IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

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

20.2.2.14 [signature]
DATE SIGNATURE

CASE NUMBER: A203/10
DATE: 16 February 2012

DAVID JOHANNES LIZAMORE *APPELLANT*

V

THE STATE *RESPONDENT*

JUDGMENT

MABUSE J:

1. This is an appeal against both conviction and sentence, leave to appeal against conviction and sentence in respect of armed robbery with aggravating circumstances ("count 2"), having been granted by the court a quo on 16 November 2009. Leave to appeal against both conviction and sentence in respect of the count of murder ("count 1") was granted

automatically by the provisions of s. 309(1)(ii) of the Criminal Procedure Act No. 51 of 1977 ("the CPA").

2. The appellant, Mr David Johannes Lizamore, appeared before a regional court magistrate in Vereeniging where he was charged with five counts, namely murder, robbery with aggravating circumstances, defeating the ends of justice ("count 3"), contravention of section 3 of the Firearms Control Act 60 of 2000 ("count 4") and contravention of section 90 of the Firearms Control Act 60 of 2000 ("count 5").

3. He pleaded guilty to counts 3, 4 and 5 in terms of the provisions of s. 112 of the CPA but not guilty in terms of s. 115 of the CPA, in respect of counts 1 and 2. After the state had led its evidence, the court *a quo* convicted the appellant as charged and sentenced him as follows; in count 1 he was sentenced to life imprisonment; in count 2 he was sentenced to fifteen (15) years imprisonment; in count 3 he was sentenced to three (3) years imprisonment, in count 4 he was sentenced to three (3) years imprisonment and in count 5 he was sentenced to one (1) year imprisonment. In terms of the provision of s. 280(2) of the CPA, the court *a quo* ordered that the sentences it had imposed on the appellant in respect of counts 2, 3, 4 and 5 should run concurrently with the sentence of life imprisonment in respect of count 1.

4. Although the appellant enjoyed legal representation when his application for leave to appeal was made, it is quite clear that the notice of appeal was not original in that the person who compiled it simply regurgitated the standard

grounds of appeal normally prepared by appellants in prison. We have seen many of such notices before and were also able to identify them as soon as we read them. Be that as it may, having perused the appellant's notice of appeal, it is clear that he has noted his appeal against his conviction in respect of both counts 1 and 2 on the basis that the State did not prove its case in respect of both counts beyond reasonable doubt.

5. With regard to his grounds of appeal against sentence, he complains about the severity of the sentence so imposed on him. He opined that the sentences are strikingly inappropriate in as much as they are disproportionate with the totality of the facts placed before the trial court in mitigation and that the court should have considered imposing a shorter sentence of imprisonment.

6. The appellant was represented throughout the whole matter in the court *a quo* by Mrs. Esterhuizen. After the appellant had pleaded not guilty to both counts 1 and 2, Mrs. Esterhuizen proceeded and made the following admissions in terms of s. 115 of the CPA on behalf of the appellant; the appellant accepted the correctness of the medico-legal autopsy report on the cause of the accused's death; that the deceased's body was conveyed from the scene to the Government Mortuary in Sebokeng on 3 August 2009 at 11h25 and that during such conveyance the said body sustained no further injuries; that the said body was received properly at the said Government Mortuary and that it sustained no further injuries after it had been received at the Government Mortuary; and that it was later properly identified as the deceased's body. In addition, the appellant accepted the rectitude of the photo album and consented to it being handed in as an exhibit; the expert

statement of the witness who had visited the scene and the statement of the policeman who visited the scene after the incident and found blood on the scene.

7. The appellant, having made the admissions in terms of s. 220 of the CPA, explained in his s. 115 plea that during a struggle he had with the deceased and while he was angry and fearful, he picked up a hammer, lost his head and noticed the deceased on the floor. He was dead. The appellant admitted in his plea explanation that he killed the deceased though it was not intentional. Accordingly the only issue between the State and the appellant in the trial court was whether or not he had intentionally killed the deceased.

8. In respect of count 2, the appellant, having admitted in terms of s. 220 of the CPA that he had removed the deceased's property, namely, the motorbike, the firearm, the wallet and the jacket he did not explain what his defence was. He failed to tell the court why he removed them. Accordingly the battlefield between the State and the defence in the court *a quo* in respect of count 2 was whether or not the appellant removed the aforementioned deceased's property with the necessary intention to permanently deprive the deceased of his ownership thereof.

