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

Case no: AR332/21

In the matter between:

KHULUMANI ZABALAZA MCHUNU **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

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

(a) The appeal against the sentence in count 1 of murder succeeds.

(b) The sentence imposed by the regional court in count 1 is set aside and substituted with a sentence of 10 years' imprisonment.

(c) The substituted sentence is antedated to 25 March 2021, in terms of section 282 of the Criminal Procedure Act 51 of 1977.

(d) The sentence imposed in count 2 of attempted murder remains unaltered, including the order that it is to run concurrently with the sentence in count 1.

JUDGMENT

Khallil AJ (Poyo Dlwati ADJP concurring)

[1] Following a plea of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (CPA), the appellant who was legally represented, was convicted and sentenced on 25 March 2021, by the Regional Court sitting at Greytown, on count 1 of murder and on count 2 of attempted murder.

[2] The murder charge was substantively framed to be read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentence Legislation), which provides for a minimum sentence of 15 years' imprisonment for a first offender, with an upper limit of not more than five years in excess of minimum sentence, in the case of a regional court which imposes such sentence, upon conviction.[1]

[3] The imposition of minimum sentences in terms of the Minimum Sentence Legislation is of course subject to the proviso in section 51(3)*(a)* that the court may deviate from the prescribed sentence if it is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence. If a court is satisfied that such circumstances exist, it is obliged to enter those circumstances on record and it must thereafter impose such lesser sentence it considers appropriate.[2]

[4] Having heard oral submissions on sentencing from both the defence and the State, some of which appear to have contradicted the facts contained in the written plea explanation that was accepted by the State, the learned magistrate found no substantial and compelling circumstances justifying the imposition of a lesser sentence on count 1

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[1] Section 51(2) of Criminal Law Amendment Act 105 of 1997.
[2] *Director of Public Prosecutions, Free State v Mokati* [2022] ZASCA 31.

and proceeded to impose the prescribed minimum sentence of 15 years', and 5 years' imprisonment on count 2. It was ordered that the sentence imposed in count 2 would run concurrently with the sentence in count 1, thus resulting in an effective term of 15 years' imprisonment.[3]

[5] Immediately following the imposition of sentence, the appellant applied for leave to appeal as envisaged in section 309B of the CPA against the sentence alone. In a terse ruling, the learned magistrate refused such leave, necessitating a petition contemplated in section 309C of the CPA to the high court for leave to appeal against the sentence imposed. This was granted on 15 October 2021. By this date, the appellant had served almost 7 months of the sentence imposed, and by the date of the hearing of the appeal on 22 April 2022, a further 6 months, resulting in a total of 13 months.

[6] The appellant's main contention is that the learned magistrate, at sentence, failed to have proper and due regard to the various disparate factors placed before him, both mitigating and aggravating, the appellant's personal circumstances, the nature of the offences convicted of, as well as the interests of society. The appellant further contends that these factors, when viewed in the light of the facts admitted in his plea explanation, and accepted by the State, cumulatively considered are such that the findings of the court *a quo* ought to have been that substantial and compelling circumstances were indeed established justifying the imposition of a lesser sentence. It is accordingly contended that the learned magistrate misdirected himself.

[7] The appellant, in his written plea statement in terms of section 112(2) of the CPA (Exhibit "A"), set out in detail the facts which he admitted and upon which he pleaded guilty. The public prosecutor not only made no objection to the plea, but positively asserted acceptance of the facts so pleaded. The prosecutor accordingly made a choice that binds the court to adjudicate the case on the basis of the facts alluded to in that statement. The prosecutor, we must accept, would have been in the best position to know the evidence at the State's disposal and whether or not the facts pleaded by the appellant

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[3] Section 280(2) of Criminal Procedure Act 51 of 1977, see the record at page 34, lines 1-13.

accorded with such evidence.[4] The court, in turn, having been satisfied of the guilt of the appellant on the strength of such statement, returned a verdict of guilty on both counts.[5]

[8] In such circumstances, the facts contained in the plea and accepted by the State must constitute the essential factual matrix, on the basis of which a sentence must be imposed. To hold otherwise, would taint the proceedings as unfair and could lead to disastrous consequences in the proper administration of justice. This was conceded by Mr Ngubane who argued the appeal on behalf of the State.[6]

[9] This by no means amounts to the shutting of the door on the State in presenting evidence on any aspect of the charge not set-out in the plea. Moreover, given the inquisitorial nature of the sentencing process, the court may also, in its discretion, consider evidence or a statement from the accused or question an accused on any aspect of the case for the purposes of determining an appropriate sentence. In fact, section 112(3) of the CPA sanctions this. This should also be viewed in the light of section 274(1) of the CPA which provides that:

'a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed'.

This is however not an unfettered discretion and the process invoked must meet the constitutional standard of fairness to both the State and accused.

