IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR667/17

In the matter between:

RIDWAAN MOTALA **First Appellant**
ADHIL BRIDGEMOHAN BUCKUS **Second Appellant**

and

THE STATE **Respondent**

ORDER

On appeal from the Ladysmith Regional Court (sitting as court of first instance):

1. The first appellant's appeal against his convictions in respect of counts 1, 2 and 3 are dismissed.
2. The first appellant's appeal against the sentences imposed in respect of counts 1 and 2 are dismissed.
3. The first appellant's appeal against the sentence imposed in respect of count 3 is upheld and is amended to read:

"In respect of count 3, first appellant is sentenced to twenty years' imprisonment, which sentence is to run concurrently with the sentence of 15 years' imprisonment imposed in respect of count 2."

4. The effective term of imprisonment in respect of the first appellant is therefore 24 years' imprisonment.
5. The second appellant's appeal against the sentences imposed in respect of counts 1 and 2 is upheld and amended to read as follows:

"In respect of count 1, second appellant is sentenced to four years' imprisonment. In respect of count 2, second appellant is sentenced to four years' imprisonment. It is

ordered that the sentence imposed in respect of count 2 shall run concurrently with the sentence imposed on count 1".

6. The effective term of imprisonment in respect of second appellant is therefore 4 years' imprisonment.

JUDGMENT

delivered on: 07 May 2021

BEZUIDENHOUT AJ with MADONDO DJP (Concurring)

[1] The first and second appellants were initially charged on three counts, namely:

(a) Count 1 – Housebreaking with the intent to commit a crime unknown to the State.

(b) Count 2 – Robbery with aggravating circumstances as intended in Section 1 of Act 51 of 1977.

(c) Count 3 – Murder

[2] On 20 June 2017 the first appellant was convicted as follows:

(a) Count 1 – Housebreaking with the intent to steal.

(b) Count 2 – Robbery with aggravating circumstances.

(c) Count 3 – Murder

[3] The second appellant was convicted of only count 1 and count 2 on the same day. The conviction in respect of count 1 was also for housebreaking with the intent to steal, a competent verdict of the original charge.

[4] The first appellant was sentenced to four (4) years imprisonment on count 1, fifteen (15) years imprisonment on count 2 (in terms of the minimum sentence legislation) and to life imprisonment on count 3 (again in terms of the minimum sentence legislation).

[5] The second appellant was sentenced to seven (7) years imprisonment on each of the two counts and the terms were ordered to run consecutively, an effective term of 14 years' imprisonment.

[6] The first appellant was granted leave to appeal against both conviction and sentence by the magistrate with the second appellant only granted leave to appeal (on petition) against sentence.

[7] The facts of the matter were briefly that on the evening or early morning of 16 and 17 of June 2016, the two appellants gained entry to the house of the deceased, Mrs Zarina Moolla, a 67-year-old female. Their intention was to steal money and it appears that they were under the impression that she was not at home. The first appellant went into her room and found her sleeping in her bed. She woke up and cried out. The first appellant retrieved a knife from the deceased's kitchen and stabbed her to death, in a particularly brutal manner. The appellants left the home of the deceased and were arrested a few days later.

[8] It is common cause that the State only relied on circumstantial evidence.

[9] The first appellant made a pointing out during which he pointed out a knife and a set of keys. He also pointed out where and how access was gained to the deceased's property and where the knife was taken from in the deceased's kitchen.

[10] A trial within a trial was conducted as the first appellant disputed that the pointing out was done freely and voluntarily. Very few aspects of the evidence given in the trial within a trial were disputed and the first appellant failed to give evidence. The magistrate ruled the pointing out to be admissible, correctly in my view.

[11] The first appellant further more resides in the house next to the deceased and had acted as a house-sitter for her on many occasions in the past.

[12] The first appellant was aware of the fact that the deceased received envelopes containing cash on 16 June 2016 as a charity contribution made during the month of Ramadhan. His own mother had received a similar contribution on the same day.

[13] The set of keys pointed out by first appellant was identified by the deceased's housekeeper as belonging to her. The knife was identified by the investigating officer

as being identical to other knives found in a ‘butcher block’ from the deceased’s kitchen and in fact fitted perfectly in the only open space in the butcher’s block.

[14] The first appellant claimed that on the evening of the incident he was visiting a relative’s house where they smoked ‘rock’ together. He returned to his house at around 22h00 where he went to sit inside a motor vehicle to listen to music where he fell asleep and only awoke the next morning.

[15] He also claimed that after his arrest he was severely assaulted over many hours by members of the police service. He was thereafter taken by certain police members and shown exactly where the knife and keys were in two different open fields and told to point the items out to the officer conducting the pointing out, which he did.