9. There was no eyewitness available for the State. Consequently, apart from the admissions that the appellant made during the plea stage, the State had to rely on further oral evidence by Dr. Phillipus Johannes Schutte ("Schutte"), who had also performed an autopsy on the body of the deceased. In his

testimony, Schutte regurgitated what was contained in the medico-legal postmortem report and proceeded further to explain his findings.

10. The appellant testified in his defence but called no witness to testify on his behalf about, not only the incident but also his conduct after the incident. It is understandable that much as the State had no eyewitness to call in support of its case due to the fact that where the incident took place only the appellant and the deceased were present, the appellant too would also have no eyewitnesses to call.

11. Be that as it may, the appellant told the court that after he and the deceased had knocked off that evening, they both drove on the deceased's motorbike to the deceased's apartment where they used drugs. While they were sitting in the deceased's bedroom, and while they were still in his bedroom, the deceased suggested that they should go and have drinks somewhere. He was reluctant to accept the suggestion. An argument then ensued between him and the deceased over his refusal to go and have drinks with him.

12. The said argument ended in a fight between the two of them. The fight took place in the deceased's bedroom initially. At this stage they hit each other with fists. As a consequence of the fight, he sustained certain bodily injuries which were captured in photographs taken of him after the incident.

13. The deceased walked down the flight of stairs and he followed. As they were walking down the deceased pushed him and he rolled down the steps and

hit his head against the wall. According to his testimony he fell because the deceased bumped him while they were walking down the stairs.

14. When he landed at the foot of the staircase, they continued fighting. The fight continued in the same way with fists, first towards the kitchen and later in the lounge through the kitchen and back on the steps and back in the deceased's bedroom.

15. Whilst he was standing on the side of the steps he asked the deceased, who had hardly worked for a month with him, why they were fighting. The deceased moved aside and whipped out a revolver. He threatened to shoot him with it whilst he used abusive language against him. He grabbed the hand in which the deceased had the firearm and while the deceased was struggling to free the hand, looked around for something that he could use to defend himself. He approached some boxes containing tools next to the steps and fished, from one of such boxes, a hammer and with it he hit the deceased.

16. Both of them fell down the stairs, he was full of blood, confused as a result of the fact that he had worked the whole night and had smoked drugs. After he hit the deceased with the hammer, both of them rolled down the stairs and in the process he bumped his head against the wall. He did not thereafter know until he noticed the deceased's body in front of him. He saw blood all over.

17. The first thing that came to his mind after he had come to, was to flee from the scene. Before doing that, he picked the hammer and the revolver and

tucked them in his trousers. He put on the deceased's jacket, helmet, took the motorbike and the deceased's purse and drove away. He did not know why he took away those items.

18. He rode the motorbike up to a certain bridge when he threw the hammer and the deceased's wallet away and where he left the motorbike. He got into a taxi and went home. Having arrived at his house, he washed himself. He did not tell his wife what had happened until he was arrested.

19. It is now clear that with regard to count 1 the issue between the State and the appellant was whether or not the appellant intentionally killed the deceased. With regard to the second count the parties' battlefield was whether the appellant attacked the deceased with the intention to rob him of his property.

20. Mr. Pitso, who appeared for the appellant, argued that the State had not proved its case in respect of both counts against the appellant beyond reasonable doubt.

21. The court accepted the findings of Schutte that some of the injuries sustained by the deceased were consistent with injuries caused by a blunt object. It found this testimony consistent with the appellant's plea explanation that he had used a hammer in self defence.

22. The court *a quo* was satisfied that Schutte was a qualified witness better as such to testify in the matter. It was satisfied about his credibility as a witness and made no adverse comments about him.

23. Schutte was not cross-examined on his observations and findings. Therefore under those circumstances it was inevitable that the court would accept his evidence in total. Moreover the appellant, during the plea stage, admitted the deceased's injuries. In his testimony the appellant himself testified that the deceased sustained all the injuries that resulted in his death during the scuffle he had with him.

24. The appellant's defence to the court was not very clear. However it was not his defence in terms of s. 115 of the CPA that at the time he hit the deceased with a hammer, he was acting in self defence nor was it his defence that he had been rendered truculent by the drugs he had taken. Although he admitted that he had used the hammer on the deceased and that the deceased's death resulted from the blows that he inflicted on him with the hammer, he seemed to suggest that he was not aware of his actions of the time of the incident.

