REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A232/2020
DPP Ref No: VB 4/2020

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

SIGNATURE: PD. PHAHLANE

DATE: 15 February 2022

In the matter between:

PHILLIP ISAAC SITHOLE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

PHAHLANE, J

[1] On 19 August 2019, the appellant who was legally represented during trial proceedings was convicted for kidnapping and murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 by this court. He was sentenced to five (5) years imprisonment for kidnapping and life imprisonment on the count of murder on 20 August 2019, and the trial court ordered that the sentences should run concurrently. On the same day, his application for leave to appeal against his sentence was dismissed by the trial court and it was subsequently granted by the Supreme Court of Appeal on 12 August 2020.

[2] As the appeal is against sentence only, it is not necessary to deal in detail with the evidence on the merits. However, one needs to have a brief background in order to appreciate the ultimate sentence. It should be noted that the appellant had during the trial proceedings tendered a plea of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("CPA") in respect of both counts, but a plea on the count of murder was not accepted by the State as the appellant had admitted assaulting the deceased and stated that he did not have the intention to kill him.

[3] The offences for which the appellant was convicted and sentenced occurred on 15 June 2018 at or near section E, Ekangala, in the district of Bronkhorstspruit. The State alleged that the appellant acted in the furtherance of a common purpose with his co-accused (accused 2) in the *court a quo*, and deprived the deceased, Thabo Leonard Sibanyoni, of his freedom of movement and thereafter killed him. On the day of the incident, the appellant and two of his friends went looking for the deceased after receiving information that the deceased was responsible for the appellant's motor vehicle's water pump and battery that were apparently stolen.

[4] They found him with his friends at Zwane's complex and when questioned about the stolen items, the deceased denied any knowledge of the whereabouts of these items. The appellant who was at the time seated in his motor vehicle, disembarked from his vehicle and went straight to the deceased and started to slap him without saying anything. He then picked up bricks and threw them at the deceased, and used the other brick which he had in his hand to hit him three times on his head until the brick broke.

[5] The deceased tried to run away, but the appellant grabbed him and as the deceased fell to the ground, the appellant kicked him several times while he was still lying on the ground. The deceased then confessed and stated that the battery was at his parental home. The deceased was taken to his parental home and upon arrival, they met the deceased's father and informed him that they were there to collect the motor vehicle battery which the deceased said was in the outside toilet. They searched the toilet and could not find the battery.

[6] The appellant continued to assault the deceased in the presence of his father and also threw him to the ground, to the extent that the deceased could not walk. As they left the deceased's home with the deceased, the deceased's father requested the appellant not to assault his son, but rather to take him to the police station. Instead of going to the police station they went straight to the appellant's house where the appellant instructed one of his friends to take the deceased out of the vehicle which they were driving, and tie him to a pole with ropes and wires. The deceased was half-naked when he was tied to a pole.

[7] The appellant went inside the house and came back with a golf club and started assaulting the deceased again all over his body. The deceased was apparently a

nyaope (drug) addict and the appellant's co-accused brought a bucket full of cold water, alleging that nyaope addicts do not bath, and went straight to the deceased and poured water over him, and thereafter assaulted him with the same bucket on his head.

[8] The grounds of appeal as noted in the notice of appeal is that the trial court having found that the appellant had no direct intention to murder the deceased but rather acted with *dolus eventualis*, it was submitted that the trial court erred in finding that this form of intention *(dolus eventualis)* coupled with the specific facts of the case constituted substantial and compelling circumstances that warranted the imposition of a lesser sentence than life imprisonment. Further that the sentence can be typified as gross and constitutionally offensive as the court did not consider all the factors relevant to the nature and seriousness of the criminal act itself, the personal and other circumstances relating to the offender which should have a bearing on the seriousness of the offence and the culpability of the offender.

