IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR10/2015

In the matter between:

LINDOKUHLE TONNY KHOZA — APPELLANT

And

THE STATE — RESPONDENT

Coram : Gorven, Seegobin et Olsen JJ
Heard : 25 January 2016
Delivered : 11 February 2016

ORDER

On appeal from the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Barnard AJ, sitting as a court of first instance):

The appeal against sentence is dismissed.

JUDGMENT

SEEGOBIN J (Gorven et Olsen JJ concurring):

[1] The appellant, *Lindokuhle Tonny Khoza*, was one of three accused who was indicted on several counts before Barnard AJ sitting in the High Court, Pietermaritzburg. The appellant appeared as accused 3. He and his co-accused were legally represented by the same legal representative. They each faced a charge of robbery with aggravating circumstances on count 1 and three counts of murder on counts 2, 3 and 4. These charges were to be read with the relevant provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Apart from these charges, each accused faced two additional charges relating to the unlawful possession of a firearm and ammunition in contravention of the relevant provisions of the Firearms Control Act 60 of 2000. As far as the appellant is concerned the latter charges were framed as counts 9 and 10 respectively.

[2] The appellant, like his two co-accused, was convicted on his plea of guilty of robbery with aggravating circumstances on count 1 and of murder on counts 2, 3 and 4. He was also convicted of being in unlawful possession of a firearm on count 9 and of being in unlawful possession of ammunition on count 10. On count 1 the appellant was sentenced to 15 years imprisonment, on counts 2, 3 and 4, he was sentenced to life imprisonment on each count and on counts 9 and 10, which were taken as one for the purpose of sentence, he was sentenced to five years imprisonment. The present appeal by the appellant against the sentence imposed is with leave of the court *a quo*.

[3] The central issue in this appeal is whether the trial court had erred in imposing the sentences which it did, particularly those of life imprisonment on counts 2, 3 and 4, regard being had to the youthfulness of the appellant at the time of the commission of these offences. Due to the fact that the appellant was 17 years old at the time, the trial court correctly found that the provisions of Act 105 of 1997 did not apply to him.

[4] The argument advanced on behalf of the appellant was that the trial court failed to attach sufficient weight to the factors set out hereunder thereby rendering the sentences to be unduly harsh and shockingly inappropriate. These factors are the following:

(a) the appellant's youthfulness (he was 17 years old at the time of the commission of these offences and 18 years and 10 months at the time of conviction and sentence);
(b) the appellant's highest level of education is grade 8;
(c) the appellant is single;
(d) the appellant was a scholar at the time of his arrest; and
(e) the appellant was a first offender with reasonable prospects of rehabilitation.

[5] The accepted facts and circumstances surrounding the commission of the offences on counts 1, 2, 3 and 4 were the following:

[5.1] The deceased in count 1, Mr *Ekard Schutte* (the first deceased) was 76 years old and was married to *Elizabeth Barbel Ingeborg Schutte*, who was 66 years old (the second deceased). They lived together on Springfield Farm in the Richmond district. A Mahindra motor vehicle which forms the subject matter of the robbery charge on count 1 belonged to them. They, *inter alia*, sold wood for a living.

[5.2] The deceased in count 3, Mr *Lutz Ekard Schutte* (the third deceased) was 33 years old and was the youngest son of the deceased mentioned above. Although the third deceased resided in Germany, on occasion he visited his parents on their farm.

[5.3] The appellant and his co-accused were friends and resided in the Sweetwaters area of Pietermaritzburg. At the time of the incident accused 1 was employed by the deceased on their farm. Accused 1 decided, sometime prior to the incident, that the first and second deceased should be robbed. He approached the appellant and accused 2 to assist him and they both agreed. In order to achieve their objective the three of them decided that they would arm themselves with knives and carry a container of petrol.

[5.4] During the late afternoon of Saturday, 1 March 2014, the first deceased was alone at the farm. His wife, the second deceased, had gone to the airport to fetch the third deceased who intended visiting his parents for the weekend so as to celebrate his father's 77th birthday together with family and friends.

