

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Case Number: **A193/2022**

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

SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

THATO GEORGE MIYA

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The appellant, upon a plea of guilty, was convicted of two counts of murder and one count of robbery with aggravating circumstances. The appellant was sentenced to life imprisonment on each of the counts of murder and to 15 years' imprisonment on the count of robbery with aggravating circumstances.
- [2] The appeal is against only against sentence.

FACTS

- [3] During the early hours of 29 August 2010, Fatima Makda and her husband Mohamed Hanif Makda were brutally murdered whilst asleep in their bedroom. The nature of the assault that led to the murder of the couple is described in the judgment of the court *a quo* as follows:

“The post mortem examination of Fatima Makda, revealed multiple incised wounds on the chest, neck and face. The first three to fourth ribs were fractured, her lungs had collapsed and were pale. The cause of death is stated to be,..

“Multiple stab wounds to the chest and neck with complications.”

The post mortem finding made of the body of Mr Mohamed Hanif Makda, were the following:

“[1] Multiple incision wounds on the chest, neck, upper limbs and face.

[2] Horizontal incision through the cardiac ventricles.

The cause of death is stated to be,...

“Stabbed chest with complications.”

- [4] The appellant, who was 20 years of age at the time, committed the murders together with one Lucky Mahlangu (“Lucky”). In his plea explanation the appellant stated that the son of the deceased, Zahid Makda, approached him during March 2010 and requested him to find people who would kill his parents. At that stage Zahid was prepared to pay R 50 000, 00 for the “job”. Initially the appellant did not take Zahid’s request seriously.
- [5] Some time passed before Zahid contacted him again in regard to murder of his parents. At this stage Zahid was prepared to pay R 100 000, 00 for the murders. The appellant did nothing until Zahid raised the reward to R 300 000,00. The appellant stated that he became *tempted*” by the amount of money offered for the murders and informed Zahid that he will do the “job”.
- [6] The appellant and Zahid devised a strategy for the murders, which led to the appellant and Lucky entering the residence of the deceased in the early hours of the morning through the kitchen door that was left open by Zahid. After the murders, Zahid opened a safe and handed some cash to the appellant. Ironically, the cash most probably belonged to the deceased.

- [7] On their way out, Lucky grabbed car keys that was lying on a table and they escaped in the vehicle of the deceased. Shortly thereafter the car crushed and the appellant was apprehended at the scene of the accident.

GROUND OF APPEAL

- [6] It is common cause between the parties that the murder was pre-meditated and that section 51(1) of the Criminal Law Amendment Act, 105 of 1997 (“the Act”) prescribes a sentence of life imprisonment. In respect of the charge of robbery with aggravating circumstances, section 51(2) of the Act prescribes a sentence of 15 years imprisonment.

- [7] The sentence imposed by the court *a quo* was therefore in accordance with the Act. Mr Kgagara, counsel for the appellant, however, submitted that the court *a quo* erred in not invoking the provisions of section 51(3)(a) of the Act, which provides as follows:

“(3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

- [8] According to Mr Kgagara, the court *a quo* erred in not finding that the following circumstances cumulatively viewed constituted substantial and compelling circumstances for the purposes of section 51(3)(a):

- “• *the appellant was a first offender;*
- *the appellant was relatively young, 19 years old;*
- *the appellant pleaded guilty;*
- *the appellant has expressed remorse;*
- *the appellant was enticed by the son of the deceased;*

- *the appellant was under the influence of alcohol; and*
- *the appellant has spent two two and a half years in custody awaiting trial.”*

LEGAL PRINCIPLES AND DISCUSSION

- [9] The test when considering an appeal against sentence has succinctly been summarised by Holmes JA in *S v de Jager and another* 1965 (2) SA 616 A at 629 as follows:

“It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.”

- [10] The circumstances listed by Mr Kgagara that should, according to him, have justified a lesser sentence than the prescribed minimum, were duly considered by the court *a quo*. Having considered the factors to be taken into account when imposing sentence, to wit, the interests of society, the nature and seriousness of the crime and the personal circumstances of the appellant, the court *a quo* came to the following conclusion:

“When I consider the brutal and savage nature of the attack on Mr and Mrs Magka in the privacy of their home and weigh these against the personal circumstances of the accused, I am unable to conclude that his personal circumstances weight enough to justify the deviation from the sentences prescribed by the Act.

I have had regard to the time the accused spent in custody pending finalisation of the trial. The prescribed minimum sentence are in the totality of the circumstances of this case, appropriate.”

[11] Taking all the circumstances that informed the imposition of the sentence by the court *a quo* into account, I am unable to find that the sentence is vitiated by an irregularity or misdirection. I pause to mention that, save for the submissions advanced on behalf of the appellant as set out *supra*, no irregularity or misdirection was pointed out Mr Kgagara in his heads of argument or during his address in court.

[12] In respect of the last leg of the test, to wit whether the sentence is so severe that no reasonable court could have imposed it, I am similarly unconvinced. To the contrary, I find myself in respectful agreement with the court *a quo*'s finding that the prescribed minimum sentence is, in the particular circumstances of this matter, appropriate.

ORDER

In the result, I propose the following order:

The appeal against sentence is dismissed.

3. The respondent is ordered to pay the costs of the appeal.

**N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

I agree.

**H KOOVERTJE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

I agree.

**FRANCIS-SUBBIAH
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DATE HEARD:

06 March 2023

DATE DELIVERED:

13 April 2023

APPEARANCES

For the Appellant:

Mr MB Kgagara

Instructed by:

Legal Aid South Africa

For the Respondent:

Advocate AP Wilsenach

Instructed by:

The State Attorney