IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: **A182/2021**

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

30 March 2022
DATE

SIGNATURE

In the matter between: -

SIBUSISO NKOSANA DHLAMINI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

NONCEMBU AJ (Kooverjie J concurring)

Introduction

[1] This is an appeal against the sentence imposed on the appellant by the regional magistrate sitting at Nigel. The appellant was charged with robbery (common) and murder read with the provisions of section 51(2) of the Criminal Law Amendment Act[1]. He was convicted of both counts on 13 August 2020 and sentenced to undergo 10 years' imprisonment for the robbery charge and to15 years for the murder charge, after the trial court found that there were no substantial and compelling circumstances justifying a lesser sentence. Effectively he was sentenced to undergo 25 years' imprisonment as the sentences were ordered not to run concurrently. Leave to appeal both conviction and sentence was refused by the trial court and after petitioning the Judge President of the Gauteng High Court, Pretoria, the appellant was granted leave to appeal his sentence only.

Background facts

[2] The conviction of the appellant was based on circumstantial evidence whereupon state witnesses testified that he was the last person to be seen with his 87-year-old maternal grandmother (the deceased). The deceased was strangled to death with a piece of cloth and robbed of R500 which was the remainder of her pension grant money. The appellant had fled the scene after the said offences were committed and was only arrested about a month later with the assistance of his mother. The trial court found that he had gruesomely and in a heinous manner killed his grandmother and robbed her of her grant money (R500 cash).

The grounds of appeal

[1] Act 105 of 1997.

[3] The main ground of appeal raised by the appellant is that the trial court erred in not ordering, at the least, that the sentences run concurrently, as the cumulative effect of the sentences rendered the sentence shockingly disproportionate to the crimes committed. It was also contended that the trial court misdirected itself by not taking into account the young age of the appellant, that he was a first offender, and that he had spent about 2 years in custody whist awaiting trial. The contention was that these factors, cumulatively constituted substantial and compelling circumstances justifying a lesser sentence than 15 years on the murder charge.

[4] Counsel for the appellant further submitted that the trial court expressed its concern with the fact that the appellant had been charged for common robbery and not robbery with aggravating circumstances (where the minimum sentence provisions would come into play).

The legal principles

[5] It is trite law that sentencing powers are pre-eminently within the judicial discretion of the trial court, and that a court of appeal will only interfere if the sentencing court did not exercise its discretion or exercised it unreasonably or in circumstances where the sentence imposed is adversely disproportionate to the offender, the crime committed and the legitimate needs of society. [2] Reiterating this principle, Kampepe J stated the following in *Bogaards v S* [3]:

> "An appellate court's powers to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[2] See *S v Rabie* 1975 (4) SA 855 (A) at 857 D-E; see also *S v De Jager and Another* 1965 (2) SA 616 (A); *S v Malgas* 2001 (2) SA 1222 (SCA); S *v Pillay* 1977 (4) SA 531 A.
[3] 2013 (1) SACR 1 CC.

[6] In the present matter, the question to be answered is whether it can be said that the trial court misdirected itself; firstly, by finding that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of 15 years' imprisonment for the murder charge and; secondly, by imposing a 10-year term of imprisonment for the robbery (common) charge, and by not making an order that the sentences be served concurrently.

[7] Ms Van Wyk argued on behalf of the appellant that it seemed that the trial court was unhappy with the fact that the state had not charged the appellant in terms of section 51(1)[4] which prescribes a minimum sentence of life imprisonment for the murder charge, and instead circumnavigated this factor by finding that there were no substantial and compelling circumstances justifying a lesser sentence than 15 years and by imposing 10 years imprisonment for the robbery (common) charge.