25. The court *a quo* analysed the whole evidence before it. Although the court did not explicitly state it, it is as clear as crystal that by analysing the seriousness of the injuries, and finding shortcomings in the evidence of the appellant, it was satisfied however that, even in the absence of evidence of an eyewitness, even despite the appellant's evidence, he killed the deceased with the necessary intention. In my view, the magistrate was correct in looking at the nature of the injuries, and the explanation or evidence of the appellant, the failure of the appellant to explain how the deceased sustained some of the injuries, the magistrate was correct in coming to a conclusion that the appellant killed the deceased intentionally.

26. In order to make a finding that the appellant acted intentionally when he inflicted the injuries on the deceased, the magistrate took into account firstly, the seriousness of the injuries; the nature of the weapon that the appellant claimed he used; the nature of the injuries that such a blunt object as a hammer could inflict on the victim; the type of the injuries that the deceased sustained at the hands of the appellant and the failure of the appellant, having pleaded and testified that in hitting the deceased he only used a hammer in self defence, to explain the circumstances under which, during their alleged struggle, the deceased sustained stab and cut wounds. According to the medico-legal postmortem report, the deceased sustained a "steekwond oor die voorkant van die nek" and "twee steekwonde aan die linkerkant van die dybeen." The magistrate, quite correctly in my view, found that these sorts of injuries could not have been caused by a hammer. I am satisfied therefore that the magistrate correctly made a finding of intention.

27. The next question is, was the appellant aware of his actions at the time? It will be recalled that in his plea explanation the appellant told the court that:

"Ek kan nie onthou presies of hoe of wanneer nie maar op 'n stadium het ek 'n hamer opgetel, ek was bang en kwaad en ek het kop verloor toe ek besef het wat gebeur het was die oorledene voor my op die vloer dood. Op daardie stadium kon ek nie glo wat gebeur het nie en ek het van die toneel gevlug."

Three things are clear in this plea explanation. Firstly, the appellant did not raise a defence that he was acting under the influence of drugs; he never

explicitly and straight forward told the court that he was acting in self-defence; and lastly, it is clear that the impression he created was that he was not aware of what he was doing at the time.

!8. In his testimony, he never told the court that at the time of the incident or in particular at the time he hit the deceased with a hammer he was not aware of what he was doing nor did he tell the court that when he did he was under the influence of drugs. He had the following to say in his testimony:

"Ja dit was 'n gevloekery en 'n deurmekaar spul. Ek het gegryp en het sy hand met die wapen in sy hand gekry en hy het geforseer en die eerste ding wat ek aan gedink het is waarmee kan ek myself verdedig en hier by die trappe was daar klomp bokse met gereedskap en klomp ander goeters en wat ook al. Ek het gekyk na iets om meet te slaan en hy het gesien hierso by die bokse en goed wat hierso staan daar in 'n steel ek het hom gegryp en dit was 'n hamer gewees."

The conclusion is inevitable that he had emasculated the deceased by not only grabbing the hand in which he had allegedly possessed the firearm but had also dragged him while he foraged for an object he could use to hit the deceased in self-defence. It is clear from this testimony that he was aware of his actions at all material times.

29. The magistrate did not accept the appellant's version that he was not aware of his actions when he hit the deceased. He made the following finding:

"Die hof is oortuig dat die beskuldigde verkieslik en gerieflikheidshalwe geheueverlies of amnesia het omdat hy nie in staat is om te verduidelik hoe hy die oorledene verskeie kere moes aanrand en steek met die skerp voorwerp en slaan met die hamer nie."

This finding by the magistrate was in my view correct.

30. The appellant's loss of memory or amnesia was not a genuine one. This can be illustrated by highlighting a few points in the evidence. The appellant's cognitive capacity before the incident appeared to have been intact up until after he had picked up the hammer. When one looked at the manner in which he described the event up to that stage, the appellant had the ability to orientate himself with regard to their respective positions after the deceased had grabbed the firearm, the manner in which they struggled and fell down on the stairs, the way in which he grabbed the deceased's hand that had the firearm, the manner in which he dragged the deceased while he was holding him and searched for an object he could use and the manner in which he identified the hammer.

31. In other words, he knew where he was, why he was there, what he was doing, why he was looking for an object and how he wanted to use it. During this period, he had the ability to direct his attentions to his intention. Besides, he never told the court that he had been rendered truculent by any liquor or drugs and no evidence was tendered on his behalf that he acted under the influence of either drugs or liquor. He could thereafter vividly remember what had happened. It is highly unlikely, in my view, that the

appellant could suddenly have lost memory and could not remember what happened.