[10] The fundamental constitutional requirement of fairness contained in section 35(3) of the Constitution of the Republic of South Africa, 1996, which must permeate all facets of a criminal trial (including the sentencing and appeal processes), militates against the reception of evidence or for that matter submissions on sentencing which contradicts the factual matrix set out in the plea explanation and accepted by the State. This is what the prosecutor purported to do, it seems largely successfully so, in placing adverse untested contentious facts from the bar on sentencing and which were clearly relied upon by the court in sentencing the appellant. The constitutional dictates of substantive fairness

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[4] *Khathide v S* [2022] ZASCA 17, see the record at page 6, lines 5 – 6.
[5] See record at page 6, lines 9 – 11.
[6] *Khathide v S* [2022] ZASCA 17; *S v Jansen* 1999 (2) SACR 368 (C).

cannot be glossed over and this was strongly affirmed by the Constitutional Court.[7] This first case decided by the Constitutional Court after it was established heralded a radical departure from the pre-constitutional era regarding notions of fairness and how it should manifest itself in matters of adjudication that serve before the courts.

[11] It is necessary to have regard to the facts of the matter. The appellant, in his section 112(2) statement stated that on 27 December 2018 at about 21h00, whilst on his way to visit his girlfriend his motor vehicle became stuck in a drain. He then walked to a certain homestead to seek assistance and found people enjoying a party. They agreed to assist and many people accompanied him back to his motor vehicle. A person by the name of Mzwakhe Ndwonde, who was present and intoxicated, volunteered to drive the appellant's motor vehicle out of the drain. When a certain lady, Sitabhele Mchunu, who was also present, intervened and objected to Mr Ndwonde driving the vehicle as he was intoxicated, an argument ensued which led to her being assaulted by Mr Ndwonde. The appellant, in an attempt to stop the assault, intervened and a fight then ensued between the appellant and Mr Ndwonde. The appellant then produced his licenced firearm and fired shots into the ground in the general direction of Mr Ndwonde who then fled the scene.

[12] One of the shots fired into the ground ricocheted and unfortunately struck the deceased, Thembalethu Ximba, in the region of his abdomen. Another shot ricocheted and struck the complainant in count 2, Mr Sphatimandla Mchunu, grazing his chest area and injuring him in his left upper arm. Both the deceased and complainant in count 2 were innocent bystanders at the scene and had no quarrel with the appellant.

[13] On noticing that the deceased and complainant were shot, the appellant immediately rushed to their assistance and transported the deceased in his motor vehicle to the nearest hospital. Mr Ximba, sadly passed on the following day as a result of the gunshot injury.

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[7] *S v Zuma and others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC).

[14] The appellant, it is common cause, had no direct intention to kill the deceased in count 1 and the complainant in count 2. He however admitted that he foresaw the possibility of death ensuing but notwithstanding, proceeded to fire the shots, regardless of whether death ensued or not. It was accordingly pleaded and accepted that the appellant had the requisite intent in the form of *dolus eventualis* in respect of both counts.[8]

[15] The appellant also expressed remorse for his actions, apologised to the family of the deceased and covered the funeral costs. These facts, contained in the plea explanation, were all admitted by the State.[9]

[16] The State, in addressing on sentence, agreed that the appellant was indeed helpful immediately after the shooting by ensuring that the deceased was taken to a hospital but, for unknown reasons, appeared to have had a change of heart regarding the sincerity of the remorse expressed by the appellant, a fact it clearly earlier admitted.[10]

[17] The prosecutor, thereafter and notwithstanding repeated objections by the defence, purported to place from the bar, facts, impermissibly so in my view, relating to the appellant's alleged conduct in telephoning the police and falsely reporting the incident as a drive-by shooting and walking to his motor vehicle to fetch his firearm before the shots could be fired. Such conduct, if true, detracts from the appellant accepting responsibility for his actions and raises doubts about the sincerity of the resultant remorse expressed. The learned magistrate relied on these allegations in concluding that the appellant was not remorseful and that he did not take the court fully into his confidence.[11]

[18] Whilst it is acceptable, and the practice in our courts to adopt an informal approach in the placement of non-contentious facts (by both the State and defence) in the form of statements from the bar in the sentencing process, where such facts are however contentious or appear to change or contradict the factual matrix upon which the plea of

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[8] See paras 4.6 to 4.8 of Exhibit "A".
[9] See para 4.10 of Exhibit "A "and the record at page 6, lines 5 to 6.
[10] See the record at page 21, lines 11-17.
[11] See the record at pages 21, 22 and 23.

guilty was accepted by the State, then at the very least, it should have been properly placed before the court as evidence, thereby allowing the appellant a fair opportunity to challenge such evidence as is his constitutional right. Such an approach would also allow the court to be in a position to properly evaluate the probative value of such evidence in the totality of factors it must consider in the imposition of a just and fair sentence.[12]

[19] Although there is authority for the proposition that the essential factual matrix set out in the plea and accepted by the State, cannot be altered even in the case of evidence subsequently adduced, this does not prevent the leading of evidence which does not contradict the plea, but which may be relevant to the question of sentence.[13]

