IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:A425/2017
6/3/2019

AARON JEREMIAH MOKOENA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MOLOPA-SETHOSA J
MOLOPA-SETHOSA (RANCHOD and KOLLAPEN JJ concurring)

Case Summary: An appeal against a sentence of 18 years' imprisonment in respect of murder read with the provisions of section 51 (2) of the Criminal Law Amendment Act, Act 105 of 1997 imposed by the High Court of South Africa, GAUTENG DIVISION, PRETORIA (Functioning as MPUMALANGA DIVISION) held at ERMELO (Makume J)

Order

The appeal against sentence is dismissed.

[1] The appellant in this matter, Aaron Jeremiah Mokoena, was arraigned at the High Court of South Africa, GAUTENG DIVISION, PRETORIA (Functioning as MPUMALANGA DIVISION), held at Ermelo, on the following charges:

[1.1] Count 1: Assault;

[1.2] Count 2: Contravening the provisions of a Protection Order;

[1.3] Count 3: Assault with intent to do grievous bodily harm

[1.4] Count 4: Contravening the provisions of a Protection Order;

[1.5] Count 5: Murder read with the provisions of ***section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997*** **("the Minimum Sentences Act");**

[1.6] Count 6: Contravening the provisions of a Protection Order;

[2] On 21 October 2014 count 1 to 4 were withdrawn by the State. The appellant pleaded guilty [on 21 October 2014] on count 5 and 6, and he was convicted on the information contained in exhibit **"E",** the appellant's statement in **terms of section 112(2) of the Criminal Procedure Act, Act 51 of 1977,** as amended ("the CPA").

[3] As appears from exhibit "E" aforesaid, the appellant's plea of guilty in terms of section 112 (2) reads as follows:

"I plead guilty to the charge put against me of murder in terms of section 51 (2) of Act 105 of 1997 as explained to me by my attorney of record herein.

Charge & facts

On the 24th of October 2013 and at or near Embalenhle in the district of Highveld Ridge I did unlawfully and intentionally kill one Tsoanelo Florence Mapela (herein after referred to as the deceased), by stabbing her several times with a knife.

On the 23rd October 2013 I came home and found that the deceased has changed the lock.at the gate and I did not have keys to open the gate. I called out to her but she did not respond. I even threw stones on top of the roof to get her attention but to no avail. I then climbed over the gate and went straight to my room, as I was no longer living in the main house with the deceased. I later learnt from one of my tenants that the deceased gave

them keys for the gate, but she did not give same..

On the 24th October 2013 in the morning I went to the main house and knocked at the deceased's door so that I can ask for the gate key, but she did not respond. I then broke the gate lock and the deceased peeped through the window and insulted me. She told me that the Russians will be coming today and they will drive me out of the yard because she no longer wants me in the premises. I then proceeded to work. I came back home around 16H00 and went to my room.

At around 16h45 I heard the deceased talking to some people outside. I then peeped through the window and saw her talking to two (2) men. I heard her say: " The dog stays in this room" she pointed to my room. Fearing that these men could be the Russians she spoke about in the morning, and that they were here to attack me, I grabbed my axe and got out of the room. I charged towards them while asking them what were they doing at my house, and they ran away. The deceased ran towards the house. I ran after her. She got inside the house. I got inside as well. She tried to grab a knife which was on top of the table, but I quickly took it from her and started stabbing her with the said knife on her body indiscriminately.

I did not count how many times I stabbed her as I was angry, and I confirm the contents of the post mortem as per Dr J. S Du Plooy's findings, and the number of stab wounds. After I stabbed her with the knife I left her there and went to my brother's place and informed him about what happened. I was later arrested.

And in relation to count 6:

I farther plead guilty to the count of contravening a protection order. On the above mentioned date. I wrongfully and intentionally contravened a prohibited condition, obligation, or order issued against me on 21 May

2012, and it was confirmed on the 2ih of June 2012 in favour of the deceased. I was well aware of the existence of the said order and the condition prohibited by the said order.

I am very much remorseful of my actions and take full responsibility of what I have done. I had not planned to kill the deceased as it happened spontaneously when I lost my temper. The said Russians are known of assaulting and killing people in our area and I feared for my life. It is a fact that I and the deceased were no longer in good terms prior to her death. We were constantly fighting and had a protection order against each other, but we will reconcile again at times. I never planned to kill her. It happened on the spur of the moment hence my plea in terms of section 51 (2) of Act 105 of 1997. I further admit that I unlawfully and intentionally killed the deceased in this matter.

That I had no permission whatsoever to kill the deceased and that I had contravened a prohibited condition when I attacked the deceased, and finally I admit that my actions were wrongful in the prevailing circumstances."