[8] This she based on the following remarks that were made by the trial court during its judgment and sentencing of the appellant:

> "The only issue here is that it is not clear to this court and you never played open cards with this court is whether or not you first took the money and then killed the grandmother, or first killed the grandmother and then took the money. Now, I think this became a bone of contention for the state because they never charged you with robbery with aggravating circumstances, although you can find yourself very fortunate in that light or that you were charged with premeditated murder or murder that happened whilst you were robbing your grandmother.[5]
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> …
>
> Now, I have eluded to that in the judgment, but I think the previous prosecutor, not the current prosecutor, made not an error, but was in a conundrum, whether or not to invoke section 51 life imprisonment section of Act 105 of 1997, because it is stipulated there that when there is a robbery and a person is killed during the execution of the robbery, there is a prescribed sentence of life imprisonment that should be imposed, unless the court finds compelling and substantial circumstances, but he did not invoke those regulations

[4] Act 105 of 1997.
[5] Page 213, line 1-10 of the court record.

here and he only with relation to count 2 invoked this section where the minimum prescribed sentence is one of 15 years imprisonment for the murder."[6]

[9] In my view, these remarks cannot, without more, be said to indicate an attitude adopted by the trial magistrate in sentencing the appellant. On the face of it, he was merely remarking on the facts as they presented themselves before him. Indeed, ordinarily, where a person is killed during the commission of a robbery the law prescribes a minimum sentence of life imprisonment. The appellant was convicted on the basis of circumstantial evidence in the current matter.

[10] There was therefore no evidence on the sequence of how the offences were committed: whether or not the murder was committed before or during the robbery in an effort to subdue the deceased or after the robbery was committed in order to cover up the robbery offence. This, in my view is what the court *a quo* was eluding to in making the above remarks.

[11] In sentencing the appellant the court *a quo* took into account that the appellant was 22 years old at the time of sentencing; he was a first offender and had spent two years in custody whilst awaiting trial on the matter. It also took into account that the offences were committed in a domestic environment[7] against a deceased who was vulnerable in more ways than one: by virtue of being a woman and because of her advanced age (she was 87 years old at the time). The appellant was her grandchild whom she had just given some money and provided medication as he had presented himself as being unwell.

[12] The trial court further took into account the heinous manner in which the deceased was killed. She had been strangled with a piece of cloth and photos depicting the brutal scene of crime were presented as evidence into court. The appellant had shown no remorse for his actions throughout the trial proceedings, in fact, he even went to the extent of trying to tarnish the image of his late grandmother by saying that she was drunk on the day in question.

[6] Page 225, lines 21-25 to page 226, lines 1-7 of the court record.
[7] In a country where domestic violence has been declared a pandemic.

[13] Having considered all of the above, I cannot fault the trial court in finding that there were no substantial and compelling circumstances justifying a lesser sentence than 15 years on the murder conviction in this matter. The Supreme Court of Appeal (SCA) has pointedly made it quite clear that the prescribed minimum sentences are not to be departed from lightly and for flimsy reasons as they are ordained as the sentences to be imposed for the specified offences, unless there are substantial and compelling circumstances justifying such a departure.[8]

[14] Regarding the period spent in custody whilst awaiting trial, the Supreme Court of Appeal held in *S v Radebe*[9] that it cannot on its own constitute 'substantial and compelling circumstances' justifying a departure from the minimum sentence prescribed by the Criminal Law Amendment act 105 of 1997. Lewis JA, said in *Radebe* (*supra)* that 'the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed'.

[15] It can thus not be said that the two years that the appellant spent in custody awaiting sentencing on this matter, on its own constitutes 'substantial and compelling circumstances' justifying the imposition of a lesser sentence than 15 years' imprisonment.

[16] The question for consideration is whether the pre-sentencing detention period (2 years), taken together with other factors, renders the effective term of imprisonment imposed on the appellant an unjustified sentence disproportionate to the crime committed. In this instance I find no compelling factors to support such a view. The trial court therefore did not err when it found that there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

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[8] *S v Malgas* 2001 (1) SACR 469 (SCA).

[9] 2013 (2) SACR 165 (SCA); see also *DPP v Gcwala* [2014] ZASCA 44 (unreported, SCA case no 295/13, 31 March 2014).

