

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER:

A52/2012

5 DATE:

19 OCTOBER 2012

In the matter between:

**ZAMIKHAYA PATRICK MSITSHANA**

Appellant

and

10 **THE STATE**

Respondent

---

**J U D G M E N T**

**BOZALEK, J:**

15

The appellant was charged in the Regional Court at Mitchells Plain with three counts, namely murder, attempted murder and robbery with aggravating circumstances, all committed on 2 September 2006. It was alleged that he shot and killed Mr  
20 Luzuko Notayi and shot and wounded Mr Banyolo Majova after he robbed him of his cell phone, jacket, wallet and R60,00 in cash. The appellant pleaded not guilty to the charges and was legally represented throughout his trial.

25 On 4 March 2011 he was found guilty on the three counts and

/RG

/...

A52/2012

sentenced to 15 years imprisonment on count 1 and 10 years imprisonment on count 2 and 3 which were taken together for the purposes of sentence. The magistrate further ordered that the latter sentence would run concurrently with the sentence  
5 on count 1 resulting in an effective sentence of 15 years imprisonment. Finally, he ordered in terms of section 276(B) of Act 51 of 1977 that the effective sentence would be subject to a non-parole period of 12 years.

10 Although the magistrate granted leave to appeal against both conviction and sentence, the appellant abandoned his appeal against conviction, wisely so, and challenges only the sentence imposed. The grounds of appeal are that the magistrate erred in the weight he attached to the interests of  
15 the community as opposed to the personal circumstances of the appellant; that he failed to take into account the element of mercy in finding no substantial and compelling circumstances to deviate from the minimum sentence in relation to count 1 and, overall, that the sentence imposed induces a sense of  
20 shock.

It is trite that a court of appeal will interfere with sentence only when there has been a material misdirection by the trial court, where the trial court did not act judicially or, failing either of  
25 these grounds, where the sentence is so unreasonable or

/RG

/...

A52/2012

induces a sense of shock, as it is put, that this in itself is evidence of a misdirection requiring intervention. See *inter alia* S v Pieters 1987 (3) SA 717 (A) at 727.

5 The evidence led by the state established that the appellant, who was 29 years of age when he was sentenced, together with a friend accepted a lift in a vehicle driven by the complainant in count 2 and 3, who himself was acquainted with the appellant. When his friend disembarked the appellant  
10 produced a firearm and for no apparent reason fatally shot him at point blank range. When the complainant on counts 2 and 3 intervened, the appellant turned on him and fired several shots at him. The complainant fell in the road and feigned death whereupon he was robbed by the appellant.

15

From that point onwards the appellant falsely claimed that the occupants of the vehicle had been shot and robbed by a passing group and that he had escaped unscathed. The appellant maintained this version throughout and at no point  
20 expressed any remorse for his actions. The complainant on counts 2 and 3 sustained extensive injuries as a result of the gunshot wound to his abdomen. He spent five weeks in an intensive care unit and was hospitalised for nearly two months in all.

25

/RG

/...

A52/2012

In terms of the minimum sentence legislation, namely Act 105 of 1997, the appellant qualified for a minimum sentence of 15 years imprisonment in respect of both counts 1 and 3.

- 5 In sentencing the appellant the magistrate took into account *inter alia* the appellant's age, that he was single, employed, had two young children in respect of whom he paid maintenance and was a first offender. The magistrate found no substantial and compelling circumstances in relation to
- 10 count 1 but, in relation to the robbery, found that the fact that some of the items stolen were recovered constituted such circumstances, thus justifying a deviation from the minimum sentence.
- 15 On behalf of the appellant it was contended that the magistrate misdirected himself in finding substantial and compelling circumstances in relation to count 1, but not in relation to count 3. In my considered view, the appellant can consider himself fortunate to have received only the minimum sentence
- 20 in respect of count 1 which amounted to the cold-blooded murder of his defenceless friend and, furthermore, that he received only a concurrent sentence of 10 years imprisonment in respect of counts 2 and 3.
- 25 If anything, the magistrate over-emphasised the appellant's

/RG

/...

A52/2012

personal circumstances and under-emphasised the elements of retribution and deterrence. Neither the effective sentence nor its component parts induce any sense of shock in me. On the contrary, I am left with a disturbing sense that the effective sentence was inappropriately lenient. Since there is no cross-  
5 appeal, however, the sentence cannot be reviewed.

The only misdirection which I can detect is one which was not identified by the appellant's representative, namely, the  
10 magistrate's use of section 276B of Act 51 of 1977 to order that the sentence would be subject to a non-parole period of 12 years. In terms of section 276B(1)(b) and (2) any non-parole period may not exceed two thirds of the effective period of imprisonment or 25 years, whichever is the shorter. The  
15 magistrate was accordingly not empowered to impose a non-parole period of more than 10 years and the sentence must be corrected accordingly.

For these reasons I would dismiss the appeal against  
20 conviction and sentence save that the order that the appellant's sentence was subject to a non-parole period of 12 years is amended to reflect a non-parole period of 10 years imprisonment.

5

I agree.

---

BOZALEK, J

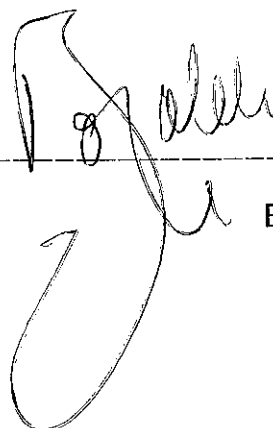
10

It is so ordered.

---

MATHEE, AJ

15

A handwritten signature in dark ink, appearing to read 'J. Bozalek', is written over a horizontal line. The signature is stylized with a large, sweeping loop at the bottom.

BOZALEK, J