REPUBLIC OF SOUTH AFRICA

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

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

15/08/2014. DOSIO
DATE SIGNATURE

15/8/2014

CASE NUMBER: A 165/2013

MAPHUTU MOGARAMEDI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

DOSIO AJ:

[1] The appellant pleaded guilty and was subsequently convicted by the North Gauteng High Court, on a charge of murder, read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("Criminal Law Amendment Act"). He was sentenced to life imprisonment.

[2] The appellant was legally represented during the proceedings.

[3] The appellant sought leave to appeal against his sentence which was granted by the court *a quo*.

[4] Before turning to consider whether the sentence imposed on the appellant is appropriate, a brief consideration of the background facts is necessary. The appellant had been practicing as a *Sangoma* for ten (10) years prior to the offence. As part of his final initiation, he had to obtain the genital organ of a close female relative. He therefore lured his younger sister, (the deceased), to his home under the false pretence that they would conduct a ritual for their incarcerated brother. He waited for the deceased to fall asleep whereupon he hit her twice on her head with an axe. He then stabbed her with a knife on the chest and waited for her to pass away. He then cut off the deceased's genital organ with an axe. He was arrested whilst in possession of the said genital organ.

AD SENTENCE

[5] It is trite that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion.

[6] A sentence imposed by a lower court should only be altered if;

I. An irregularity took place during the trial or sentencing stage.
II. The trial court misdirected itself in respect to the imposition of the sentence.
III. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.

[7] In the case of ***S v Malgas*** [i]; the learned Marais JA stated at paragraph [12];

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court."

[8] In the case of ***S v Pillay*** [ii] at page 535 E-G, the court held that;

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

[9] Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("Criminal Law Amendment Act") states that;

"(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

[10] Part I of schedule 2 offences include:

"Murder, when –
(a) It was planned or premeditated;..."

[11] Counsel for the appellant submitted that the only issue for adjudication in the current appeal is whether substantial and compelling circumstances existed which would have justified a lesser sentence than the prescribed minimum sentence of life imprisonment. The following factors were submitted as substantial and compelling, namely;

I. The appellant was forty nine (49) years old and was a first offender with no history of violent behaviour. He pleaded guilty.
II. The killing was not committed for financial gain but out of a deep rooted religious belief that such act was necessary as part of his initiation to become a *Sangoma.*
III. The appellant had endured hardship in perpetrating the offence, as he suffered from some degree of emotional hardship subsequent to the offence.

[12] Counsel argued that the aforementioned factors justified that the appellant was capable of rehabilitation and that individual deterrence could be achieved by imposing a substantially lesser sentence than life imprisonment.

[13] Counsel drew this courts attention to the case of ***S V Dodo*** [iii] where the Constitutional Court confirmed the principle of proportionality and the "Determinative Test" in order to prevent prescribed sentences being imposed as a norm.

[14] In the case of ***S v Malgas*** [iv] the learned Marais JA stated at paragraph [25];

"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."

[15] Counsel for the respondent submitted that the court *a quo* carefully considered all the relevant mitigating and aggravating factors and was correct in sentencing the appellant to a term of life imprisonment. Counsel contended that although life imprisonment was a robust sentence, it was not excessively heavy or disproportionate to the seriousness of this crime, the appellant or the interests of society. Counsel did not believe this appellant is a candidate for rehabilitation, irrespective of him being a first offender.

[16] Section 11 of the Bill of Rights dictates that, *"Everyone has the right to life".*

[17] In the case of ***S v Makwanyane*** **1995 (3) SA 391 (CC)**, the learned O'Regan J stated;

"...The right to life was included in the Constitution not simply to enshrine the right to existence..., but...to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values... The right to life is the most primordial right which humans have. If there is not life there is no human dignity."

[18] The learned authors S Woolman and M Bishop in ***Constitutional Law of South Africa*** [v] state that;

"To kill or to condone the killing of a person thus amounts to an infringement of the right to life"

[19] Section 31 of the Bill of Rights, which relates to *"cultural, religious and linguistic communities"* states;

"(1)Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
(a) to enjoy their culture, practice their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2)The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[20] In South Africa, cultural practices pertaining to a belief in witchcraft, and muti killings prevail. [vi]

[21] The public at large has expressed its anger in respect to muti killings. Instances where the community have taken the law into their own hands to kill witch doctors is not uncommon.

