IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, NELSPRUIT

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

DATE **SIGNATURE**

CASE NUMBER: A151/19

DATE: 15 November 2019

SETSOTO LEKORO Appellant

V

THE STATE Respondent

JUDGMENT

MABUSE J: (Makhubele J concurring)

[1] This is an application by the Appellant, Mr Setsoto Lekoro, against both conviction and sentence. The Appellant's leave to appeal was granted by the court *a quo*.

[2] The Appellant appeared before a regional court magistrate in Oberholzer, where he was charged with murder of a certain woman, namely, Makhala Alina Thebane, committed between 5 August 2016 and 9 August 2016. The allegations by the Respondent against the Appellant in the court *a quo* were that the Appellant was guilty of murder read subject to the provisions of the Criminal Law Amendment Act 105 of 1997, section 52(1) thereof ("the Minimum Sentence Act") in that upon or about or between 5 August 2016 and 9 August 2016 and at or near Khutsong in the regional division of Gauteng, the Appellant unlawfully and intentionally killed the deceased Makhala Alina Thebane, by stabbing her several times with a sharp object.

[3] The Appellant, who enjoyed legal representation, right through the whole trial, pleaded not guilty to the charge and made no plea explanation. Despite his plea of not guilty, the Appellant was convicted accordingly and upon conviction was sentenced to 15 years' imprisonment, the court *a quo* having found no substantial and compelling circumstances. Therefore, it is the said conviction and sentence that the Appellant challenges on the grounds fully set out in his notice of application for leave to appeal. In view of the fact that the said notice of application for leave to appeal constitutes part of these appeal papers, the Court does not deem it necessary to regurgitate the grounds set out therein in this judgment.

[4] The charge against the Appellant arose from the following circumstances, set out in the evidence of the witnesses. The Respondent's first witness, a certain M[….] M[….] ("M[….]"), told the court *a quo* that she knew the deceased. According to her the deceased stayed in a shack inside their (M[….]'s) premises. The deceased was her tenant. She knew the Appellant. The Appellant and the deceased had a love relationship. The Appellant visited the deceased at her shack regularly.

[5] On Friday, 5 August 2016, between 20h30 to 21h00, she went out to party, leaving behind the deceased and the Appellant in the deceased's shack. When she came back from partying that night, she went straight to her home to sleep. The following day, a Saturday in the morning, she noticed that the deceased's shack was locked from outside with a lock. That shack was locked in that manner until Tuesday, 9 August 2016. The deceased's sister, M[....], came to her (M[....]), looking for the deceased. She told M[....] that she last saw the deceased the previous Friday, that is 5 August 2016, and that her shack had been locked since the previous Saturday, 6 August 2016.

[6] They broke the door and got in. In the shack they found the deceased lying on the bed. There was blood on the pillow. L[....] S[....] ("S[....]") removed a blanket with which she was covered. The deceased was lying on the bed facing away. The deceased was dead. She went and alerted the members of the community. Many members of the community responded to the call and assembled at the deceased's shack. Someone among them called the police.

[7] She did not see the Appellant again since 5 August 2016 until after his arrest. She denied, during cross-examination, that the deceased had another boyfriend.

[8] The evidence of the State continued with the evidence of S[....]. She told the court that on 5 August 2016, around 20h30, the deceased and the Appellant arrived at a shop where she was working. They bought bread, eggs and some stuff. When they left the shop they started having a quarrel and swearing at each other. To her it appeared that the deceased had lost all her love for the Appellant. The Appellant started dragging the deceased who at the same time was screaming to the Appellant to leave her alone because she had lost all her love for him. She did not follow the deceased and the Appellant as they were walking away.

[9] On Saturday, 6 August 2016, she noticed that the deceased's shack was locked. Some people approached her over that weekend and asked her if she had not seen the deceased. She was present when the door to the deceased's shack was forcefully opened. Once the door was opened, she saw the deceased's head in the bed. She was lying. At the request of the deceased's sister, she walked into the shack towards the bed. The deceased was covered in a blanket. She removed the blanket and uncovered the deceased up to her belly. She observed that the deceased had been slaughtered. There were wounds on both of her breasts. She then left her uncovered and walked out. The police were called whilst she was still on the scene.

[10] A[....] L[….]'s evidence confirmed S[....]'s evidence. He went looking for the Appellant, found him and took him to the deceased's shack where he handed him over to the police.

[11] The Appellant testified in his evidence but called no witnesses to testify on his behalf. He testified that he and the deceased were in a love relationship and that such relationship started in the year 2016. During such relationship the deceased had told him that she had another boyfriend and did not want the Appellant to disturb them in that love relationship. The boyfriend's name was M[….]. He stayed in Klip Town in Soweto. When the deceased told him that the boyfriend was coming he rose with the intention of leaving the shack but the deceased stopped him and told him that he should only leave after the boyfriend had called her and told her that he was in town. Again he rose to leave but the deceased again stopped him from leaving and told him that he would only leave once the boyfriend had called and told her that he was at the taxi rank in Khutsong. The boyfriend called after he had gotten off the taxi. At this stage he left the deceased's shack.

