



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 5 May 2016

SIGNATURE: [Signature]

5/5/16

CASE NO.: A394/2014

In the matter between:

NICHOLAS MATHIBELA MAPOTHAMA

Appellant

and

THE STATE

Respondent

JUDGMENT

Jansen J

- [1] In this matter an appeal was heard in respect of the first appellant during 2014 and a written judgment was delivered on 9 October 2014. The appellant's co-accused's appeal against sentence was successful and the sentences reduced to an effective term of 20 years' imprisonment. The non-parole order imposed by the magistrate was set aside (*Maroga v State Case No. A394/2014 (9/10/14)*).
- [2] The second appellant's appeal was not heard as his attorneys of record had withdrawn due to a lack of instructions. Both appellants were granted leave to appeal on a petition to this court on sentence only.
- [3] On 30 July 2013, the appellant and his co-accused (the first appellant, as appears *ex facie* the record) were convicted in the Pretoria Regional Court of robbery with aggravating circumstances and murder. The charge sheet referred to section 51(2) of Act 105 of 1997 only. Hence the provisions of section 51(1) which refer to a life sentence in certain circumstances set out in part 1 of Schedule 2, find no application.¹

¹(Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 stipulates that: —
"...(n)otwithstanding any other law, but subject to subsections (3) and (6), a regional court or High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."

In part 1 of Schedule 2 (c) (ii) the following is stated: -

"Murder, when –

(a)"

(b)

(c) The death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i)

(ii) Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);"

- [4] On 30 October 2013, the appellant was sentenced to 15 years' imprisonment for robbery with aggravating circumstances and 18 years' imprisonment for murder. The sentences imposed were to run consecutively.
- [5] In terms of section 276B(1) of Act 51 of 1977, a non-parole period of 22 years was imposed. The effective term of direct imprisonment imposed is therefore a period of 33 years.
- [6] A synopsis of the evidence demonstrates that the appellant and friends were drinking at a tavern when they noticed a man who was purchasing liquor for two women. When the man and the women left, the appellant, his co-accused and the state witness Mekgwe, decided to follow them and to rob them. A struggle ensued and one of the women was hit on the head with a bottle (and was robbed of two cell phones) by the appellant's co-accused. The other woman managed to flee. Because the deceased put up a fight, the appellant (apparently) used a bottle to stab the deceased twice. (Although a knife was found at the scene, no blood was found on it.) The wound was 17cm long - a deep wound which would indicate the use of a knife. However, the knife was never inspected for fingerprints or blood.
- [7] The deceased fell to the ground and the appellant's co-accused kicked him. According to the post-mortem report, and the evidence of Dr M M Sefanyatsu, the cause of death of the deceased was a stab wound in his armpit and the fact that an axillary artery and nerves were severed. (The axillary artery conveys oxygenated blood to the lateral aspect of the thorax, the axilla (armpit) and the upper limbs.)
- [8] For purposes of sentencing, the following evidence is important: —

- a) Though the appellant was under the influence of liquor, he admitted that he knew what was happening, even after a long evening of drinking. The deceased was similarly under the influence of liquor. The post mortem report indicated that the stomach contents of the deceased smelt strongly of alcohol.
- b) The murder was not premeditated and the magistrate only found *dolus eventualis* as far as the murder is concerned. This, in itself, is not a mitigating circumstance but may be regarded as such should it be demonstrated that the intention of the appellant when perpetrating the crime is less heinous. (***S v Rapitsi 1987 (4) SA 351 (A)***). As set out above, section 51(1) was not relied upon in the charge sheet and hence premeditated murder was not a charge preferred against the appellant.
- c) The appellant had no previous convictions or pending cases against him.
- d) The appellant was born during October 1990, and was described as a relatively young person by the magistrate. He was 19 when the incident occurred. He was unmarried. He passed matric and was studying further at the Tshwane Self Study College (namely N4 and N6 in mechanical engineering). He was in a scholarship program at Eskom in Lephalale at the time of his arrest and earned R1,200 per month.
- e) He came from a happy family with both his parents being permanently employed. He was a social drinker, did not smoke and attended the ZCC church.

- f) There was no evidence of undue force being used. The deceased died of one fatal stab wound.

- [9] The learned magistrate alleged that he took the cumulative effect of the sentences into account but paid mere lip service thereto.
- [10] There was a misdirection on the part of the magistrate when imposing sentence in tarring him with the brush of his co-accused, who was a hardened criminal. The magistrate failed to take the age of the appellant, the fact that he was a first offender and the circumstances under which the crimes were committed into account.
- [11] In this regard it was held in *S v Mokela 2012 (1) SACR 431 (SCA)* at (11) that when the evidence shows that the offences are “...*inextricably linked in terms of locality, time, protagonists and importantly the fact that they were committed with one common intent*”, sentences should be ordered to run concurrently.
- [12] In the instant case, the evidence is clear to the effect that the two offences are inextricably linked in that during the robbery the deceased fought back and was stabbed during the imbroglio.
- [13] The magistrate further *mero motu* imposed a non-parole period without affording the parties an opportunity to address the court on this issue. The magistrate’s conduct, in the court’s opinion, violated the accused’s fair trial rights, as was held in *S v Stander 2012 (1) SACR 537 (SCA)* at paragraph [22]. The court also omitted to make a specific finding regarding exceptional circumstances which would justify the

imposition of a non-parole period supported with reasons. In *S v Pauls (2)* SACR 417 (ECG) at page 421 f–g it was held that the magistrate was duty bound to do so.

[14] The appellant was sentenced in accordance with the provisions of section 51(2)(a)(i) of Act 105 of 1977 for the robbery, which provides for a maximum sentence of 15 years for a first offender.

[15] *De facto* no account was taken of the fact that the appellant was young. Nonetheless, his youth cannot detract from the severity of the crimes. Based on the evidence presented at the trial, the appellant's counsel did not seek to argue that the minimum sentence should be deviated from in respect of the robbery.

[16] In the premises, the appeal is upheld and the following order is proposed.

[17] The order of the magistrate is set aside and the following order is substituted therefor: —

Order

1. The appellant is sentenced to a term of 15 years' imprisonment in respect of both counts 3 and 4, the sentences to run concurrently. The sentence is antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977 to 30 October 2013.
2. The imposition of a non-parole term is set aside.
3. The appellant is declared unfit to possess a firearm in terms of section 103(1) of Act 60 of 2000.

MM JANSEN J

Judge of the High Court

I agree and it is so ordered.

N KHUMALO J

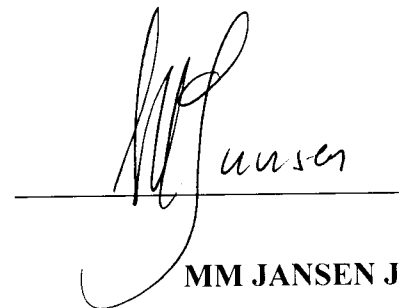
Judge of the High Court

For the Appellant: Advocate J P Marais

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For the Respondent: Advocate A Roos

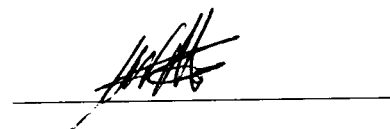
Instructed by: Director of Public Prosecutions, 28 Church Square, Pretoria



MM JANSEN J

Judge of the High Court

I agree and it is so ordered.



N V KHUMALO J

Judge of the High Court

For the Appellant: Advocate J P Marais

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