IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: **AA14/2022**

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

... [redacted] 15/09/2023

In the matter between:

NKHENSANI THOMPSON MHLONGO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NAUDÈ-ODENDAAL J:

[1] The Appellant was charged in the High Court of South Africa (Circuit Local Division) held at Phalaborwa with one count of murder read with the provisions of Section 51(1) of Act 105 of 1997.

[2] The Appellant was legally represented throughout the proceedings. The Appellant pleaded guilty to the charge in terms of Section 112(2) of the Criminal Procedure Act, 51 of 1977, as amended. Before the guilty plea was read into the record, the defense counsel alerted the Court that the plea is not in line with the preferred charge which was murder read with the provisions of Section 51(1) of Act 105 of 1997. The guilty plea was in line with the provisions of Section 51(2) of Act 105 of 1997. The guilty plea tendered by the Appellant was then read into record.

[3] The State did not accept the guilty plea tendered by the Appellant indicating that the plea does not accord with the facts at their disposal. The State further indicated that it intended to lead evidence to show that the charge is in line with the provisions of Section 51(1) of Act 105 of 1997. The state proceeded to lead the evidence of two witnesses, Constable Matome Ananias Machete and Grace Mosola Khoza.

[4] On the 22nd of September 2016 the Appellant was convicted as charged in terms of the provisions of Section 51(1) of Act 105 of 1997 and was sentenced to an effective term of life imprisonment.

[5] This appeal is against sentence only with leave from the Supreme Court of Appeal granted on the 22nd of June 2021. The Appeal was unopposed by the State in that the State did not file any heads of argument or any cross-appeal. At the hearing of the matter a representative on behalf of the State however appeared in court.

[6] The grounds of appeal are as follows:-

6.1 An effective term of life imprisonment imposed on the Appellant is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation of sentence and it degrades the period of time the Appellant spent in custody awaiting trial.

6.2 The trial court erred in not finding that there are substantial and compelling circumstances justifying the deviation from the prescribed minimum sentence.

6.3 The trial court erred in not finding that given the circumstances of the Appellant, he can be rehabilitated in to the community.

6.4 The trial court erred in over emphasizing the seriousness of the offence, the interest of the community, the prevalence of the offence, the deterrence effect of the sentence and the retributive element of sentencing.

[7] The Appellant submitted that the settled approach to be adopted by this court is that the sentencing task resorts primarily within the scope of the trial court's discretion, and the court on appeal shall not interfere with a sentence so imposed, save for if it is found that the sentence is ominously inappropriate and or disproportionate to the severity of the offence or that the trial court did not exercise its discretion judiciously.

[8] The Appellant further submitted with reference to **S v RO and Another 2000 (2) SACR 248 (SCA) at paragraph 30 that Hener JA** stated as follows:-

"sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are, the crime, the offender,

the interest of society with different nuance, prevention, retribution, rehabilitation, reformation and deterrence. Invariably there are overlaps that render the process more unscientific, even a proper exercise of the judicial function allows reasonable people to arrive in different conclusions."

[9] Mr. Machovani on behalf of the Appellant argued that it is not in dispute that the Appellant was convicted of a very serious offence, however when imposing sentence, the sentencing court must have had due regard to the Appellant's personal circumstances and the sentence should have been blended with mercy.

[10] The personal circumstances submitted on behalf of the Appellant were as follows:-

10.1 The Appellant has two previous convictions dating as far back as 30 years and he should be treated as a first offender.

10.2 He pleaded guilty to the charge, which is a sign of remorse.

10.3 The Appellant has been in custody since the commission of the offence on 19 April 2015.

10.4 The Appellant is 60 years of age and at the time of the commission of the offence he was 59 years old. (The Appellant would currently by approximately 67 years old). He is therefore an elderly person.

[11] It was submitted by the Appellant that in passing sentence, the trial court arrived at the conclusion that there are no substantial and compelling circumstances warranting the departure from the prescribed minimum sentence of life imprisonment. It was conceded by the Appellant that during mitigation of sentence, the defense did not place on record more personal circumstances on behalf of the Appellant. It was however submitted that there are some mitigating factors which if cumulatively taken into consideration, constitute substantial and compelling circumstances for the court to deviate from imposing the prescribed minimum sentence of life imprisonment.

[12] Mr. Machovani argued that the fact that the Appellant is a first offender, he pleaded guilty to the charge, was 59 years old at the time of the commission of the offence and he has spent some time in custody awaiting the finalization of trial, are substantial and compelling enough and

should have persuaded the trial court to depart from imposing the prescribed minimum sentence of life imprisonment.

[13] It was submitted by the Appellant that the court *a quo* failed to apply the determining test as laid down in **S v Malgas 2001 (1) SACR 469 (SCA)** and thereby erred in finding that no substantial and compelling circumstances are attendant to the person of the Appellant on the basis of which the court can be justified in deviating from the imposition of the prescribed minimum sentence.

[14] It was argued on behalf of the Appellant that the trial court further failed to take into account as a mitigating factor that the Appellant pleaded guilty to the charge. It was submitted that by pleading guilty the Appellant showed remorse and an offender who shows remorse for the crime they committed can be seen as that they are able to acknowledge that they acted wrongfully, take responsibility for their action and want to change their behaviour.