[5.5] At approximately 17h00 on the day in question, the appellant and his co-accused arrived on the farm. As per their prior agreement they were armed with knives and they also carried a container of petrol. As they had conspired, accused 1 called the first deceased under the guise that he was there to purchase wood from him. The first deceased exited the house and requested them to accompany him to the shed where the wood was stored. Upon arrival at the shed, the appellant grabbed the

deceased while accused 1 and 2 repeatedly stabbed the first deceased all over his body. They also cut his throat.

[5.6] The fatally wounded deceased was left behind in the shed and the appellant and his co-accused made their way into the hose. On entering the house they realized that the second deceased was not present as the motor vehicle referred to in count 1 was not there. They found a safe in one of the bedrooms. They were unable to find the safe keys so they decided to wait for the second deceased, suspecting that she would have the safe keys. At approximately 19h00 that evening the second deceased arrived at the farm house together with the third deceased. The two of them entered the house wherein, unbeknown to them, the appellant and his co-accused were lying in wait. As the second and third deceased entered the house they were accosted by the appellant and his co-accused. The appellant grabbed the third deceased while accused 2 grabbed hold of the second deceased. Accused 1 then proceeded to stab the third deceased while the appellant continued to hold him. The third deceased's throat was also cut.

[5.7] The appellant and accused 2 thereafter took the second deceased to the main bedroom. Her wrists were bound and duct tape was placed over her mouth. The second deceased was instructed to open the safe. She complied with the instruction. The contents of the safe were removed. The third deceased was then stabbed repeatedly and her throat was also cut. The appellant and his co-accused then loaded their loot in the deceased's motor vehicle. Before fleeing the scene in the loaded vehicle, they doused each of the deceased with the petrol they carried and set them alight. The cause of death of all three deceased were stab wounds to the neck which penetrated the jugular veins and carotid arteries.

[6] A feature of the vicious and deadly attack on the three deceased is that they were completely defenseless at the time. They put up no resistance whatsoever. The accepted facts show that the murders were committed in a cold-blooded and callous manner. As the trial judge correctly pointed out, once the appellant and his co-accused had attacked the first deceased and left him for dead in the shed, they would have had time to reflect on what they had done. Instead they chose to pounce on the third deceased and mercilessly stabbed and killed him in front of his mother. As far as the second deceased is concerned, even after she opened the safe for them, they thought nothing of stabbing her and slitting her throat. In my view, the attacks on the deceased in this matter were not only particularly cruel and bloody-minded, but they also showed such a complete disrespect for their persons and bodily integrity that it fills one with abhorrence.

[7] A reading of the record in this matter, particularly the judgment on sentence, indicates, in my view, that the trial judge gave careful consideration to the issue of sentence. While on the one hand he was fully aware of the fact that he was dealing with a young offender in the appellant, on the other he could not ignore the vicious and heinous nature of the offences committed and the interests of society.

[8] It is so that young offenders such as the appellant pose particular problems for sentencing courts especially in those cases in which a higher sentence is called for given the nature of the violence perpetrated by such a person as happened in this case. In my view, young people who commit barbaric and despicable acts of violence against innocent and defenseless members of society should not expect a lighter sentence by claiming to rely on their relative youthfulness and immaturity at the time of commission of an offence. The following extract from the minority judgment of Yacoob J in the matter of

Centre for Child Law v Minister of Justice[1] is instructive and illustrates the point:

> "Indeed, the harsh, regrettable and undeniable reality is that particularly heinous crimes are committed by children who are 16 and 17 years old. If one has regard to this (as we must), the legislature is justified in reflecting society's utter outrage. Our Constitution does not say that children who are 16 and 17 years old, who commit barbaric and despicable crimes against society and prey on innocent and vulnerable people should necessarily be given different sentences than adults who commit the same crimes. Any sentencing approach that suggests that age is the only factor fails in the preventive effort. The law must certainly come down as hard as is appropriate on these offenders."

