IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A211/2021

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

SIGNATURE 25/04/2022 DATE

In the matter between:

MZWANDILE KHUMALO **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

MOSOPA, J

1. The appellant was convicted of one count of murder, read with the provisions of section 51(2) of Act 105 of 1997 and one count of possession of a firearm, in contravention of section 3 of the Firearms Control Act 60 of 2000, read with the provisions of section 51(2) of Act 105 of 1997, on 21 May 2020 in the Nigel Regional Court.

2. Following the appellant's conviction, he was sentenced as follows;

2.1 Murder – fifteen (15) years imprisonment;

2.2 Unlawful possession of a firearm – fifteen (15) years imprisonment;

Effective sentence was thirty (30) years imprisonment. The appellant was also declared unfit to possess a firearm.

3. This is an appeal against sentence only, brought with the leave of this court.

AD MERITS

4. The evidence used to convict the appellant can be summarised as follows;

4.1 The appellant was at the tavern with his girlfriend, Lindiwe Petunia Mabena, who also testified in the below court on behalf of the State as a section 204 of the Criminal Procedure Act 51 of 1977 ("CPA") witness, along with two other male persons.

4.2 At the time, the appellant was in possession of a firearm, which later on became a murder weapon, which was clandestinely taken into the tavern by his girlfriend. Inside the tavern, the appellant was involved in a fight with the deceased and the deceased was taken out of the tavern by a security officer. Once outside the tavern, the appellant followed the deceased and shot him in the head.

4.3 The appellant, together with Lindokuhle Sibiya and Boikanyo Piet Mokoena, loaded the body of the deceased into the appellant's vehicle and went to the veld to dispose of the deceased's body. The appellant's girlfriend was with them at all material times and also assisted in hiding the appellant's firearm in her brother's bedroom.

4.4 The appellant denied ever killing the deceased, being in possession of a firearm and that he disposed of the body of the deceased. He testified that it was Lindokuhle Sibiya and Boikanyo Piet Mokoena who were

responsible for removing the body of the deceased from the scene and disposing of it.

AD SENTENCE

5. *In casu*, there are two issues for determination;

   5.1 Whether the court erred in finding that there are no compelling and substantial circumstances; and

   5.2 Whether the court erred in not ordering concurrent running of sentences, in terms of section 280 of the CPA.

6. The Constitutional Court, in the mater of ***S v Bogaards 2013 (1) SACR 1 (CC)***, at 14 paragraph 41, when dealing with the appellate courts' power to interfere with the sentence imposed by the below court, stated;

   "Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power 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. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

7. Section 51(2) of Act 105 of 1997 prescribes a minimum sentence of fifteen (15) years for murder, where the person convicted is a first offender, and fifteen (15) years imprisonment for the conviction of unlawful possession of a firearm (semi-automatic). Section 51(3) further provides for deviation of the court from imposing such sentences, if it is found that substantial and compelling circumstances are present in the case of a convicted person. The below court found that no such substantial and compelling circumstances existed and the appellant was sentenced according to the prescribed minimum sentence.

8. The appellant at the time of sentencing was 30 years old, not married and had four (4) dependents aged 2, 3, 4 and 11 years respectively. He was self-employed in the transport business earning an amount of between R4000.00 and R6000.00 per month. He was solely responsible for the maintenance of his children, and the mother of the appellant's last born child, gave birth while the appellant was in custody awaiting finalisation of his trial matter. He has no previous convictions and he spent a period of three (3) years awaiting finalisation of his trial matter.

9. The period spent awaiting finalisation of a trial matter on its own, does not constitute substantial and compelling circumstances, but must be considered with other factors. It was contended on behalf of the appellant that the fact that the appellant spent three (3) years in custody pending finalisation of the matter, is due to no fault on his part. Nothing in detail was said as to how the State delayed the finalisation of the appellant's matter. This aspect is of importance more especially for the determination of the issue raised on behalf of the appellant.

10. In the matter of ***S v Ncgobo 2018 ZASCA (23 February 2018)***, the Supreme Court of Appeal, when determining whether the period spent in custody is a substantial and compelling factor, stated at paragraph 14;

> *"'the test was not whether on its own that period of detention constituted a "substantial and compelling circumstance", but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one.'*
> *Furthermore:*
> *'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.'*
> *In short, a pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust..."* (see ***S v Radebe 2013 (2) SACR 165 (SCA)*** para 14).