[12] He did not know what happened in his absence. He was not there at the shack when the deceased was killed.

[13] The State then recalled sergeant Baliso who told the court that he interviewed the Appellant after his arrest but did not take down his statement because the Appellant told him that he would make his statement at court.

[14] The court *a quo* was aware that the crucial question it had to determine was the identity of the perpetrators. The duty of the State to prove its case beyond reasonable doubt includes the duty to prove the identity of the perpetrators. It will be recalled that there is no direct evidence as to the person who killed the deceased. For that reason, the court had to make its findings based on circumstantial evidence. I will deal with this circumstantial evidence later.

[15] The court *a quo* correctly found the following proven facts:

15.1 that M[....] never saw the deceased's other boyfriend;

15.2 that if it were true that the deceased had another boyfriend there was always a reasonable possibility that M[....] would have known about him and seen him;

15.3 that M[....] knew the Appellant only as the deceased's boyfriend.

15.4 The court also accepted the evidence of S[....] that at the shop and as they were leaving the shop, the deceased and the Appellant had an exchange of words during which the deceased told the Appellant that their love relationship was over.

15.5 The court also mentioned the fact that the weekend came and passed and the Appellant failed, during that weekend, to visit the deceased. The court *a quo* then made a finding that the Appellant deliberately refrained from visiting the deceased during that relevant weekend because he knew that the deceased was dead.

[16] The court found that the Appellant had normal access to the deceased's shack and that the Appellant had motives. It pointed out to the misunderstanding between the two of them and further to his unfounded suspicion that the deceased had another boyfriend.

[17] The court *a quo* rejected the evidence of the Appellant and accepted the evidence of the State witnesses. It found, on the basis of circumstantial evidence, that it was the Appellant who had killed the deceased.

[18] Ms Masete, counsel for the Appellant, referred the court, in her heads of argument, to the lapidary of the well-known case of **R v Blom 1939 AD 988 at 202 to 203**, where Watermeyer JA, as he then was, in setting out the acceptance of circumstantial evidence, had the following to say, that:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them safe the one said to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

Ms Masete then sudmitted that there is no direct evidence linking the Appellant to the commission of the offence. This is the main problem with circumstantial evidence. It is trite that the application of circumstantial evidence implies the absence of direct evidence. Circumstantial evidence by its nature can only be applied by inferential reasoning where there is no direct evidence.

[19] On the other hand, on the same aspect, Ms S Mahomed, counsel for the Respondent, referred the Court, in her heads of argument, to **S v Reddy and Others 1996 (2) SACR 1(A) at page 8 paragraph C**. She stated that in this case, the Appellate Division made it very clear that it is only upon the totality of the evidence that it falls to be determined whether the inference sought to be drawn is consistent with the proved facts and whether the proved

facts exclude every reasonable inference except the one to be drawn. It is as clear as crystal that in S v Reddy and Others the Appellate Division echoed its approach in R v Blom.

[20] I now turn my attention to considering the question whether it can be inferred that the Appellant killed the deceased. The following factors are crucial in that regard:

20.1 that the deceased is dead and died from the injuries inflicted on her is not in doubt. In other words, the cause of the deceased's death is not in dispute;

20.2 it is furthermore not in question that the injuries that the deceased sustained on 5 August 2016 were inflicted by another person who had, judging from the nature and severity of the injuries, the parts on the body of the deceased on which these injuries were inflicted, the necessary intention to kill her;

20.3 it is also clear that these injuries were inflicted on the deceased while she was in her shack. When M[....] left to go and party the deceased was in her shack. There is no other evidence;

20.4 when she went to party, M[....] left the deceased in the shack in the company of the Appellant;

20.5 there is no evidence of the presence of another person in the shack or within the premises of M[....] or with the deceased. Therefore, the Appellant was the last person who was in the company of the deceased. Mention was made of the so-called deceased's boyfriend. There is no evidence whatsoever that such a person ever existed and furthermore that if he ever existed he ever came to the deceased's shack on 5 August 2016. The purpose of mentioning his name is simply to obfuscate the issues before the court;

20.6 the landlord, M[....], did not know the said boyfriend. As she testified and as pointed out earlier she only knew the Appellant as the deceased's boyfriend;

20.7 the conduct of the Appellant after being told that the deceased had died was not consistent with the reaction of someone who did not know that his girlfriend had died. He was not in a hurry to find out in any way why his girlfriend had died, what the cause of her death could have been and furthermore the circumstances under which she died. He was just nonchalant;

20.8 the fact that he imposed himself on the deceased even when the deceased told him that their love affair was over;

20.9 the manner in which the Appellant insulted the deceased in the messages that he sent in her cell phone also is a factor that this Court must have regard to.