[9] In imposing the sentences which it did on counts 1, 2, 3 and 4, the trial court found, correctly in my view, that the youthfulness of the appellant was offset by the sheer viciousness of the attack on the three deceased. The trial judge was no doubt fortified in this finding having regard to the views expressed by Ponnan JA in *S v Matyityi*[2] in paragraph [14] where the learned judge of appeal said the following:

> "[14] … It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is

[1] 2009(2) SACR 477 at page 521, para [125].
[2] 2011(1) SACR 40 at page 47, para [14].

> to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor."

[10] The offences of which the appellant and his co-accused have been convicted are commonly referred to in this country as "farm killings". This is simply because the country is facing a crisis of alarming proportions in respect of the senseless killing of farmers, their family members and in some cases their employees as well. The accompanying violence with which these offences are committed (as happened in this case) fills society with anger and outrage.

[11] The statistics collated over the past few years are a matter of deep concern not only for Government but also for the courts which have to deal with matters of this nature on a daily basis. In the present matter evidence of the statistics was called by the State in aggravation of sentence. The evidence in this regard was given by Mr *Jacobus Frederick Cornelius Marais* who is employed by the KwaZulu-Natal Agricultural Union (better known as 'KwaNalu') where he manages the security desk. Mr Marais provided evidence regarding the number of incidents that have taken place on farms since 2001. As at July 2014 when this matter was heard, the evidence showed that 126 farm murders were committed in KwaZulu-Natal. The number of farm attacks amounted to 659. The total number of victims amounted to 966 and the total number of incidents were 785. These figures have no doubt increased since 2014.

[12] Having regard to these disturbing statistics, members of the public are rightly outraged by the increasing number of farm attacks which continue unabated. There is increasing pressure on the courts to impose the harshest sentences to exact retribution in an effort to try and stem the flow of these

attacks and to deter further criminal conduct. While the issue of retribution will no doubt be a strong consideration in matters of this nature, it is not the only factor to be taken into account. To meet the sentencing objectives, what is called for is a balanced approach having regard to the triad of factors referred to in the well-known case of *S v Zinn*[3], namely the offender, the crime and the interests of society. This is the approach that was adopted by the trial judge in the present matter in considering an appropriate sentence to be imposed on the appellant.

[13] Given the planned, calculated and brutal manner in which these offences were committed, the trial judge was left in some doubt as to whether there was any hope of rehabilitation. He reasoned, however, that a sentence of life imprisonment does not rule out any possible rehabilitation as pointed out by the then Appellate Division in the matter of *S v Cele*[4], as follows:

> "It seems to me that a sentence of life imprisonment would be sufficient to express society's revulsion at the appellant's deed and to deter others from committing similar ones, while the appellant would, for his part, not be entirely denied the possibility of rehabilitation and eventual release."

[14] It is trite that sentences may be interfered with on appeal only if the sentencing court misdirected itself, or if the sentence is shockingly inappropriate. In the present matter no misdirections were alluded to nor could any be found. Given the heinous nature of the offences committed by the appellant, I do not consider that the sentences imposed by the trial court are either unduly harsh or shockingly inappropriate.

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[3] 1969(2) SA 539(A) at 540 G. See also S v Samuels 2011(1) SACR 9 (CA) para 9.
[4] 1991(1) SA 627 (AD) at 632.

[15] All in all, I consider that the trial court's approach to the issue of sentence insofar as the appellant is concerned and the reasons therefor, cannot be faulted in any way. It follows, in my view, that the appeal against sentence cannot succeed.

ORDER

[16] The order I make is the following:

The appeal against sentence is dismissed.

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GORVEN J

I agree

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OLSEN J

Date of Hearing	:	25 January 2016
Date of Judgment	:	11 February 2016
Counsel for Appellant	:	EX Sindane
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	M Miza
Instructed by	:	Director of Public Prosecutions, Pietermaritzburg