11. The deceased was killed in a callous manner by the appellant over an incident that happened at the bar. Despite the deceased being led to the outside of the tavern by security, the appellant followed him and shot him in cold blood. He then loaded the body of the deceased into his vehicle, in full view of people, and went to dump it in a veld and burn it. The appellant showed no dignity and respect to the deceased. The body of the deceased was found in a decomposed state and burnt. Despite all this, the appellant maintained his innocence and denied his involvement in the killing of the deceased. Instead he blamed people who he had in fact instructed to remove the body of the deceased, as being responsible for what happened to the body of the deceased.

12. In my view, the sentence imposed for murder is not unjust and disproportionate. As for the personal circumstances of the appellant, there is nothing extraordinary. What is important to consider is whether the appellant will offend again, but that cannot be confidently predicted, especially in the absence of a probation officer's report or a psychiatric report. What is relevant is the past conduct of the appellant and whether he is remorseful. The appellant lacked the element of remorse, but what is in favour of the appellant is that he lived 27 years of his life without a criminal record. However, a material consideration is that, in light of his conviction of a serious crime, the personal circumstances of the appellant recedes to the background (see ***S v Vilakazi 2009 (1) SACR 552 (SCA)*** at 574 para 58).

13. The second leg of the enquiry relates to the concurrent running of sentences. It must be noted that the court below did not find that substantial and compelling circumstances existed, in respect of the count of possession of a firearm, and consequently, imposed a minimum sentence of fifteen (15) years imprisonment. Section 280(2) empowers the court to, amongst others, to impose a concurrent running of sentences in the event of conviction of two or more offences.

14. It is contended on behalf of the appellant that the below court misdirected itself when exercising its discretion and did not order the concurrent running of sentences. It was further contended on behalf of the appellant that the below court should have at least ordered five (5) years of the sentence imposed for the

possession of a firearm to run concurrently with the sentence for the count of murder. If properly understood, the contention means that this court should not interfere with the sentence imposed on the murder count, but must interfere with the sentence for the possession of a firearm, more specifically with regard to the concurrent running of sentences.

15. It is not clear why the appellant was in possession of an illegal firearm at the time of the commission of the offence. However, there is nothing which indicates that the appellant carried his firearm so as to kill the deceased and it can be safely assumed that he carried the firearm for his protection, taking into account that he was at the tavern on the day in question.

16. In the matter of ***S v Mthethwa 2015 (1) SACR 302 (GP)*** at 308 para 22, when determining the concurrent running of sentences, the court stated;

> *"[22] An order that sentences should run concurrently is 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' (S v Mokela 2012 (1) SACR 431 (SCA) at para 11). Put differently, where there is a close link between offences, and where the elements of another, the concurrence of sentences in particular should be considered (S v Mate 2000 (1) SACR 552 (T))."*

17. Having regard to the locality and time and the fact that the offences are inextricably linked, in that the firearm was used to commit the murder offence, it is my view that the below court erred in not ordering the concurrent running of sentences and the sentence should be interfered with.

18. No attack was levelled at the sentence of fifteen (15) years imposed on the appellant, but the sentencing regime for unlawful possession of a firearm has been sentences ranging from six (6) years to ten (10) years imprisonment.

19. *In casu*, the submission made on behalf of the appellant that a portion of the sentence be ordered to run concurrently, in my considered view, is reasonable.

The sentence will therefore be interfered with, to the extent suggested by counsel for the appellant.

ORDER

20. The appeal against sentence succeeds, and the sentence of the below court is set aside and the appellant is sentenced as follows;

    1. Count 1: Murder read with the provisions of section 51(2) of Act 105 of 1997, the appellant is sentenced to fifteen (15) years imprisonment.
    2. Count 2: Unlawful possession of a firearm, the appellant is sentenced to fifteen (15) years imprisonment.
    3. It is ordered that five (5) years of the sentence imposed in count 2, unlawful possession of a firearm, to run concurrently with the sentence in count 1, murder. Thus, the effective sentence to be served by the appellant is 25 years imprisonment.
    4. The applicant is declared unfit to possess a firearm.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

I agree,

B CEYLON

ACTING JUDGE OF THE

HIGH COURT, PRETORIA

APPEARANCES

For Appellant:	Adv M van Wyngaard
Instructed by:	Kruger & Okes Inc.
For Respondent:	Adv JMB Rangaka
Instructed by:	The DPP
Date of hearing:	2 March 2022
Date of delivery:	Electronically transmitted