[22] The learned Professor Gerard Labuschagne in an article entitled ***"Features and Investigative Implications of Muti Murder in South Africa"***,[vii] stated that in respect to muti killings ;

"...The majority of Africans and traditional healers do not condone such behaviour and associate it more with charlatans and 'evil' traditional healers...such practices are rejected by other healers...The use of human body parts as an ingredient for medicines or portions, ... is practiced by a minority of individuals (but is rejected by the majority of traditional healers and members of society."

[23] The learned author Camden Behrens in an article entitled ***"Challenges in investigating and preventing 'muti' – related offences in South Africa"*** [viii] also stated that most traditional healers do not condone the use of human muti and are quite co-operative with the police in their investigations as to who was responsible for the murder.

[24] The appellant's religious beliefs and convictions cannot supersede the deceased's right to life. Although everyone has a right to practice their belief, as soon as this belief

leads to an action which falls within the bounds of illegality, for instance a murder to obtain body parts, then in terms of section 31 (2) of the Bill of Rights it can no longer be condoned or protected merely because it is based on a religious or cultural belief. Cultural and religious beliefs must respect life and must be practiced in line with the Bill of Rights. If one allows such factors as in this present case to be regarded as substantial and compelling it will open the flood gates for many other accused found guilty of killing innocent victims and dismembering their bodies, for muti purposes, to seek lesser sentences than those prescribed.

[25] In section 51 (3) (aA) of the Criminal Law Amendment Act our legislature has excluded a person's cultural and religious beliefs as amounting to substantial and compelling circumstances. The section states that;

"...(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) ...

(ii) ...

(iii) An accused person's cultural or religious beliefs about rape; ..."

[26] This section only applies to rape matters, however it is clear that section 10 of the Bill of Rights played a predominant role to exclude cultural and religious beliefs in order to ensure that everyone has an inherent right to dignity.

[27] The Supreme Court of Appeal has previously dealt with matters where the appellants subjectively believed in witchcraft. A brief analysis of these cases will depict a differentiation between murders committed by perpetrators who believed in witchcraft and killed witch doctors who they believed had caused harm or fear to their families, as compared to muti related killings.

Cases where appellants subjectively believed in witchcraft and killed witch doctors who had caused harm or fear to their families

The following cases refer to acts of prevention and self-protection and have been regarded by the Appeal courts as amounting to "extenuating" and mitigating circumstances.

In the case of ***S v Lukwa en 'n Ander*** [ix], the appellants went on a witch hunt and killed those who were accused of being witches. They were sentenced to death by the Supreme Court of Venda. The death sentence was converted to life imprisonment as the court held the appellants subjectively cherished a deep-rooted belief and fear for witchcraft and the events of that night had been ignited and fuelled by such belief.

In ***S v Motsepa en 'n Ander*** [x] and ***S V Latha and Another*** [xi] the respective appellants were found guilty of murdering men who were regarded as wizards or witch doctors. In the former case the appellant killed the alleged wizard in the interest of his community and his sentence of death was replaced with an effective twenty two (22) years imprisonment. In the latter case the appellants who murdered the deceased under the belief that he had bewitched their family were respectively sentenced to fifteen (15) years and ten (10) years.

In the case of ***R v Biyana*** [xii] the perpetrators killed a deceased who they believed was practicing witch craft and had by supernatural means caused the death of their family members. The learned Lansdown JP stated;

"...when we find that this has been the motive of the criminal conduct under consideration, we feel bound to regard the accused as persons labouring under a delusion which, though impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide extenuating circumstances"

[28] The above mentioned cases are different to the facts before this court as the appellant before this court was not defending himself or the community from the actions of a witch doctor. Instead this appellant murdered his own defenceless sister for his own gain to become a *Sangoma*.

[29] The Supreme Court of Appeal has taken a harsher stance towards appellants who killed to obtain body parts for muti related purposes.