[9] It is on this basis that Mr Venter on behalf of the appellant submitted that the sentence of life imprisonment is strikingly inappropriate and induces a sense of shock, as it is more than the fifteen (15) years' imprisonment sentence that is normally imposed on offenders who had direct intent to murder. Relying on the case of ***S v Mokgara***[1]**,** Mr Venter submitted that the trial court erred in finding that the appellant was not a suitable candidate for rehabilitation when one has to consider the character of the appellant before the incident. He however conceded that the prolonged assaults perpetrated on the deceased were horrific and tying the deceased to the pole was degrading. He also conceded that the

[1] 2015 (1) SACR 634 (GP) at para 22,

appellant showed no remorse when he was convicted and even after his conviction as there is no evidence on the record to show that he had remorse.

[10] The respondent opposed the appeal and submitted that the sentence imposed is fair and appropriate under the circumstances, and that the trial court did not misdirect itself as it took into consideration all the relevant factors when sentencing the appellant. Mr More further submitted that the trial court was obliged to impose the prescribed minimum sentence of life imprisonment as the offence of murder fell under the provisions of Part I Schedule 2 of Act 105 of 1997, having found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence.

[11] He insisted that the sentence imposed was commensurate with the gravity of the offence and does not in any way evoke a sense of shock, taking into account the following factors:

11.1 That the appellant showed no remorse.

11.2 That the deceased died a cruel and painful death after being assaulted by the appellant several times with a golf club that ended up breaking and a brick that also broke on impact when the deceased was hit on the head with it.

11.3 That the deceased was assaulted in different places and also in the presence of his father.

11.4 That the assaults started around 17:30 and continued until the evening.

11.5 That cold water was poured over the deceased during the night of a winter season, because it was alleged that as a drug user, he did not take a bath.

11.6 That acts of vigilantism should be discouraged given the fact that there was no evidence that the deceased stole the items belonging to the appellant.

The appellant's water pump was recovered from the co-accused (accused 2).

[12] In order to deal with the grounds of appeal relating to the alleged misdirection by the trial court, it is important to restate the legal principles on sentencing. It is trite law that the imposition of sentence falls within the discretion of the court burdened with the task of imposing the sentence and the appeal court will only interfere with the sentence if the reasoning of the trial court was vitiated by misdirection, or the sentence imposed induces a sense of shock, or can be said to be startling inappropriate. Nonetheless, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The sentence must be of such a nature, degree, or seriousness that it shows that the trial court did not exercise its sentencing discretion at all, or exercised it improperly, or unreasonably.

[13] The following personal circumstances of the appellant were placed on record:

(a) That he was born on 7 April 1981 which makes him to be 38 years old.
(b) He was 37 years of age at the time of the commission of the offence.
(c) The level of education achieved by the appellant is Grade 12 in 2000.
(d) He has been employed at Sasol from the year 2001 up to the period leading to his arrest in 2018.
(e) He earned a monthly salary of R14 000.
(f) The appellant is not married but has two children (boys aged 5 and 3 years respectively).
(g) The 5-year old boy attends Grade R and the 3-year-old boy attends crèche.
(h) The mother of the accused's children is unemployed.
(i) The appellant was responsible for their maintenance.

(j) He was also staying with his siblings, who are also looking to him for their maintenance.

(k) The appellant was involved in the development of the youth in the community of Ekangala and has a netball team and a soccer team which keeps the youth of Ekangala away from using drugs.

(l) He had a business of a tuck-shop at his place.

(m) The accused has been in custody since his arrest and has been in custody for a period of one year and two months.

(n) He had no previous convictions.

[14] The trial court held that the contention that the appellant is a suitable candidate for rehabilitation without expert opinion has no merit, and that nothing prevented the appellant from instructing his counsel to obtain a probation officers report to ventilate this aspect. In this regard, Mr Venter, relying in the case of ***S v Van de Venter***[2], submitted in his heads of argument that the trial court should have requested a pre-sentence report.

[15] The circumstances of the appellant in the case of ***S v Van de Venter*** *supra* differs with the circumstances of the appellant in the current matter. Although the appellant did not testify in his defence in that matter, the Supreme Court Appeal found that the trial court ignored the evidence contained in the reports of Prof Roos and Dr Plomp, psychiatrists in the employ of Weskoppies hospital who concluded in their reports that whilst the appellant appreciated what he was doing at the time of the commission of the offences, his moral responsibility was diminished because he was a schizoid personality who was emotionally depressed.