[16] The State re-opened its case to call a witness who had given the first appellant a lift into town around 01h00 in the morning of 17 June 2016. Upon his return he again saw the first appellant walking next to the road and again gave him a lift back to where he came from.

[17] The second appellant made a confession to a magistrate. It was also disputed that it was made freely and voluntarily and a trial within a trial was held. The magistrate ruled the confession to be admissible, correctly in my view.

[18] The second appellant testified that he also had been severely assaulted over many hours and only agreed to make a confession in order to stop the assaults on him. He claimed that what was taken down in the confession was a story made up by him based on pieces of information he gleaned from the policemen interrogating and assaulting him.

[19] He also testified that on the evening in question he was at home watching a movie with his mother and his nephew. He went to bed at around 00h30 that evening or early morning and did not leave the house. He called no witnesses to support his alibi, his mother being too old and sickly to give evidence.

[20] From the second appellant's confession, it appears that he and the first appellant went to the deceased's house on the evening in question. The first appellant told him that the deceased was not at home. They entered through the kitchen door. He kept watch in the kitchen whilst the first appellant went into the deceased's bedroom to look for money. The first appellant apparently then found the deceased sleeping. She woke up and shouted at him. The second appellant heard her making a noise, and when he entered the room he saw holes in stomach and on the side of her body. He ran outside and waited for the first appellant who came out a while later. They left the house and went to buy drugs.

[21] The magistrate convicted both appellants on circumstantial evidence. She was well aware of the fact that the confession made by the second appellant could not be used as evidence against first appellant.

[22] As far as circumstantial evidence is concerned, the following was said in *S v Reddy and others*:[1]

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn". The matter is well put in the following remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9:

"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference

[1] *S v Reddy and others* 1996 (2) SACR 1 (A) at 8C-G.

which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."'

[23] The magistrate, also quite correctly, found that there was no evidence before her that more than one person participated actively in the murder of the deceased. She said the following:
'It just seems more likely that the intention initially was to enter this house to steal the money but when the deceased was discovered in the house this intention changed from merely stealing into robbing the deceased and having to use force to kill the deceased.'

[24] In argument before us Ms Hulley, appearing for the appellants, argued that the magistrate should have accepted what first appellant said in his pointing out, namely that he saw his accomplice throw the knife away, and that's how he knew where the knife was.

[25] It is however clear from the record that this version was not repeated by first appellant when he gave evidence under oath.

[26] It is clear in my view that taking into account the cumulative effect of all the evidence led by the State, the magistrate was correct in convicting the first appellant, as she did on all three counts. She was also correct in acquitting the second appellant on the count of murder and only convicting him on the first two counts. I can find no misdirection in her approach to the evidence and the conclusions drawn from it.

[27] As far as sentence is concerned, there are however a couple of misdirections made by the magistrate.

[28] I will deal with the sentence of the second appellant first as counsel for the State, Mr Mbokazi, quite rightly and appropriately conceded that the effective

sentence of 14 years' imprisonment imposed by the magistrate constituted a material misdirection.

[29] The second appellant was sentenced to 7 years' imprisonment on the first count of housebreaking with the intention to steal whereas the first appellant, who for all intents and purposes was the instigator, only received a sentence of 4 years' imprisonment.

[30] From the record it is clear that the magistrate was attempting to punish the second appellant for not distancing himself from the first appellant's behaviour and because 'he did nothing' and then 'joined in the spoils'.

[31] Although the magistrate indicated that she considered the cumulative effect of the sentence imposed, it is clear that she merely paid lip service to this aspect and did not give it proper consideration.

[32] Our courts have dealt with this aspect on numerous occasions and have found that a sentencing court must have regard to the cumulative effect of a sentence to ensure that it does not become shockingly inappropriate.[2]

[33] Where the cumulative effect of a number of sentences strikes one as excessive appellate interference is warranted.[3]

[34] As far as the sentences imposed in respect of the first appellant and in particular on counts 1 and 2, the magistrate cannot be faulted.

[35] The sentence imposed on count 3 – that of life imprisonment, requires closer scrutiny. During the hearing of this matter Ms Hulley raised an interesting point, which was not dealt with during the trial, during the sentencing proceedings, during the application for leave to appeal, or in her heads of argument for that matter.

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[2] See *S v Moswathupa* [2011] ZASCA 172, 2012 (1) SACR 259 (SCA); *Zimila v S* [2017] ZASCA 55; *S v Mhlakaza and another* 1997 (1) SACR 515 (SCA).
[3] *S v Dube* 2012 (2) SACR 579 (ECG) para 11.