[15] It was further submitted that the sentence of life imprisonment imposed on the Appellant is shockingly inappropriate and should this court therefore interfere with the sentence imposed by the court *a quo* and replace the sentence with a correct sentence.

[16] The Supreme Court of Appeal in **Nkabinde and Others v S [2017] ZASCA 75;2017 (2) SACR 431 (SCA)at para 51** held that '*sentencing lies in the discretion of the trial court*'.

[17] It is trite law that a court of appeal will not interfere with an imposed sentence of a lower court unless the discretion of the lower court was not judicially exercised, or if there was a severe irregularity or misdirection by the trial court, or if the sentence was so severe that no reasonable court would impose it, or if the sentence is shockingly inappropriate, or when there is a striking disparity between the sentence passed by the lower court and that which the Court of Appeal would have imposed. See **S v De Jager 1965 (2) SA 616 (A)** and **S v Pieters 1987 (5) SA 717**.

[18] In **S v Obisi 2005 (2) SACR 350 WLD, S v Rabie 1975 (4) SA 855 (A) at 857 D-E** and **S v De Oliveira 1993 (2) SACR 59 A at 667**, it was held that

the test on appeal is not whether or not the court sitting on appeal would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when imposing sentence. This court is mindful of the decision in **S v De Jager 1965 (2) SA 616 (A) at 628** where the discretion of the appeal court was described as not having a general discretion to ameliorate the sentences of trial courts but that it is the trial court that has such discretion.

[19] In the absence of a material misdirection by the trial court, an appellate court cannot approach the question of sentence as if it were the trial court and then substitute the trial court's sentence simply because it prefers to. The same would apply to an accused who cannot choose the sentencing regime that he prefers.

[20] In the present matter, when imposing the sentence of life imprisonment, the trial court had regard to all the mitigating factors placed on record on behalf of the Appellant due to the fact that the Appellant chose not to testify in mitigation of sentence, which factors are as follows:-

20.1The Appellant's age,

20.2 The fact that the Appellant pleaded guilty from the onset;

20.3 The Appellant is to be regarded as a first time offender;

20.4 The Appellant has been in custody since 19 April 2015.

[21] The trial court also had regard to the aggravating factors in that the Appellant stabbed the deceased 21 times with a knife. The Appellant did not testify and there is no evidence to show that the Appellant demonstrated remorse at any given time.

[22] In determination of an appropriate sentence in the present matter, the court *a quo* weighed and balanced the mitigating and aggravating factors cumulatively. The court *a quo* further had due regard to the triad of factors as stated in **S v Zinn 1969 (2) SA 537 (A).**

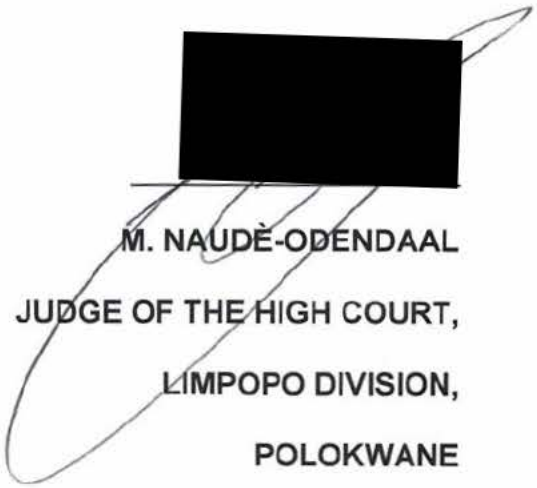
[23] After considering the factors required to be taken into account in the imposition of sentence, including the Appellant's personal circumstances and the fact that the Appellant stabbed the deceased 21 times to death, the court *a quo* came to the conclusion, and correctly so, that there were

no substantial and compelling circumstances present to deviate from the prescribed minimum sentence in the present matter.

[24] In this court's view, the court *a quo* did not misdirected itself and did not exercise its discretion improperly in sentencing the Appellant to life imprisonment. The appeal against sentence therefore stands to fail.

[25] Accordingly, this court therefore makes the following order:-

1. The appeal against the sentence of life imprisonment is dismissed.



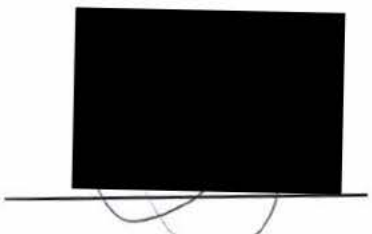
M. NAUDÉ-ODENDAAL

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

I AGREE:



M.V. SEMENYA

ACTING JUDGE PRESIDENT

OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

I AGREE:

J.T. NGOBENI

ACTING JUDGE OF

THE HIGH COURT,

POLOKWANE

APPEARANCES:

HEARD ON: 18 AUGUST 2023

JUDGMENT DELIVERED ON: 15 SEPTEMBER 2023

For the Appellant:	Mr. R. Machovani
Instructed by:	Legal Aid South Africa,
	Polokwane Local Office,
	Polokwane
For the Respondent:	Adv. M. Maleka
Instructed by:	The Director of Public Prosecutions
	Polokwane