Considering all these factors, we are of the view that the findings of the court *a quo* that the State had proved its case beyond reasonable doubt and furthermore that it was the Appellant who killed the deceased were correct. The court *a quo* supported its reasoning with valid and relevant authorities.

[21] In the premises we are of the view that the appeal against conviction cannot succeed.

[22] I now wish to turn my attention to the sentence. As pointed out earlier, the court *a quo* found no substantial and compelling circumstances after it had taken all the relevant factors placed before it into consideration. The court took the following factors into account:

"As far as the community is concerned the court cannot give the impression that life is cheap. People are frantic about this kind of offence. It is the order of the day and many people get away with it, it is difficult to prevent and solve the matters.

The court must look at the circumstances of the offence. You had an argument with the deceased, she was stabbed five times with a sharp object. The witness, Ms L[....] S[....], also emphasised that there was no struggle inside the shack so you were not attacked

inside the shack or the deceased did not fight back. The body was left in a hot shack to decompose.

The court must look at your personal circumstances. You to some extent co-operated and took the police at least in your trust. You are only 21, that is significant that you were only 20 on the day of the incident. You are unemployed. Actually it looks like you are a Lesoto citizen, but that will not affect the sentence. You have no children, you are healthy. No income, but the mother supports you. You made standard 5. No previous convictions and no pending cases. You have been in custody for fourteen months. The court must see if there are compelling and substantial facts to deviate from the prescribed sentence."

Despite what is stated above it was submitted by Ms Masete that the court *a quo* failed to give due regard to the aspects of rehabilitation and downplayed important mitigating factors inherent in the matter. She relied on the case of S v Khumalo 1984 (3) SA 327(A) where the court stated at page 332 that:

"In my opinion, therefore, the learned trial judge overemphasised the retributive aspect, with the result that he did not give due consideration to the more important aspects of deterrence and reformation. This amounted to a misdirection."

[23] On the other hand it was argued by Ms Mahomed that the Appellant's appeal against sentence was premised on the grounds that there are substantial and compelling circumstances and further that a sentence of 15 years' imprisonment was shockingly inappropriate. It is trite law that sentencing is at the discretion of the sentencing officer. See in this regard **R v Mapumulo and Others 1920 AD 56 at page 57** where the court had the following to say:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances

of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

This Court can only interfere with the sentence imposed by the court *a quo* if there is proof of an irregularity or a misdirection or if the court *a quo* imposed a sentence which is shockingly inappropriate. This Court may not interfere with the sentence simply out for the Appellant. The approach in R v Mapumulo was followed by the court in **R v S 1958(3) SA 102 [AD] at p.104** which itself sets out the circumstances under which an Appeal Court may interfere with the sentence imposed by the lower court as follows:

"There are well recognised grounds on which a court of appeal will interfere with the sentence. Where a trial judge – or the magistrate, as the case may be – has misdirected himself on the law or the facts, or has exercised his discretion capriciously or upon a wrong principle or so unreasonable as to induce a sense of shock (vide the remarks of Greenberg, JA, in Ex parte Neethling and Others, 1951(4) SA 331 AD at page 335, and those of Broome J in Rex v Zulu and Others, 1951(1) SA 489 (N) at pp 496 and 497 and the cases quoted by both Judges). Where no such grounds existed, however, the Appeal Court will not interfere merely because the appeal Judges considered that they themselves will not have imposed the sentence."

[24] In order to succeed with his appeal against sentence, the Appellant must satisfy this Court that, in imposing the sentence of 15 years on him, the court *a quo* committed one or the other misdirection. The Appellant was charged with murder read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. It means that in the absence of any substantial and compelling circumstances the court *a quo* was obliged to impose the ordained sentence. Having weighed all the factors in aggravation and mitigation of sentence

and the personal circumstances of the Appellant the court found no substantial and compelling circumstances. The fact that the Appellant was a first offender did not constitute a substantial and compelling circumstance as demonstrated by the case of the S v Matyityi. His youthfulness pales to nothing compared to the gravity of the crime that he has committed, the multitude of the injuries to the body of the deceased, and his lack of remorse. Accordingly, we are of the view that there is no merit in the appeal against sentence. Accordingly, the following order is made:

1. **The Appellant's appeal against both conviction and sentence is hereby dismissed.**
2. **The conviction and sentence of the Appellant imposed by the court *a quo* are hereby confirmed.**

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P.M. MABUSE

JUDGE OF THE HIGH COURT

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T.A.N. MAKHUBELE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:	*Ms MMP Masete*
Instructed by:	*The Legal Aid Board*
Counsel for the 1st and 2nd respondents:	*Adv S Mahomed*
Instructed by:	*The Director of Public Prosecutions*
Date Heard:	*13 November 2019*

Date of Judgment: *15 November 2019*