Concurrency of sentences

[17] Section 280 of the Criminal Procedure Act [10] provides for the concurrency of sentences. It states as follows:

> "(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
>
> (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently."

[18] In sentencing an offender where more than one punishment is involved, a court has a duty of ensuring that the cumulative effect of the sentences does not result in excessive punishment. This the court can do by ordering that the sentences, or a portion/s thereof run concurrently.

[19] The essence of the argument on behalf of the appellant in the present matter is that the effective term of 25 years' imprisonment is an excessive punishment for the offences of robbery (common) and murder committed by the appellant. This argument in my view loses sight of two pertinent factors.

[20] In the first instance, the test in determining whether or not the sentences ought to be ordered to run concurrently, is - whether or not the sentences are appropriate; whether there is an inextricable link between the offences in the sense that they form part of the same transaction or were committed as part of the **overall criminal conduct**. [11] (**my emphasis).** Referring to *S v Mokela*, [12] Mbha JA stated the following in *S v Nemutandani* in this regard:

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[10] Act 51 of 1977.

[11] See *S v Nthabalala* [2014] ZASCA 28 (unreported, SCA case no 829/13, 28 March 2014); *S v Nemutandani* [2014] ZASCA 128 (unreported, SCA case no944/13, 22 September 2014).

[12] 2012 (1) SACR 431 (SCA) at [9].

"[T]he murder committed by the appellant was inextricably linked to the robbery of the deceased during which deceased's canvas shoes were removed and taken. It is trite law that an order for sentences to run concurrently is always called for where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, **importantly, the fact that they were committed with one common intent**." (**my emphasis**).

[21] Earlier on in this judgment I referred to the remarks made by the court *a quo* to the effect that there was no evidence on the sequence of events with regards to how the offences were committed in the current matter. It could therefore not be concluded that the offences were inextricably linked in terms of the fact that they were committed with the same criminal intent. The only evidence presented was that the deceased who was an 87-year-old woman, was killed due to strangulation and was robbed of R500 cash.

[22] In the second instance, as was also mentioned by the trial court during sentencing, the penal jurisdiction of a regional court for a robbery (common) offence is 15 years' imprisonment. Taking into account that the deceased, who was the appellant's grandmother, was robbed and killed by the appellant on the day in question, nothing precluded the trial court in imposing a term of 15 years' imprisonment, which was a competent sentence for the offence in question.

[23] No doubt, there were more aggravating factors (as referred to elsewhere in this judgment) than mitigating factors on the facts of the current matter (these being the age of the appellant, the time he spent in custody awaiting trial and that he was a first offender). The trial court, having considered all of these, found that 10 years' imprisonment was an appropriate sentence for the offence of robbery (common). I cannot fault its finding in this regard, nor can I find that it did not exercise its discretion properly.

[24] The remarks by the trial magistrate, that the appellant was fortunate for not having been charged in terms of the life imprisonment provisions on the murder charge, or robbery with aggravating circumstances, were in my view, fair comments given

the gravity of the offences committed by the appellant, and the circumstances under which they were committed.

[25] On the conspectus of the facts and argument before me, everything considered, I cannot find that 25 years' imprisonment is a shockingly excessive or inappropriate sentence for offences of robbery and murder. In the premise therefore, the appeal cannot succeed.

Ruling

[26] Consequently, the following order is made:

(a) The appellant's appeal against sentence in respect of both counts is dismissed.

(b) The following sentences imposed by the court *a quo* on the appellant:

Count 1: 10 years' imprisonment;

Count 2: 15 years' imprisonment –

are hereby confirmed.

NONCEMBU AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

KOOVERJIE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

DATE OF HEARRING	*: 17 March 2022*
DATE OF JUDGMENT	*:* 30 *March 2022*
For the Appellant	*: Adv L A Van Wyk*
	Legal Aid SA
	Pretoria
For the Respondent	*: Adv F J Van der Merwe*
	Office of The Director of Public Prosecutions
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