[2] 2011 (1) SACR 238 (SCA)

[16] The Supreme Court of Appeal held that none of the mitigating factors alluded to were even mentioned in the judgment of the trial court, nor were they balanced against what were perceived to be the aggravating features in the commission of the offences. The Supreme Court of Appeal further held that in failing to afford any recognition to those factors in the determination of an appropriate sentence, the trial court disregarded the traditional triad, namely the consideration of the crime, the offender and the interests of society.

[17] The sentencing court has a discretion to exercise whether to call for a pre-sentence report or not. It is evident that a pre-sentence report is meant to assist the court in the exercise of its discretion so that it can be placed in a better position to make an informed decision regarding sentence. A pre-sentence report may be required where the court feels the need to be better informed about the character of an accused person and to have sufficient information such as information relating to mitigating and aggravating factors, at its disposal.

[18] As such, in considering what an appropriate sentence would be, the court has to decide whether it has before it, sufficient information to exercise its sentencing discretion properly and reasonably. Although the appellant was represented in the trial court, the legal representative did not call for a pre-sentence report, and similarly, the trial court did not call for a pre-sentence report and proceeded to pass the sentence.

[19] The question whether the trial court misdirected itself in not calling for a pre-sentence report gives rise to the same issue which every court of appeal sitting on appeal against the sentence has to decide, namely, whether the sentence imposed is an appropriate sentence. Consequently, the question whether the

court is duty bound to do so, depends on whether or not it requires evidence to enable it to exercise a proper judicial sentencing discretion.

[20] Mr More submitted that there was no need for the trial court to request a pre-sentence report when sentencing the appellant because it took into consideration all the relevant factors relating to the appellant's personal circumstances; his standing in the community; and the contribution the appellant has made in the community.

[21] Mr Venter on the other hand, argued that the sentence imposed on the appellant is only reserved for harsh and heinous crimes, and submitted that the crime committed by the appellant is not of such a nature that the maximum sentence available should be imposed. He further submitted that the trial court erred in placing the onus on the appellant when it held that nothing prevented the appellant from instructing his counsel to obtain a probation officer's report to ventilate the aspect regarding whether the appellant is a suitable candidate for rehabilitation.

[22] The fact that the appellant was legally represented did not excuse the trial court from requesting a pre-sentence report as was necessary to enable it to exercise a proper judicial sentencing discretion. If one considers the context in which the crime was committed, as well as the circumstances of the appellant such as the fact that the appellant was a 38 years old first offender; that he pleaded guilty to the charges, that he was involved in the development of youth in the community of Ekangala, such report would have assisted the court to better understand the offender and the reasons for the crime – this being one of the triad factors that the court has to consider when deciding on an appropriate sentence.

[23] In light of the circumstances of this case, I am of the view that the trial court misdirected itself. In the absence of a pre-sentence report, the trial court was not placed in a better position to exercise a proper judicial sentencing discretion. Sentencing the appellant to serve a term of life imprisonment on the count of murder was a travesty of justice. Accordingly, the interests of justice demand that the order of the trial court be set aside.

[24] In the circumstances, the following order is made:

1. The sentence handed down by the trial court on 20 August 2019 is set aside and substituted with the following sentence:

   Count 1: Twenty (20) years imprisonment.

   Count 2: Five (5) years imprisonment.
2. It is ordered that the sentences are to run concurrently in terms of section 280(2) of the CPA.
3. The sentence is antedated to 20 August 2019 in terms of section 282 of the CPA.

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

R.G. TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, it is so ordered

C. COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Appellant	: MR. J. VENTER
Instructed by	: DAVID H BOTHA, DU PLESSIS & KRUGER INC. HOUGHTON ESTATE, JOHANNESBURG Email: jpventer@bdk.co.za / thefirm@bdk.co.za Tel: (011) 838-1214
For the Respondent	: ADVOCATE L.A. MORE
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Date of hearing	: 25 OCTOBER 2021
Date of delivery	: 15 February 2022