IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A310/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

17 SEPTEMBER 2021 Tlhapi
DATE SIGNATURE

In the matter between:

GIBSON LION ZWELAKHE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

[1] The appellant was charged and convicted in the Regional Court held at Oberholzer on charges of murder and robbery with aggravating circumstances. The charges were read with the provisions of section 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the Act"), and he was sentenced to Life and to fifteen years imprisonment respectively. It was ordered that the sentences run concurrently. In terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act") he was entitled to an automatic right to appeal his conviction and sentence. Having pleaded guilty to both charges, he now appeals his sentence to life imprisonment only.

[2] Although the appellant pleaded guilty and was convicted, a brief summary of the facts is necessary for purpose of dealing with the appeal on sentence. The appellant was employed as a gardener for a number of residents at the SAVF-Senatus Home of the Aged in Carletonville, where the deceased was also resident. He pleaded guilty to a charge of murder, that on 22 May 2019 he stabbed the deceased with a sharp object and assaulted her with a hammer. He also pleaded guilty to having on the same day, robbed the deceased of her motor vehicle, a handbag, a cell phone, credit cards and identity document.

[3] Briefly, in his written plea in terms of section 112 (2) of the Criminal Procedure Act, the appellant stated that he had a sexual relationship with the deceased over a period of time. Initially he got paid for the sex. The deceased later failed to meet her promise to pay for the sex. She told him that she was no longer willing to pay him. However, she still insisted on having sex with him. This was making it difficult for him to earn a living and he lost interest in her. On the day of the incident after she had approached him for sex. He proceeded to his home on the pretext of fetching condoms as she had directed. He decided to kill her. He took a hammer at his place of residence, which was used as the murder weapon. They had planned to meet up

a distance from the residence and that she would give a sign of her approach by the flickering of lights of her vehicle.

[4] She instructed him to take the back seat. He persuaded her to accompany him to fetch his wife and child from his home to do shopping at Checkers. He advised her to use a shorter route to his home as there were people who were striking on the main route to the Mall. When he had ascertained that no one was following them he struck her with the hammer while she was driving, she stopped the vehicle and they both exited. He struck her on the head several times till she collapsed. He realized she was no longer breathing. He left her on the ground and drove away in her vehicle and other belongings.

[5] The issue is whether the sentence was shockingly inappropriate and induces a sense of shock and, further, whether the trial court misdirected itself in finding that there were no substantial and compelling circumstances entitling it in terms of section 51(3) of the Act to deviate from imposing the prescribed minimum sentence.

[6] In determining whether or not substantial and compelling circumstances were present, the trial court relied on the personal circumstances of the appellant as stated in the pre-sentencing report compiled by a Social Worker. The appellant was 47 years old; not married but living with his partner and 14 year old school going minor child. He was employed at the SAVF-Senatus Home of the Aged; He was a not a first offender and had a previous conviction for theft dating back to April 2002 and, had spent 1 year and 3 months awaiting trial.

[7] Counsel for the appellant contended that the appellant co-operated with the police and showed remorse by pleading guilty and the items stolen were recovered. The appellant did not have a good upbringing, having been abandoned by his father and a mother who often left them to be taken care of by the extended family. He was forced take up role as bread winner to take care of his siblings. He also took over as

provider and guardian of his 14 year old son, whose mother had abandoned him. It was contended that there were prospects of rehabilitation. He was a first offender in a crime involving violence and that 17 years had lapsed since his previous conviction for theft. Substantial and compelling circumstances were cumulatively mirrored in the personal circumstances and the additional factors which came to light in the report.

[8] Counsel for the respondent contended that a mere reading of the judgement does not evince any misdirection. Interference with the trial court's sentence was only permissible where there was a misdirection and where the finding was patently wrong.

[9] Section 51(1) of the Act prescribes life imprisonment for premediated murder and where death results from a robbery with aggravating circumstances. In this instance the appellant was charged with robbery with aggravating circumstances as a separate count in terms of section 51(2) of the Act which called for a minimum sentence of 15 years imprisonment for a first offender. The prescribed sentences were to be imposed and not departed from lightly. Deserving considerations qualified for a deviation from the imposition of life imprisonment which would exist only if this court would find that the sentence was shockingly disproportionate and that the trial court had misdirected itself.