Cases where appellants subjectively believed in witch craft and killed innocent victims to obtain body parts

In the case of ***S v Sibande*** [xiii] the appellant consulted a traditional healer who advised him that if he raped his grandmother, then killed her, and then cut off a portion of her ear and chin for muti purposes he would be more successful in his gambling. The appeal against the conviction of murder and the death sentence was dismissed. The learned Beadle CJ stated at page 967 C- F;

"It is quite true that in certain circumstances where primitive people commit offences under the influence of witchcraft, that belief is regarded as an extenuating circumstance....but those are all cases where the accused killed the deceased in the genuine belief that by killing the deceased he was averting some great evil that would either befall himself or befall his family or his community. In no circumstance have I known a belief in witchcraft to be regarded as an extenuating feature where the motive for the crime is for personal gain of the accused himself. For example, cases come before this Court where a human being is murdered with the object of taking some portion of that human being's body for making "muti" to be used for witchcraft purposes. In every one of those cases the accused, who has been found guilty of such a murder, has been found guilty of committing the offence without any circumstances of extentuation, although the killing was prompted by the belief in witchcraft"

In the case of ***S v Modisafife*** [xiv] the appellant who was an uneducated man had been requested by his brother to murder the brother's stepchild who was a one (1) year old girl. The appellant believed in witchcraft and thought the medicines would protect him from being struck by lightning on the request of his enemies. On the direction of a traditional healer the appellant cut out certain body parts of the child for muti purposes. The appeal against the death sentence was dismissed.

In the case of ***S v Malaza*** [xv] a witchdoctor advised the appellant to drink the blood of a strong man and to bury his internal organs. This would allegedly help the appellant find a job and a woman. A suitable victim was identified by the appellant and was killed.

The deceased posed no threat to the appellant, and he was killed purely to further the selfish interests of the appellant. The death sentence was confirmed on appeal.

In the case of ***S v Munyai and Others*** [xvi] the appellants were part of a group of persons who committed a muti related murder. They were all sentenced to death. One of the appellants believed his new business would be successful if human body parts were buried on the business premises. Another appellant selected his own two-and-a-half-year-old-grandson for this purpose. The child's lips, half of his tongue and penis were removed and his head was decapitated with an axe. The learned Nestadt JA held that the appellants' belief in the supernatural was not a mitigating factor as this was not a situation where a deceased was killed out of fear of harm befalling the appellant's family. His motive was purely financial gain. Nestadt JA held that this was a case were the aggravating factors were such that the deterrent and retributive objects of punishment had to play a dominant role. The appeal in respect to the appellants was dismissed.

In the case of ***S v Alam*** [xvii], the appellant pleaded guilty to a crime of murder and rape. The appellant murdered the deceased so that he could obtain human blood sought by a traditional healer for ritual purposes. The appellant would be paid seven thousand rand (R7000-00). After killing the deceased he raped the deceased's wife. The court did not impose life imprisonment. The factors which led to a lesser sentence were that the appellant two months after committing the crime handed himself over to the police, who were unable to identify a suspect. He also committed the crimes under the influence of alcohol. His cumulative sentence was (17) seventeen years imprisonment for both counts. The learned Dhlodhlo ADJP held;

"Insofar as the murder is concerned, there is no evidence that he believed in witchcraft when he stabbed the deceased in order to obtain his blood... Poverty may have played a role..."

[30] The facts before this court are different to that of ***S v Alam*** in that the appellant before this court did entertain a deep rooted belief in witchcraft, and he did not hand himself up to the police voluntarily. Neither did he consume alcohol prior to committing this offence. His actions were not driven by poverty as he was employed as a security officer. Neither did he kill his sister in the deep rooted belief that she would cause some harm to him. The murder was premeditated and the motive was self-gain.

[31] This court has considered the aspect of the appellant's rehabilitation. Although the appellant pleaded guilty, he had no choice as he was found by the police in possession of the private parts on his way to deliver them at Chaka Stad. No mention was made in his plea of guilty whether once released from prison he would refrain from muti related killings. This belief to kill another human being for muti related purposes goes against the very core of our Constitution. Due to the appellant's deep rooted belief that it is a necessity to kill a human being to complete his initiation as a *Sangoma* there is a strong probability that the appellant may in the future give the same advice to another prospective *Sangoma* initiate. Accordingly, the appellant is not a candidate exhibiting a strong prospect to reform. Deterrent and retributive objects of punishment have to play a dominant role in such a case.