[36] Ms Hulley submitted that the magistrate had failed to explain to the appellants the correct minimum sentences. We were referred to the record of the proceedings where the magistrate explained the following to the appellants:
'Mr Motala and Mr Buckus, before you plead, just listen to the following explanation. You understand that as far as the robbery with aggravating circumstances charge is concerned, as well as the murder charge there are minimum sentences applicable. As far as the robbery…. As far as the murder is concerned, the same applies, if you are a first offender 15 years' imprisonment if you are convicted of murder, 20 years' imprisonment, for a second offender, and 25 years' imprisonment for a subsequent offender. Do you both understand the concept of minimum sentencing?'

[37] Prior to the magistrate explaining the above to the appellants, the prosecutor put the charges to the accused. It is however not recorded what exactly was read out to the accused, as is the norm in appeal records. It simply states that the 'Prosecutor puts charge to accused'.

[38] The charge sheet in respect of count 3, the murder charge, reads as follows:
'That the accused is/are guilty of the crime of MURDER read with the provisions of section 51(1), 51(2) (a)/(b)/(c) (Parts I, II, III and IV of Schedule 2) of the Criminal Law Amendment Act 105 of 1997). Delete if not applicable.

IN THAT during 10-17 June 2010 and near or at Ladysmith in the Regional Division of KwaZulu-Natal, the accused did unlawfully and intentionally kill ZARINA MOOLLA, a female person.

The principles of the doctrine of common purpose will apply to the facts (unless it is alleged that accused acted on his/her own) i.e. it is alleged that the accused acted in common purpose.

Competent verdicts for murder – Section 258 CPA and Offences not mentioned – Section 270 of the Criminal Procedure Act 51 of 1977.
MINIMUM SENTENCE/S THAT MAY BE APPLICABLE:

- Notwithstanding any other law, but subject to sections 51(3) and (6) a Regional Court or High Court shall sentence the accused, if convicted of the above charge, an

offence referred to in Part 1 of Schedule 2 of Act 105 of 1977, to imprisonment for life.

- If accused is/are convicted of the above charge, as mentioned in Part 2 of Schedule 2 of Act 105 of 1977 section 51(2)(a) makes provision for a minimum sentence of:

(i) 15 years imprisonment in case of a first offender;
(ii) 20 years imprisonment in case of a second offender;
(iii) 25 years imprisonment in case of a third or subsequent offender…'

No sections or portions were deleted on the charge sheet. The underlined portion was added in script, presumably by the prosecutor, on the original charge sheet.

[39] On the face of it, it appears as if the magistrate in error explained the minimum sentences applicable to a charge as mentioned in Part 2 of Schedule 2 of Criminal Law Amendment Act 105 of 1977 (the minimum sentencing legislation).

[40] As this particular point was not raised in the heads of argument filed by Ms Hulley on behalf of the appellants, Mr Mbokazi, for the State did not and could not address this issue fully before us. I requested Ms Hulley to provide me with case law, which she did in reply, albeit only in the way of providing the case citation and a brief referral to the head notes. She referred us to the following two cases namely *S v Legoa*[4] and *Khoza and another v S*.[5]

[41] Bearing in mind the importance of this aspect, I deemed it crucial and in the interests of justice to afford both counsel an opportunity to submit further heads of argument to deal with the above decisions as well as a subsequent decision on a similar issue namely *S v Ndlovu*,[6] delivered on 15 June 2017. Accordingly, a letter was addressed to both counsel involved and their supplementary heads of argument were received on 28 April 2021 and the 3rd May 2021 respectively.

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[4] *S v Legoa* 2003 (1) SACR 13 (SCA)
[5] *Khoza and another v S* [2017] ZANWHC 108.
[66] *S v Ndlovu* 2017 (2) SACR 305 (CC).

[42] In *Ndlovu*, supra, the Constitutional Court dealt with the situation where the applicant had been charged in the regional court with rape subject to the provisions of section 51(2) of the minimum sentencing legislation and was informed at the commencement of the trial that the court was bound to impose a minimum sentence of 15 years imprisonment. After hearing evidence of the serious nature of the complainant's injuries, the magistrate found the applicant guilty 'as charged' but sentenced him to life imprisonment in terms of section 51(1) of the minimum sentencing legislation.

[43] The court found at paragraph 46 that the regional court did not have jurisdiction to impose life imprisonment in terms of section 51(1) as Mr Ndlovu had been convicted of rape read with section 51(2) and accordingly the magistrate was required to impose a minimum sentence of 10 years imprisonment. The regional court's jurisdiction was also limited to a maximum of 15 years' imprisonment in terms of section 51(2) of the minimum sentencing legislation.

