiously, Ayanda Mlunga's evidence was that the deceased returned to the shop the appellant was, the deceased said: *"....what are you doing I was playing with you, as he said that the accused then hit the accused [deceased] with a fist"*

[8] According to Ayanda Mlunga, the altercation transferred to the block of flats where they lived at about 19:15. The appellant who also lives in the same block of flats followed them there. There was a continuation of the fight, but the appellant and the deceased were separated. The appellant conceded he went to his flat to take out his knife. His version is that the deceased returned with a knife which he pointed at him. Ayanda Mlunga denied that the deceased had a knife. The knife the deceased allegedly had was not tendered in evidence. Evidence is that the fight ensued again after 30 minutes at the passage. The appellant stated that the deceased came onto the knife. It does not appear from the record Ayanda Mlunga saw how the deceased was stabbed.

[9] There is no dispute that until that day, there was no history of conflict between the appellant and the deceased.

[10] The Probation Officers' report found the appellant had an opportunity to change his mind. He had been the aggressor. The murder was premeditated. There was no cogent, weighty or tangible reason for the fight. The report states the appellant still shifted responsibility onto the deceased. He acted out of anger. He killed for no apparent reason. The failure to take responsibility was an aggravating factor. That his family's contribution towards funeral expenses was not a demonstration of his remorse.

[11] The pre-sentence report reveals that the appellant was born in KwaZulu-Natal. His parents died in 2011 and 2015 respectively. He has two siblings. He has matriculated in 2015 and aspired to be a school teacher. He had stable employment from 2016 earning R4 000 per month to support his children aged 6 and 3 years respectively. The children live with their respective mothers.

[12] He had no previous convictions. It transpires from the report prepared for the consideration of correctional supervision sentence, he would have to relocate to his original family in Nkandla where his extended family lives if the court had imposed correctional supervision. The extended family is reported to have found the incident uncharacteristic of the appellant. He had not been involved in violent behaviour in the past. He persisted that his actions were not intentional. He expressed remorse, and his family contributed R10 000.00 towards funeral expenses. He had not been given an opportunity to apologise to the deceased's family. The officer reported he had not taken responsibility for his actions. This militated against a recommendation for correctional supervision and direct imprisonment was recommended.

[13] It is trite that sentence is a matter that eminently lies within the discretion of the trial court. The Judgment by Trollip JA in *S v Pillay 1977(4) SA 531 AD at page 535*, which has been cited by the courts sets out the principles as follows:

As the essential inquiry in an appeal against sentence however, is not whether the sentence was right or wrong, but whether the court imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence; it must be of such nature, degree or seriousness that is shows, directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed on that vitiates the Court's decision on sentence.

[14] The court found that the appellant had the opportunity to repent or change his mind. It found the appellant was the aggressor at all these stages. There had been no reason to kill the deceased. The appellant showed no remorse. It considered these aggravating factors. It dismissed the appellant's assertion that

the deceased *"got into the knife"* and held that the appellant showed remorse after it became clear he faces long term imprisonment.

[15] I have considered the reasoning of the trial court in imposing the sentence. It referred to the triad propounded in *S v Zinn 1969(2) SA 537* to arrive at a sentence that is just. It noted that people in the like of the appellant make the Johannesburg CBD dangerous. Even though a crime of murder carries a 15year term of imprisonment, there was premeditated murder, which carries life imprisonment. The trial court however found there were substantial compelling circumstances to deviate from the prescribed minimum sentence because the time that lapsed between the altercation was not lengthy, unlike in other cases of premeditated murder. It found the appellant could still be rehabilitated as a good member of society. He had been in custody for 6 months and a first offender. In *Banda* B Friedman J explained that:

"The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial C incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern"

[16] Curiously there appears to have been an expectation that the court renders its judgment on sentence on 25 January 2018 as opposed to the 26 January 2018. The sentencing and probation reports were made available on 25th and the court required time to consider them. The trial court observed that family members of the deceased cried out loud in court demanding that the court renders its judgment on sentence because of their personal circumstances. The impression is that pressure and weight was brought to bear on the court to mete out its sentence. The court was at pains to address this in its judgment.

[17] This court, is mindful that the appeal lies solely against the sentence pointed to certain unexplained aspects in the evidence. The location of the stab wound on the right shoulder appears to be inconsistent with the intention to murder even though Mr Mothibe argued it was. There had been no history of conflict between the deceased and the appellant. In my view, the trial court did not sufficiently weigh the inconsistencies in the evidence of the of the altercation. Even though it correctly found that the appellant did not show remorse, whether there was apparent pressure placed on the court by the deceased's family to impose a stiffer sentence and as reported by the Probation Officer lingers from the record.

[18] Adv Mothibe correctly conceded that a term of imprisonment of 15 years would have been an appropriate sentence to impose. We agree. Given the trial court's own finding that the appellant could be rehabilitated supports a reduction of the sentence.

[19] Having regard to the above, the appropriate sentence this court would have imposed is 15 years in respect of the count of murder. Accordingly, the following order is made:

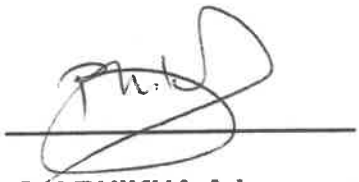
[1] The sentence for Count 1 of 25 years of imprisonment is set aside and substituted as follows:

"For Count 1 and the charge of premeditated murder, the accused is sentenced to 15 years imprisonment"

[2] the appeal in respect of the sentence for assault with the intention to do grievous bodily harm is dismissed

[3] The order that the sentences should run concurrently is upheld

N T SIWENDU
Judge of the High Court
of South Africa,
Gauteng Local Division.



G. LBHIKHA AJ

Judge of the High Court
of South Africa,
Gauteng Local Division

APPEARANCES:

Counsel for the Applicant:	Adv. MULLER
Instructed by	LEGAL AID
Counsel for the Respondent:	Adv. MOTHIBE
Instructed by	STATE ATTORNEY
Date of Hearing	2 MAY 2019
Date of Judgment	9 MAY 2019