[10] In assessing sentence a court is required to have regard to the trite principles of deterrence, retribution, the personal circumstance of the appellant and also while remaining firm, exercise an element of mercy in imposing sentence. In S v Rabie 1975 (4) SA 855 (A) the following was stated:

> *".....the court hearing the appeal (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court"; and (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the*

discretion has not been judicially and properly exercised". The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[11] In S v Malgas 2001 (2) SA 469 (SCA) at para [8] and [9] the following is stated:

"[8] First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. It was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crime specified, in short, the legislature aimed at ensuring a severe, standardised and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentence come what may."

[9].....The sentences were not to be departed from 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. "

[12] In determining whether the prescribed sentence is proportionate to the particular offence, a trial court looks to the offence in the context of whether the circumstances render it unjust and disproportionate to impose the sentence. In this context the "offence" as stated S v Dodo 2001(3) 382 (CC) at para 37 "*consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.*" If on consideration of the sentence it would be unjust and disproportionate then the court is obliged to impose the lesser sentence.

[13] From a reading of the judgment it is evident the learned magistrate stated that she had regard to the trite principles espoused in S v Zinn 1969 (2) SA 537 (A), being the crime, the interests of society, the personal circumstances of the appellant and other additional factors addressed in the pre-sentencing and victim impact reports. The Zinn triad was also restated in Malgas *supra.* Regard was also had to the prevalence of the offence of murder in the community. I am in agreement with the learned magistrate's view that the plea of guilty in the circumstances of the case did not favour the appellant, or meant that he was remorseful. He had no option but to plead guilty in that all the deceased's belongings were found in his possession.

[14] The judgment correctly addressed the purpose for punishment that is, it is retributive in the sense that an offender is expected to be punished for breaking the law and deterrent in that sentences by the courts are expected to deter the offender and the general public from committing a similar offence. Counsel for the appellant contended that other additional factors to be taken into account in assessing substantial and compelling circumstance were the effect of appellant's upbringing; that he had spent a year and 3 months in prison awaiting trial and that even at his age he could be rehabilitated.

[15] The appellant was 47 years old and lived with his partner. He was gainfully employed and had taken up the responsibility of bringing up his minor child. It does not appear from the record or from the pre-sentencing report how the factors stated in his upbringing adversely affected him or had a bearing on his commission to the crime and the reasons for the murder. The appellant did not testify in mitigation, there was scant information available to the court.

[16] The pre-sentence detention of the appellant cannot be considered in isolation, because it forms part of those factors which have to be taken into account cumulatively. The record does reflect a number of postponements over a period before trial and that no bail was granted. What is not reflected is the reasons for the delay. Of relevance and importance is that consideration has to be given to the serious nature of the crime, aggravating circumstances and the fact that life imprisonment is the prescribed sentence for premeditated murder. Probably this aspect could have impact if a sentence other than life imprisonment was prescribed in terms of the Act.

[17] In as far as rehabilitation was concerned, in the case of S v Nkomo 2007 (2) SACR 198 (SCA) in a majority judgment the sentence of life imprisonment was set aside and a sentence of 16 years imprisonment was imposed. The reasons for deviating from the prescribed sentence was the view that the appellant "may have a chance of rehabilitation" and, some of the personal circumstances considered were that he was 29 years of age and was employed. The dissenting judgment was that the prospect of rehabilitation could not be considered in the absence of evidence in order to determine whether the aspect of rehabilitation fell within the meaning of substantial and compelling circumstance. In the pre-sentence report in this matter it was opined that the appellant required counselling for anger management as a process towards rehabilitation. Although serious offences are involved, this case is distinguishable from the Nkomo matter. In the Nkomo matter the appellant was convicted for kidnapping and multiple rapes on the victim and sentenced to life imprisonment for the rape counts and three years for the kidnapping. Also in S v Sikhipha 2006 (2) SACR 439 (SCA)

involving a 13 year old rape victim where the appellant was sentenced to life imprisonment, the issue of rehabilitation was considered as a mitigatory factor. It is my view that in the context of this case where the offence was a premeditated murder, it would amount to speculation to deal with the issue of rehabilitation and what it would entail.