[4] The state accepted the appellant's plea of guilty as tendered and facts contained in the statement in terms of section112 (2) as is contained in Exhibit "E". In essence the state accepted that the murder charge fell under the provisions of section 51 (2) of the Minimum Sentences Act; as opposed to premeditated murder falling *under* the provisions of section 51 (1) of the Minimum Sentences Act.

[5] Pursuant to the appellant's guilty plea in terms of section 112(2) aforesaid, the appellant was convicted on the same day 21 October 2014.

[6] On 22 October 2014 the appellant was sentenced as follows:

[6.1] Count 5: 18 years imprisonment;

[6.2] Count 6: 2 years imprisonment;

[6.3] In terms of section 280 of the CPA the sentence of two (2) years'

imprisonment in count 6 was ordered to run concurrently with the sentence in count 5. The effective sentence of the appellant is therefore eighteen (18) years' imprisonment;

[6.4] The appellant was declared unfit to possess a firearm.

[7] The appellant was legally represented during the trial proceedings in the court *a quo*

[8] On 17 August 2016 the appellant brought an application for leave to appeal against his sentences before the learned judge *a quo.* The application for leave to appeal against his sentence **only** was granted by the learned judge *a quo.* The appellant thus appeals against sentence.

[9] The state proved the following previous convictions against the appellant:

[9.1]1980 - Assault with intent to do grievous bodily harm-5 months of imprisonment wholly suspended for a period of 3 years on condition;

[9.2]1981 - Assault with intent to do grievous bodily harm-3 months of imprisonment;

[9.3]1983 - Theft -Rl80 or 90 days of imprisonment;

[9.4]1984 - Assault with intent to do grievous bodily harm- 4 cuts plus 4 months of imprisonment wholly suspended for a period of 3 years on condition;

[9.5]1995-Trespassing - R200 or 20 days of imprisonment;

[9.6]1996 - Assault with intent to do grievous bodily harm- R1 000 or 6 months of imprisonment;

[9.7]1997 - Theft - R900 or 90 days of imprisonment wholly suspended for a period of 3 years on condition;

[9.8]1999 - Theft - R800 or 4 months of imprisonment wholly suspended for a period of 5 years on condition he is not convicted of theft during the period of suspension.

[10] The appellant testified in mitigation of sentence. The factors placed on record were the following: He was 54 years old at the time of sentencing and he

was married to the deceased; no children were born out of their marriage. He has two children aged 26 and 24 born from a previous relationship. At the time of the appellant's arrest, he was unemployed. He receives disability pension as well as normal pension of R1 260 per month. He supplements his pension by doing piece jobs; The deceased was also unemployed and the appellant supported her. Lastly he testified that he had apologised to the mother of the deceased and that he was remorseful.

[11] N M ("N"), the biological daughter of the deceased was called by the state to testify in aggravation of sentence. She testified that the deceased was her mother; and that the appellant is not her father. The deceased used to assist the appellant to build shacks for other people. At the time of her death the deceased had two children, one of which is deceased; she is now the only surviving child of the deceased. At the time of her death the deceased was 53 years' old. She further testified that she/N has no support structure as her mother-the deceased-used to assist her financially and in taking care of her/the deceased's grandchild.

[12] In terms of section 51(2) of Act 105 of 1997 a minimum sentence of 15 years' imprisonment is prescribed for a first offender of murder.

[13] The trial court found no substantial and compelling circumstances to justify the imposition of a sentence less than the prescribed minimum sentence.

[14] The appellant contends that that the Court *a quo* misdirected itself in finding no substantial and compelling circumstances justifying the imposition of a sentence less than the prescribed minimum of 15 years of imprisonment in respect of count 1. Further that the Court *a quo* misdirected itself in not taking into account the following factors, which he contends are peculiar to this case, and/or not attaching sufficient weight to the following factors:

[14.1] The appellant and deceased had a history of having arguments;

[14.2] They both had protection orders against each other;

[14.3] The deceased had locked the appellant out of the communal property without giving him a key to the gate;

[14.4] The appellant had phoned the Police for assistance in this regard;

[14.5] The deceased had threatened the appellant with the Russians who

were known to assault and kill people in the community;

[14.6] The deceased had picked up a knife when the appellant followed her into the main house;

[14.7] The appellant was in possession of an axe and did not attack the deceased with an axe;

[14.8] He took the knife from the deceased and stabbed her with it;

[14.9] The deceased kept on insulting the appellant;

[14.10] The appellant had lost his temper and was angry.

[15] It was submitted on behalf of the appellant that the above mentioned factors cumulatively considered amounts to substantial and compelling circumstances justifying the imposition of a sentence less than 15 years of imprisonment; that therefore the appeal in respect of sentence ought to succeed and that a period of imprisonment less than 15 years of imprisonment should have been imposed.