[20] In *casu*, the learned magistrate not only allowed, but also relied upon contentious statements by the prosecutor from the bar notwithstanding protestations by the defence, in concluding that the appellant 'tried to cover up his actions by reporting that it was a drive-by shooting' and further that the appellant 'did not take the court into his confidence' in not disclosing that he fetched his firearm from his motor vehicle before the shooting. What is clear from the reasoning of the magistrate is that the acceptance of this information had a significant impact in sentencing the appellant.[14]

[21] I am mindful that the Supreme Court of Appeal has cautioned that minimum sentences are not to 'be departed from lightly or for flimsy reasons', and are the starting point when imposing sentence. Should substantial and compelling circumstances be absent, then a sentencing court is still entitled to depart from imposing the prescribed minimum sentence, if it is of the view that it would be disproportionate and unjust not to do so, the so-called proportionality test.[15]

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[12] *Khathide v S* [2022] ZASCA 17.
[13] Section 112(3) of the Criminal Procedure Act 51 of 1977; *S v Jansen* 1999 (2) SACR 368 (C); and *S v Khumalo* 2013 (1) SACR 96 (KZP).
[14] See the record at page 31, lines 24-25; at page 32, lines 1-7 and lines 19-25; at page 33, lines 1 – 23.
[15] *S v Malgas* 2001 (1) SACR 469 (SCA).

[22] Regarding his personal circumstances, the appellant was a 36 year-old first offender, who was gainfully employed and the father of two minor children, who were financially dependent on him. The circumstances surrounding the incident was most peculiar and the deceased and complainant in court 2 had no quarrel or disagreement with the appellant. They were innocent bystanders. Clearly there was no direct intention to kill the deceased or injure the complainant in count 2.

[23] In assessing remorse, it is largely to the surrounding actions of the appellant rather than what is only said in court that one should look at. His conduct in coming to the aid of the deceased, rushing the deceased to hospital from the scene in his motor vehicle, apologising to the family of the deceased and paying for the funeral costs, coupled with his plea of guilty, are strongly indicative of not only regret, but of genuine remorse on the part of the appellant.[16] There was no other credible evidence to indicate otherwise.

[24] The fact that the appellant fired several shots, as opposed to a single shot, albeit into the ground, must be regarded as an aggravating factor. He knew that there were onlookers at the scene. He should have regulated his behaviour knowing that the person he got into a fight with was youthful and under the influence of alcohol at the time.

[25] The loss of a life is always tragic and has profound consequences for family and loved ones left behind by the deceased. The irresponsible use of licenced firearms cannot be tolerated. The appellant must be suitably punished and society demands this of the courts. At the same time, the imposition of a sentence should not be likened to taking revenge but should be the culmination of a process having proper regard to the personal circumstances of the appellant, the nature of the offences convicted of, the surrounding circumstances relating to the shooting, the actions of the appellant as well as the interests of society. I am of the view that the learned magistrate misdirected himself when considering the cumulative effect of these circumstances, in not finding the existence of substantial and compelling circumstances justifying the imposition of a lesser sentence.[17]

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[16] *S v Matyityi* 2011 (1) SACR 40 (SCA).
[17] *S v Kruger* [2011] ZASCA 219, 2012 (1) SACR 369 (SCA) para 11.

[26] It was also an irregularity by the learned magistrate in allowing the prosecutor to place contentious facts before the court from the bar and which tended to contradict the factual matrix pleaded by the appellant and earlier accepted by the State. The fact that the learned magistrate placed much reliance on such information in sentencing the appellant, also constituted a material misdirection justifying interference by this court. Mr Ngubane, for the State, conceded this point and given the peculiar circumstances of the case, readily conceded that the sentence imposed by the learned magistrate was unduly harsh.

[27] What this case highlights is the need for prosecutors to carefully consider any plea tendered by an accused and to make an informed choice at an early stage whether the facts pleaded accord with the evidence at the disposal of the State. This choice not only binds the State but also the court. If it does not, this should be placed on record and preferably evidence led regarding disputed or contentious circumstances relating to the commission of the offence. The acceptance of facts contained in the plea, without careful consideration by the prosecution, could have unintended consequences in sentencing and could bring the administration of justice into disrepute. The choice made by the State binds the court to adjudicate the case on the basis of the facts alluded to in the plea statement.[18]

[28] Both counts of murder and attempted murder, it is common cause, were closely related in time, place and circumstances.

[29] In the light of the aforegoing, the following orders are made:

(a) The appeal against the sentence in count 1 of murder succeeds.

(b) The sentence imposed by the regional court in count 1 is set aside and substituted with a sentence of 10 years' imprisonment.

(c) The substituted sentence is antedated to 25 March 2021 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

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[18] *Khathide v S* [2022] ZASCA 17.

(d) The sentence imposed in count 2 of attempted murder remains unaltered, including the order that it is to run concurrently with the sentence in count 1.

KHALLIL AJ

Appearances:

For Appellant:	Ms L Barnard
Instructed by:	Nel and Stevens Attorneys
	Greytown
For Respondent:	Mr C N Ngubane
Instructed by:	Director of Public Prosecutions
	PIETERMARITZBURG
Date of Appeal:	22 April 2022
Date of Judgment:	29 April 2022