[18] However, in the judgement hardly any comment is made by the learned magistrate of how the appellant described the relationship between himself and the deceased and the reasons for committing the offence. The learned magistrate failed to fully consider the circumstances around the context of the offence, for purposes of applying the prescribed sentence and, for assessing whether substantial and compelling circumstances were present. It was important for her to mention what circumstances of the offence were considered. She couched her reasons in vague language and in that regard, I quote from excerpts from the judgment:

> "*The court although you have pleaded guilty cannot find today that you as a result of your plea really show remorse. The court does not specifically find any indication that is convincing this court to accept that you are really remorseful. ……the charges against you are of the most serious one that we have. Here in Oberholzer as well as our town of Fochville which is close by in the same division murder is our most prevalent type of offence together with robbery…..Without repeating the details…. The court had to accept that plea. I do not know if you wanted to use something to tell the court why your acted? It seemed that way from the way you answered the question by the family member. But if it is true and the court must accept that you were convicted on that the court views your actions in a more serious and aggravating light. If you knew her well it is even worse for you if it could be worse to kill a person like that whom you actually are showering love and respect. The facts and the way you have treated the deceased there is not a perfect word the court can think of now…..it is a human being who loved and cared for by may people. A*

person who went an extra mile for all people around her, you included. She did not discriminate against race. She did not say I will help my neighbour who is a white lady but am not going to help Mr Gibson who is a black man.

She trusted you so much and cared so much that she drove you up and down on her own costs she did not charge you money for that. And this reason that you are trying to provide for killing her that you did not have a choice to get out of this relationship is utter nonsense and unacceptable, it is plain cold blooded murder. And then you make this arrangement, ask her for her help to transport you again and then you go and fetch a hammer. Part of the seriousness of this *offence is the impact these offences had on the family of the deceased as well as sit, on your own family,....you see now how people are crying in court, is it your wife?*

The prosecutor is correct and he again reminded you that there are minimum sentences that are applicable....the court cannot hand down a lesser sentence for flimsy nonsense reasons. There must be good valid reasons, exceptional reasons to deviate from the sentences."

Considering all the factors mentioned sir and everything mentioned in the report whether recommendations etcetera, the court is of the opinion and finds that there are no substantial and compelling circumstances." (my underlining)

[19] The Act does not define what substantial and compelling circumstances are nor is it a requirement that they be exceptional. A finding by the learned magistrate that there have to be exceptional reasons is therefore erroneous, Malgas *supra* at para [31]:

".equally erroneous, so it seems to me, are dicta which suggest that for

circumstances to qualify as substantial and compelling they must be "exceptional" in the sense of seldom encountered or rare. The frequency or infrequency of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling"

[20] In evaluating the judgment of the trial court in Malgas as at paragraph [25] reference was made to the approach, the principles to be adopted and, the weight to be attached when exercising a discretion during sentencing in terms of the Act. In this matter the State accepted the facts and reasons given in the plea explanation and the appellant was convicted of the murder. The plea explanation constituted the only version of the commission of the crime and the appellant was the only witness which the State relied upon in order to prove its case. It is my view that the trial court failed to consider the reasons the appellant gave for the murder and apply the principles established when it assessed whether substantial and compelling circumstances were present or not. It is those reasons together with the Zinn Triad and all other circumstances which cumulatively should be assessed whether departure from the prescribed minimum sentence is justified. The reasons of the appellant which were in my view ignored were described as "*flimsy nonsense reasons*"; "*utter nonsense and unreasonable*" The reasons are recorded as follows:

"At that point I had decided to kill the deceased, I wanted to get her out of the house so that I can kill her. I was tired of being her sex slave. It had been a year now, since she asked me to have sex with her. I had been reluctant at first but she insisted, saying she could not ask anyone else. At first she was paying me for to have sex with her but at later stage she stopped paying me but still insisted that we have sex. The deceased was also very clear about keeping what were doing as a secret. I was no longer interested in having sexual intercourse with the deceased, because she was longer paying me. She was making it difficult for me to earn a living as a gardener at the old age as she was always demanding that I only go to her place thereby costing me an

income. I was resentful of the complainant, I resented her for making me bath every time she wanted me to have sex with her, as this made me feel she was looking down on me but still she wanted me to satisfy her sexual needs. I felt trapped and I could not share this with anyone."