[16] It was further submitted on behalf of the appellant that in the present matter the state had accepted the plea of guilty by the appellant, the circumstances which had led to the commission of the crimes, and the circumstances during the commission of the crimes as contained in the plea of guilty, which was accepted by the state. That the Court *a quo* consequently misdirected itself when it stated the following:

> *"What I find difficult to understand is that two men running away from one person who is armed with an axe and leaving an unprotected woman there. This incident, according to the accused, happened in the afternoon at around 17h00 when people are still walking around in the streets and yet no one was called to corroborate this incident at the gate, not even neighbours. I really have serious doubts that such incident happened. The deceased was therefore attacked not because of the presence of the two unknown men but because of the anger of being locked out and other incidents relating to the domestic violence and the unhappy relationship."*

Further that neither the state, nor the trial court gave an indication that they did not accept or believe the explanation in the plea of guilty, or the evidence of the appellant in mitigation of sentence. That therefore the trial court as well as the State is bound by the explanation given by the appellant regarding what had transpired on the day of the murder.

[17] Counsel for the respondent submitted on the other hand argued that there are no such substantial and compelling circumstances on behalf of the appellant. That nothing in the personal circumstances put before the court *a quo* constituted substantial and compelling circumstance to justify the court from deviating from imposing the minimum sentence; and that the unusually gruesome extent of the violence perpetrated against the deceased, the fact that the appellant was the deceased's husband, the nature of the severe injuries inflicted, and the fact that there was a protection order in place are all aggravating factors to be taken into account; that nothing in the appellant's personal circumstances are indicative of the presence of substantial and compelling circumstances which justify the imposition of a lesser sentence.

[18] Further, that the sentence imposed does not induce a sense of shock, and given the facts, is not disproportionate to the offence and no irregularity can be found.

[19] It is trite that a court of appeal does not lightly interfere with a sentence imposed by the court of first instance; see **R v Lindley 1957 (2) SA 235 (N).** In **S v Rabie 1975 (4) SA 855 (A)** it was held that the appeal court (a) should be guided by the principle that punishment is pre- eminently a matter for the discretion of the trial court, and (b) be careful not to erode such discretion, hence that the sentence should only be altered if the discretion has not been judicially exercised. A court of appeal will interfere with the sentence only if there is a material misdirection or if the court could not, in the circumstances of the case, reasonably have imposed the particular sentence. In S v Salzwedel 1999 (2) SACR 586 (SCA) at 591F-G it was held that:

> *"A court of appeal was entitled to interfere with a sentence imposed by a trial court in a case where the sentence was 'disturbingly inappropriate', or*

totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which showed that the trial court had not exercised its discretion reasonably. "

[20] The general approach to be followed by a Court of Appeal with regards to sentence is set out as follows in S v Pieters 1987 (3) SA 717 (A) at 727:

"Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om ' Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers. "

[21] Interference will only be competent if the appeal court is satisfied that the trial court had not exercised its sentencing discretion reasonably.
See *S v Matlala* 2003(1) SACR 80(SCA) 83b-f

[22] The Supreme Court of Appeal reiterated that it would interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence the appellate Court would have imposed was such that interference was competent and required. See S *v* Monyane & Others 2008(1) SACR 543(SCA); S *v Mat/ala supra.*

[23] It became clear that one of the issues in this appeal is whether the court *a quo* erred in not finding that the facts put forward by the appellant amounted to substantial and compelling circumstances justifying a departure from the minimum sentence as envisaged by s51(3)(a) of the Act. The section requires that, if the court is satisfied that substantial and compelling circumstances exist

which justify the imposition of a sentence less than the prescribed minimum sentence, it must enter those circumstances on the record of the proceedings and may thereupon impose such a lesser sentence as it deems appropriate.

[24] The question to be answered is whether the court *a quo* erred in failing to find that the circumstances of this case were substantial and compelling, as to justify a departure from the minimum sentence; further whether the court *a quo* erred in imposing a sentence of eighteen (18) years' imprisonment, which is above the minimum sentence of 15 years stipulated in section 51 (2) of the Minimum Sentences Act.

[25] I cannot find on the facts before this court that the learned judge misdirected himself in finding that there were no substantial and compelling circumstances in this case, and imposing the sentence he imposed. It is correct as submitted by the appellant's counsel, that *having accepted the appellant's plea, the state was bound by the facts set out in the plea;* however this does not erode the discretion of the sentencing Court. The Court a quo is entitled to indicate that it did not accept further submissions from the bar, see ***S v Khumalo*** 2013 (1) SACR 96 (KZP).

