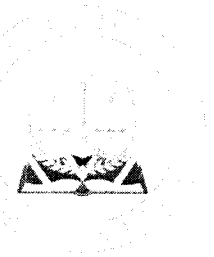

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

22/4/2016.

Not reportable

Not of interest to other Judges

CASE NO: **CC 13/2014**

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG, PRETORIA Applicant

and

PORTIA THULISILE TSOTETSI Respondent

J U D G M E N T – Leave to appeal

MAKGOKA, J

[1] This is an application by the Director of Public Prosecutions for leave to appeal against the sentence imposed on the respondent, who was convicted of two counts of murder. In both counts, the sentences were subject to the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997, in terms of which the respondent had to be sentenced to imprisonment for life in each count, unless substantial and compelling circumstances were found to exist, in which event, lesser sentences could be imposed. The court found such circumstances to exist, and imposed a sentence of 20 years' imprisonment in respect of each count, and ordered the sentences to run concurrently. The effective sentence was therefore 20 years' imprisonment.

[2] In concluding that substantial and compelling circumstances existed, justifying deviation from the prescribed sentences, the court considered the cumulative effect of the personal circumstances of the respondent and the length of period which the respondent had spent in custody awaiting the finalization of the trial. As regards the respondent's personal circumstances, she is amongst others, HIV positive. Ordinarily, this factor, on its own, would not carry much weight when sentence is considered for serious crimes.[1] However, in the present case, the court took into account the circumstances under which the respondent acquired the HI virus, namely that she was infected by her husband, the deceased in one of the murder counts.

[3] As regards the period spent in custody awaiting finalization of the trial, the respondent had spent a period of just under 5 years - 4 years and 8 months to be exact. The respondent was only 26 years old when the murders were committed. That is relatively young. I say 'relatively young' guardedly, because In *S v Matyitiyi*[2] the Supreme Court of Appeal concluded that the age of 20 and above could not be regarded as a mitigating factor. On the other hand, the same Court considered the age of 29 as 'relatively young' and a mitigating factor in *S v Nkomo* [3]

[4] The above considerations, taken cumulatively with the other aspects of the respondent's personal circumstances, including the fact that she is a first offender, impelled the court to conclude that substantial and compelling circumstances were present, justifying the imposition of lesser sentences.

[5] In its notice of application for leave to appeal, the Director of Public Prosecutions criticizes the court for 'speculating' about the respondent's motive for committing the murder in count 1. It is correct that the court inadvertently overlooked the evidence that the intention to commit the murder in count 1 had been established months before the respondent discovered that she was HIV positive. The upshot of this is that her knowledge of her HIV status could not have been the motive. This aspect, however, has no bearing on whether the court properly considered, on the

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[1] *S v Mahachi* 1993 (1) SA 36 (Z).
[2] *S v Matyityi* 2011 SACR 40 (SCA) para 14.
[3] *S v Nkomo* (fn 2 above) para 13.

objective and established facts, the presence of substantial and compelling circumstances. As it is often said, an appeal does not lie against the reasoning, but the conclusion, of the court. As a result, nothing really turns on this so-called misdirection. The key question is whether another would come to a different conclusion on whether substantial and compelling circumstances are present.

[6] The Director of Public Prosecutions also complains that the court downplayed the respondent's 'absence of remorse.' During her evidence in mitigation of sentence, the respondent offered an apology to the families of the deceased. Pressed during cross-examination, she stopped short of admitting her role in the murder of the two deceased. This, the Director of Public Prosecutions, contends, is indicative of lack of remorse. From that premise, it is argued that the respondent's prospects for rehabilitation are remote. I do not agree. It was clear during cross-examination of the respondent by the State that the State wanted the respondent to admit her involvement in the killing of the deceased. The manner in which she elected to defend herself made it difficult simultaneously to express remorse in the manner the State would have preferred. Short of changing her plea to one of guilty during mitigation of sentence, there was very little the respondent could say regarding her apology and remorse.

[7] I closely observe the respondent's demeanor in the witness box when the apology referred to above, was made. The general tenor of the apology appears to entail the recognition by the respondent that deaths of the two deceased had caused considerable pain to their respective families. In all circumstances, it is unduly harsh and not factually grounded to write off the respondent as an irredeemable recidivist. As correctly observed by Theron AJA in her minority judgment in *S v Nkomo,*[4] there is hardly any person of whom it can be said that there is no prospect of rehabilitation.[5]

[8] The other ground of appeal by the Director of Public Prosecutions is even if the finding of the presence of substantial and compelling circumstances was correct,

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[4] *S v Nkomo* 2007 (2) SACR 198 (SCA).
[5] Para 30.

the Court erred by ordering the two sentences to be served concurrently. The approach in this regard is trite. Where an accused person is convicted of more than one offence, it is a salutary practice for a sentencing court to consider the cumulative effect of the respective sentences. In this regard, an order that the sentences should run concurrently may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment.[6] An order that sentences should run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent'.[7] Put differently, where there is a close link between offences, and where the elements of one are closely bound up with the elements of another, the concurrence of sentences in particular should be considered.[8]

[9] In the present case, the Director of Public Prosecutions contends that the two murders were 'not closely linked in time or space and totally separate processes of planning (preceding) each of the murders.' This statement cannot be correct. It is clear from the totality of the evidence that the two murders were closely related and linked. In fact, it was the State' theory during the trial that the deceased in count 2 was killed because of his involvement in the killing of the deceased in count 1, and his subsequent blackmailing of the respondent to spill the beans about the respondent as the master-mind behind the killing of the deceased in count 1. The evidence established this, and accordingly, the Court found an inextricable link between the two murders in terms of the locality, time and the protagonists. The contention by the Director of Public Prosecution is therefore devoid of any merit, and is in fact, disingenuous in light of the stance taken by the State during the trial.

[10] Lastly, the Director of Public Prosecutions contends that the Court did attach sufficient weight to the seriousness of contract killings and that the sentence fails to reflect this aggravating feature of both murders. Each case must be determined on

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[6] *S v Whitehead* 1970 (4) SA 424 (A).
[7] *S v Mokela* 2012 (1) SACR 431 (SCA) para 11.
[8] *S v Mate* 2000 (1) SACR 552 (T).

its merits. The Supreme Court of Appeal has, for example, reduced sentences of life imprisonment to lesser sentences for contract killing.[9]

[11] The sum total of all the above is that there is no merit in any of the grounds raised by the Director of Public Prosecutions. There are therefore no reasonable prospects that the Supreme Court would come to a different conclusion on sentence. The application falls to fail.

[12] In the circumstances the following order is made:

1. The application by the Director of Public Prosecutions (Gauteng) in terms of s 316B of the Criminal Procedure Act 51 of 1977, for leave to appeal to the Supreme Court of Appeal against the sentence imposed on the respondent, is dismissed.

TM Makgoka
Judge of the High Court

[9] See, for example *DPP v Gcwala* (295/13) [2014] 44 (31 March 2014).