[44] Mr Mbokazi, in his supplementary heads of argument, correctly in my view, submitted that the charge to which the appellants pleaded was ambiguous as it referred to both sections 51(1) and 51(2) of the minimum sentencing legislation as nothing had been deleted.

[45] He furthermore conceded that the magistrate made an error when she explained the minimum sentence applicable to the murder count which was count 3 and that such error created an expectation with the first appellant that he was facing a less stringent punishment.

[46] Mr Mbokazi finally submitted that the magistrate misdirected herself in imposing life imprisonment. I fully agree with this submission. The magistrate's misdirection has a direct bearing on the first appellant's right to a fair trial and falls to be set aside.

[47] The first appellant chose not to give evidence in mitigation. His legal representative placed the absolute bare minimum about the first appellant's personal circumstances on record.

[48] The first appellant was a first offender and 27-years-old. He was self-employed as a mechanic and earned between R7 000.00 and R10 000.00 per week. He was not married and had no children. In *S v Vilakazi*[7] Nugent JA said that in cases involving serious crime deserving a substantial period of imprisonment, the personal circumstances of an offender recede into the background. I cannot agree more.

[49] It was submitted by his legal representative that 'drugs did play a role in the commission of this offence'. However, as mentioned before, the first appellant chose not to give evidence and did not take the court into his confidence by disclosing the nature of his drug use or addiction. In *S v Piater*[8] the fact that an accused did not take the court into her confidence by testifying and subjecting herself to cross-examination, was held against her.

[50] I am of the view that the first appellant has failed to demonstrate any circumstances which justify the imposition of a lesser sentence from what is prescribed in the minimum sentence legislation. I deem it therefore unnecessary to even discuss the principles as set out in *S v Malgas*.[9]

[51] In terms of section 51(2) of the minimum sentencing legislation, the maximum term of imprisonment a regional court magistrate may impose 'shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years'.

[52] The question as to whether a sentence in excess of the prescribed minimum is competent has been answered in the affirmative in *S v Mthembu*,[10] which was approved and confirmed by the Supreme Court of Appeal.[11]

[53] The first appellant was convicted of a violent and vicious murder on an innocent and unsuspecting woman of 67 years in her own home. The post mortem report indicated that the deceased sustained four stab wounds to her chest and five stab wounds to her abdomen. A further stab wound to her neck was inflicted with so

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[7] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58.
[8] *S v Piater* 2013 (2) SACR 254 (GNP).
[9] *S v Malgas* 2001 (1) SACR 469 (SCA).
[10] *S v Mthembu* 2011 (1) SACR 272 (KZP).
[11] *S v Mthembu* 2012 (1) SACR 517 (SCA).

much force that the larynx, pharynx and oesophagus were completely severed. In this day and age where violence against women is becoming more prevalent every day, the first appellant certainly deserves a lengthy period of imprisonment.

[54] I agree with Khampepe J, in *Ndlovu*[12] that '[it] is therefore incumbent upon prosecutors to discharge this duty diligently and competently'. The utmost care should be taken when drafting charge sheets to ensure that the correct sections are relied upon and explained to an accused person. The magistrate herself should also have ensured that she explained the correct provisions to the accused persons appearing before her. It was clear from the charge sheet that the State was relying on the doctrine of common purpose and that life imprisonment would be the prescribed sentence and accordingly explained to the accused.

[55] The following order is made:

1. The first appellant's appeal against his convictions in respect of counts 1, 2 and 3 are dismissed.
2. The first appellant's appeal against the sentences imposed in respect of counts 1 and 2 are dismissed.
3. The first appellant's appeal against the sentence imposed in respect of count 3 is upheld and is amended to read:

"In respect of count 3, first appellant is sentenced to twenty years' imprisonment, which sentence is to run concurrently with the sentence of 15 years' imprisonment imposed in respect of count 2."

4. The effective term of imprisonment in respect of the first appellant is therefore 24 years' imprisonment.
5. The second appellant's appeal against the sentences imposed in respect of counts 1 and 2 is upheld and amended to read as follows:

"In respect of count 1, second appellant is sentenced to four years' imprisonment. In respect of count 2, second appellant is sentenced to four years' imprisonment. It is ordered that the sentence imposed in respect of count 2 shall run concurrently with the sentence imposed on count 1".

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[12] *S v Ndlovu* 2017 (2) SACR 305 (CC) para 58.

6. The effective term of imprisonment in respect of second appellant is therefore 4 years' imprisonment.

BEZUIDENHOUT AJ

MADONDO DJP (concurring)

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Date of judgment : 07 May 2021

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