32. In deciding whether a person had genuinely lost memory a court is entitled to have regard to the manner in which he relates the events up to the stage where he claims that he had lost memory; the manner in which he continued with his narration after the stage where he had lost memory; the circumstances that prevailed before he lost memory; the length of such loss of memory and evidence by other witnesses. For these reasons, the court *a quo* correctly found that the appellant's claim of loss of memory or amnesia had its genesis in the appellant's failure to explain the presence on the body of the deceased of injuries which were not consistent with the hammer and the magnitude of the injuries that were inflicted on the deceased.

33. The court *a quo* therefore found, in my view, that the appellant was at all material times perfectly aware of his actions; what he was doing and that his attempt to set store on the loss of memory or amnesia fell between two stools. He was correctly convicted of murder.

34. With regard to count 2, robbery with aggravating circumstances, the appellant was, frankly speaking, disclosed no defence. Having killed the deceased in the manner accepted by the court *a quo*, he set upon to remove, unlawfully and intentionally, and for no apparent reason whatsoever, the deceased property. He had incapacitated the deceased by killing him by using a variety of tools on him and proceeded thereafter to plunder his property. Mr. Pitso argued that the State did not call witnesses to prove that

the appellant attacked the deceased with the sole intention to rob him of his property. I cannot accept this argument, as, in my view, it seems to ignore the fact that intention can be proved by circumstances. It was not necessary that the State should, in the circumstances of this case, lead any evidence of the intention of the appellant to commit armed robbery when there was other evidence upon which the State could rely. The conviction of the accused by the court on armed robbery is therefore correct. In my view, the appeal against conviction cannot succeed.

35. I now turn to dealing with the appeal against sentence. The appellant, as pointed out earlier, set out his grounds of appeal against sentence in his notice of appeal which was deposited with the clerk of the court on 16 November 2009. In the said notice of appeal, it was not his case that the court *a quo* erred in sentencing him in terms of the provisions of s. 51(1) of the Criminal Law Amendment Act 105 of 1997 ("The Minimum Sentence Act") when he was charged under s. 51(2) of the said Act. This court is however prepared to accept this ground as it is patently clear that the appellant was sentenced to life imprisonment in respect of count 1 while he had been charged under the provisions of s. 51(2) of the same Act, which, as we all know, does not provide for a life imprisonment sentence. This being an obvious oversight by the magistrate, the appeal against the sentence imposed on count 1 should, in my view, succeed.

36. The approach this court should adopt in dealing with an appeal against sentence was set out in **R v Mapumulo and others 1920 AD 56 at p. 57** and followed in **R v S 1958(3) S.A. 102 A.D. at 104**. In this authority Fagan CJ, as

he then was, set out the grounds upon which an appeal court may interfere with the sentence imposed by either a trial judge or magistrate as follows:

a) where the trial judge or magistrate has misdirected himself on the law or facts;

b) or has exercised his discretion capriciously or upon a wrong principle; **and**

c) or where the sentence imposed is so unreasonable as to induce a sense of shock.

The duty is on the appellant to satisfy the appeal court that at least one of the grounds set out above exists before he can succeed.

37. I am satisfied that there exist good grounds to interfere with the sentence which the court *a quo* imposed on the appellant in respect of count 1. I have already indicated the reasons somewhere above why the sentence imposed in respect of count 1 should be altered.

38. With regard to the sentence imposed on the appellant in respect of count 2, I am satisfied that the court *a quo* took all the aggravating factors into account and that he committed no misdirection. There is therefore no reason, in my view, to interfere with the sentence of the trial court and the appeal against this sentence cannot succeed.

Accordingly I propose the following order:

(1) The appeal against conviction in count 1 is dismissed and the conviction of the accused on the said count is hereby confirmed.

(2) The appeal against conviction on count 2, that is the count of robbery with aggravating circumstances, is dismissed and the said conviction is hereby confirmed.

(3) The appeal against sentence in respect of count 1, that is the count of murder, is hereby upheld.

(4) The sentence of life imprisonment imposed by the trial court on the appellant in respect of count 1 is hereby set aside and replaced with the following:

"The accused is sentenced to 15 (fifteen) years imprisonment, which is antedated to 5 November 2009."

(5) The appeal against sentence imposed on the appellant in respect of count 2 is dismissed and is hereby confirmed.

(6) The sentences imposed in respect of counts 2, 3, 4 and 5 shall run concurrently with the sentence imposed in respect of count 1.

P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree, and it is so ordered

G. WEBSTER
JUDGE OF THE HIGH COURT

Appearances:

Appellant's Counsel:	*Adv. S Moeng*
Respondent's Counsel:	*Adv. C Kersten-Smit*
Date Heard:	*10 August 2010*
Date of Judgment:	16 February 2012