[26] Violence against women is rife and prevalent, has reached alarming proportions and has become pervasive and endemic, and sentencing in such matters must reflect the gravity of the crime, for society not to lose confidence in the criminal justice system. In The Director of Public Prosecutions v Mngoma 2010 (1) SACR 427 (SCA) at 432, paragraph [14] the following is stated:

> *"A failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, would lead to society losing its confidence in the criminal justice system. This is so because domestic violence has become pervasive and endemic."*

Femicide/spousal murder is of national importance, so much so that the government has been taking a harsher stance due to the pandemic proportions thereof in the country.

[27] In S *v Bastian* WCHC case no. SS35 the court held the following at

paragraph [26]:

> *"Not only will such a sentence reflect the seriousness with which our society and the courts view the crime of murder committed and the violence perpetrated against the deceased as a woman by her own husband, but it will send a clear message that the abuse of female partners within the confines of the marriage relationship and the home is intolerable and will not be treated lightly. Nothing in the accused's personal circumstances persuades me differently or compels me to impose a lesser sentence.* "

[28] The sentence imposed must reflect the gravity of the crime and take account of the prevalence of domestic violence in South Africa; refer S v Roberts 2000 (2) SACR 522 (SCA) at par [20].

[29] I have considered both arguments before this court, keeping in mind what was said in S v Malgas, 2001(1) SACR 469 (SCA) at 477 D-E regarding the concept of substantial and compelling circumstances, where the following is stated:

> *"The specified sentences were not to be departed of lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.* "

[30] The Supreme Court of Appeal has, also in S v Malgas supra, at paragraph [18] observed that the wording of the Statute signals that it is deliberately and advisedly left to the Courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so the Court is required to regard the prescribed sentence as being generally appropriate for the crime specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.

[31] It is so that society cries out for protection against all types of criminals who should not be sent to prison today to return tomorrow showing bold and daring faces _as heroes of crime in a community that shuns crime. The convicted offenders must do their stint in prison for all serious crimes (as the ones here) so that when they return they must respect the right to life, property and dignity and all other rights of the citizens of this country, including the rights of women and children. The appellant was clearly cruel, heartless and abusive of the deceased. The protection order obtained by the deceased against the appellant bears witness to this. The appellant never produced any protection order which he alleges he had obtained against the deceased.

[32] From an early age, it is apparent from the list of previous convictions, that the appellant is a violent man. He has no less than four (4) previous convictions of assault with intent to do grievous bodily harm.

[33] The prov1s1ons of the Minimum Sentences Act prescribe a minimum sentence and not a maximum sentence. There is no bar to a Court, in appropriate circumstances and having regard to the facts of a particular case, imposing a sentence above the minimum sentence set out in the Minimum Sentences Act. The gruesome manner in which the demise of the deceased was brought about is an extremely aggravating feature and is indicative of the heartless and merciless way in which the crime was executed. From the post-mortem report compiled by Dr Jacobus Stephanus Du Plooy, dated 29 October 2013, there are no less than seventeen (17) stab wounds, most of which are around the deceased's chest, including the heart.

[34] The appellant, on his own version, had no reason to follow the deceased into the house where he brutally stabbed her indiscriminately to death. The alleged 'Russians' he alleges the deceased had called, on his own version, had run away when he allegedly came out of his room wielding an axe; he did not pursue them; there was no imminent danger posed against him. When the deceased ran into the house he pursued her and stabbed her many times. From the facts, the deceased was not posing any danger to him prior to the pursuit.

[35] The court *a quo* carefully considered the personal circumstances of the

Appellant, the seriousness of the offences, the prevalence of the crime and the interests of society.

[36] Evidently sentencing in this matter must attach due weight to the gravity of the crimes for which the appellant has been convicted of. The seriousness of the crimes must weigh heavily in deciding upon appropriate sentences. The trial court was fully aware of this and largely imposed a sentence of appropriate severity. The cases cited by the appellant's counsel in the heads of argument are distinguishable; most, if not all, have to do with alleged infidelity on the part of the deceased, which is not the case *in casu.*

[37] I am not persuaded that the appellant's personal circumstances set out above meet the threshold of substantial and compelling circumstances set out ins *51(3)(a)* of the Act. There are no circumstances relating to the commission of the offence which amount to such weighty circumstances. The imposed sentence cannot in my considered view be said to be disturbingly inappropriate, vitiated by misdirection or totally out of proportion to the gravity or magnitude of the offences the appellant has been convicted of.

[38] The appeal against the sentence imposed can thus in my view, not succeed

[39] In the result, I propose that the following order be made:

1. The appeal on sentence is dismissed. The sentence imposed by the court *a quo* is confirmed.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

N RANCHOD

JUDGE OF THE HIGH COURT

I agree

J KOLLAPEN

JUDGE OF THE HIGH COURT

It is so ordered

Appearances:

For the Appellant:	Adv: LA Van Wyk
Instructed by:	Legal Aid South Africa
For Respondent:	Adv: L Williams
Instructed by:	Director of Public Prosecutions