IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS175/2007

DATE: 11 MAY 2010

In the matter between:

THE STATE

and

MZIYANDA FOKWANA

JUDGMENT

Application for Leave to Appeal

McDOUGALL, AJ:

Ms Fitzpatrick acted on behalf of accused 3 in the case of S v Moi & Four Others (case number SS176/2007). Ms Fitzpatrick has brought an application for leave to appeal against Mr Fokwana's sentence of life imprisonment and various other years of imprisonment which were ordered to run concurrently with the term of life imprisonment. Ms Fitzpatrick has also brought an application for condonation for the late filing of the notice of application for leave to appeal.

The test to apply in a matter of this nature is whether or not

another court may come to a different conclusion with regard to the sentence that has been imposed. Ms Fitzpatrick sets out the reasons why the sentence induces a sense of shock in her notice of appeal. In her submissions to this court, she relies on two cases, namely S v Thebus & Another 2002 (2) SACR 566 (SCA) and S v Erskine 2008 (1) SACR 468 (CPD). Her principal submission was that it had not been proved that Mr Fokwana had fired the shot that killed the deceased and that Mr Fokwana was a first offender. Ms Fitzpatrick conceded that the facts showed that it was a premeditated robbery and that Mr Fokwana was in possession of a firearm and he did fire at the Coin Security vehicle after the death of the deceased.

We are not in a position to determine who exactly fired the shot that killed the deceased, but we do not believe that it makes any difference at the end of the case. I refer to the case of Bongani Philip Vilakazi, case number 576/07 and The State, the respondent, a judgment of the Supreme Court of Appeal which was delivered on 2 September 2008, dealing with sentencing principles. At page 9, Nugent, J had the following to say:

> "That determinative test for when the prescribed sentence may be departed from, was expressed as follows in Malgas and it deserves to be emphasised:

(If the sentencing court, on consideration of the circumstances of the particular case, is satisfied that they render the prescribed sentence unjust, in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence)."

This court agrees with Ms Marshall that the present case and the Thebus and Erskine cases are entirely distinguishable. In the Thebus case there was a shootout between a vigilante group and alleged drug dealers, passers-by had been shot and a seven year old girl fatally injured. The court *a quo* had sentenced the two appellants to eight years imprisonment, which was suspended on certain conditions. The Supreme Court of Appeal replaced their sentences with 15 years imprisonment each.

In the Erskine case, the appellant and two others were found guilty of one count of kidnapping, five counts of rape and one count of indecent assault of a 15 year old girl. The evidence proved that the appellant had not raped the complainant, but had forced her to masturbate him. He, the appellant, was sentenced to an effective 18 years imprisonment.

In the circumstances this court finds that another court will not

come to a different conclusion as regards sentence and impose a lesser sentence. In the circumstances the applicant for leave to appeal is dismissed and so is the application for condonation for the late filing of the notice of appeal.

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