[21] In as far the learned magistrate required there be exceptional reasons I find the following paragraph in Malgas to be relevant:

"*[33] It is not possible to say to what extent the leaned judge's evaluation of the case as not being substantial and compelling was influenced by his adoption of the proposition that they were classified as exceptional before they would qualify as substantial and compelling circumstance. That it must have played some role seems clear for he found it necessary to state expressly that he approved of Stegman J's view that the circumstances would have to be exceptional. Given that misdirection this Court is at large to reconsider the matter afresh and it is unnecessary to decide whether or not it would have been free to do so absent such misdirection."*

[22] Since there was in my view a misdirection a reconsideration is called for. In my view the words used in Malgas relating to "flimsy reasons" cannot be equated to "utter nonsense and unreasonable." As I see it, the reasons were not believed at all and she might have thought the reasons given bordered on deception or wanting to mislead the court. I cannot though speculate in this regard because the appellant was not questioned neither did he testify in mitigation. However, the court and his legal representative relied on the content of the pre-sentencing report.

[23] I agree that aggravating circumstances were present and these were found in the fact that the crime was pre-meditated. Under the pretext of going to fetch condoms from his home as was expected by the deceased, he brought along the murder

weapon. The manner in which she was assaulted was gruesome. The post mortem report reveals that the deceased was bludgeoned to death. A photo-album was admitted as an exhibit and added to that the appellant robbed the deceased of her belongings and left her on the side of the road. The victim impact report describes the trauma suffered by the deceased's family. The learned magistrate addressed the prevalence of the offence and the need for the courts to implement the prescribed minimum sentences in order to curb such violent crimes which were evidently on the rise.

[24] It is my view that in assessing substantial and compelling circumstances the the learned magistrate failed to assess the possibility that the appellant felt like a "sex slave;" that the deceased's decision to stop paying for the sex while making demand for more sex impacted on him and made it difficult for him to earn money; or that he resented being made to take a bath before satisfying her sexual needs; or that he resented having sex with her when he wanted to end the relationship; that because the relationship was kept a secret by both, he indeed had no one to turn to in those circumstances to discuss the problem of his relationship with the deceased. These reasons cannot be disregarded as "utter nonsense or unreliable" in the absence of other cogent evidence to refute their existence. In my view, describing the reasons as nonsense seems to depict deceptiveness or unreasonable behaviour not acceptable or believable.

[25] It is my view that had the trial court should have taken all the circumstances cumulatively into account and that should have found that substantial and compelling circumstance were present which called for a sentence other than life imprisonment for the murder. The sentence in respect of the second count should stand. The offence was a very serious and an appropriate sentence in deviation is in my view one of 25 years imprisonment.

[26] In the result the following order is made:

1. The sentence of the trial court in respect of the murder count (count 1) of life imprisonment is set aside and is replaced with a term of imprisonment for 25 years imprisonment and it is ordered that the sentence of 15 years imprisonment in respect of the robbery with aggravating circumstance, count 2 is to run concurrently with that imposed in respect of count 1 and the sentences are backdated to the 9 September 2019.

Tlhapi

TLHAPI VV
(JUDGE OF THE HIGH COURT)

I agree,

VAN DER WESTHUIZEN C J
(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**03 AUGUST 2021**
JUDGMENT RESERVED ON	:	**03 AUGUST 2021**
ATTORNEYS FOR THE APPELLANT	:	**THE LEGAL-AID OF SA**
ATTORNEYS FOR THE RESPONDENT:		**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**