[32] The personal circumstances taken into consideration by the court *a quo* were;

I. He was a forty nine (49) year old widower, a first offender and he had completed standard eight (8). At the time of his arrest he was working as a security guard. He was in custody ten (10) months prior to his sentence.
II. He has three children, two girls and one boy.
III. He has been practicing as a *Sangoma* for ten (10) years.

[33] The following aggravating factors are present;

I. The offence was perpetrated in order to unlawfully remove a body part of the deceased. The appellant attacked the deceased whilst she was sleeping and hit her twice on her head with an axe and stabbed her underneath the left breast until she died. After waiting for the deceased to die he returned and cut off the private parts.
III. This is a heinous, callous and brutal murder perpetrated against the appellant's own sister, a person who trusted him with her life. The appellant had a blatant and flagrant disregard for the dignity of human life. He regarded the life of the deceased as cheap and of little value. The appellant could have refrained from committing this crime, however, he carefully planned it.
IV. This crime was committed for personal gain.

[34] Life imprisonment is the most severe sentence which a court can impose.

[35] Bearing in mind the strong cultural belief surrounding traditional healers and the fact that muti killings are unlikely to stop in the future, it is the task of this court to deter the killing of innocent people for such purposes. The community must be protected.
The aspect of general deterrence is important to restore the trust the community have in the justice system. To regard such killings as substantial and compelling circumstances would send out the wrong message to the community. The prevalence of such cases in South Africa is high [xviii] . The continuation of such killings will create more instability in the communities where such practices are rife. A strong message must be sent out that such conduct will not be condoned in a civilized society. Where such killings arise they must be punished with the full strength of the law.

[36] This is a case of exceptional seriousness. These circumstances, cumulatively regarded, satisfy me that a sentence of life imprisonment would be just.

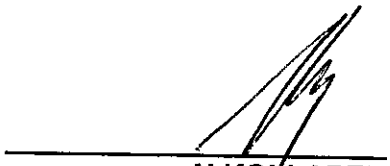
[37] I am satisfied that the court *a quo* carefully considered the sentencing options and imposed a sentence commensurate to the seriousness of the offence, balancing carefully the personal circumstances of the appellant, the seriousness of the offence and the interests of the community.

[38] In the result I make the following order;

The appeal in respect to sentence is dismissed.

D DOSIO
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION

I agree and it is so ordered



N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION

I agree

S A THOBANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION

Appearances:

On behalf of the Applicant:	**Adv V Z Nel**
	FNB Building **Church Square, Pretoria**
On behalf of the Respondent:	**Adv S J Ntuli**
Instructed by:	**Director of Public Prosecutions** **28 Church Square** **Pretoria**

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[i] 2001 (1) SACR 496 SCA
[ii] 1977 (4) SA 531 (A)
[iii] 2001 (1) SACR 594 (CC)
[iv] 2001 (1) SACR 496 SCA
[v] Second Edition, Juta, 2013 page 39-8
[vi] TS Petrus, *Combating witchcraft-related crime in the Eastern Cape: Some recommendations for holistic law enforcement intervention strategies, Acta Criminologica* 22 (2) 2009, page 22; DN Swart, *Human trafficking and the exploitation of woman and children in a Southern and South African context, Child abuse Research A South African Journal* 2012, 13 (1) 62-73, page 71
[vii] Page 193 and page 205, *Journal of Investigative Psychology and Offender Profiling*, 191-206, John Wiley & Sons, Ltd 2004. Gerard Labuschagne is the Section Head of the Investigative Psychology Unit, Serious and Violent Crimes Component, South African Police
[viii] Page 9, in the *Acta Criminologica: Southern African Journal of Criminology* 26(1) 2013. Camden Behrens is a lecturer in the Department of Criminology, University of the Free State
[ix] 1994 (1) SACR 53 (A)
[x] 1991 (2) SACR 462 (A)
[xi] 2012 (2) SACR 30 (ECG)
[xii] 1938 EDL 310
[xiii] 1975 (1) SA 966 (RA)
[xiv] 1980 (3) SA 860 (A)
[xv] 1990 (1) SACR 357 (A)
[xvi] 1993 (1) SACR 252 (A)
[xvii] 2006 (2) SACR 613 (Ck)
[xviii] DN Swart, *Human trafficking and the exploitation of woman and children in a Southern and South African context, Child abuse Research A South African Journal* 2012, 13 (1) 62-73, page 71