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

Case No: A91/2021

In the matter between:

RENALDO APPOLIS Appellant

and

THE STATE Respondent

Coram: Justice J Cloete *et* Acting Justice S Hockey

Heard: 28 May 2021

Delivered electronically: 1 June 2021

JUDGMENT

CLOETE J (HOCKEY AJ concurring):

[1] On 7 June 2018 the appellant was convicted in the Kuilsriver Regional Court (sitting at Blue Downs) on 3 of the 4 counts he faced, namely one of premeditated murder and two of attempted murder. During the trial in that court he was also discharged in terms of s 174 of the Criminal Procedure Act[1]

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[1] 51 of 1977.

("CPA") on a fourth count (count 2) after the State failed to adduce any evidence in regard thereto.

[2] On 27 September 2018 he was sentenced to life imprisonment on the murder count and 15 years imprisonment on each of the attempted murder counts. He approaches this court on appeal against all the convictions and sentences. Although he has an automatic right of appeal in respect of the murder count in terms of s 309(1)(a) of the CPA this does not apply to the attempted murder counts.

[3] The question which thus arises is whether this court may nonetheless entertain the appeal in respect of the two attempted murder counts. The answer is that we cannot. In *S v Chake*[2] the Supreme Court of Appeal considered the effect of the legislature's amendment, by the enactment of the Child Justice Act,[3] to the previous s 309(1)(a) which resulted in the automatic right of appeal for a person sentenced to life imprisonment being done away with.

[4] It made clear that the effect of that amendment was that a convicted person sentenced to life imprisonment by a regional court first had to apply for leave to appeal in the lower court. Approving the findings on this issue in *S v Alam*,[4] it held the conclusion reached by the high court in *Chake* that it could entertain the appeal to be wrong. The Supreme Court of Appeal found that:

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2 2014 (1) SACR 177 (SCA).
3 75 of 2008.
4 2011 (2) SACR 553 (WCC).

[13] …Judges must be careful not to submit to the temptation of substituting what they regard as reasonable and sensible for what was in fact done by the legislature, and to thereby "cross the divide between interpretation and legislation". Instead, a court must determine the appropriate meaning of the words used in the statutory provision in question by adopting their plain meaning, unless it would lead to a glaring absurdity. In the present case there is no absurdity…

[16] It is necessary to emphasise that the appellant is not without recourse… [and] *ought to have applied to the regional court for leave to appeal under section 309B of the Criminal Procedure Act and, in the event of that application failing, have petitioned a high court for such leave under section 309C. This he failed to do. His appeal was therefore not properly before the high court, which should have declined to entertain it, and its order dismissing the appellant's appeal must be set aside… This will leave the appellant at liberty to seek to pursue an appeal in the prescribed manner if he is so advised.'*

[5] Section 309(1)(a) of the CPA has subsequently again been amended and in its current form the relevant proviso reads as follows:

'(1)(a)… Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).'

[6] In addition s 309B of the CPA stipulates that:

*'**309B. Application for leave to appeal**.---(1) (a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any accused, other than a person referred to in the first proviso to section 309 (1) (a), who wishes to*

> *note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.'* [my emphasis]

[7] For sake of completeness, s 302 of the CPA deals with sentences imposed by a magistrate's court which are subject to review in the ordinary course. The present case does not fall into the ambit of s 302, and this much is apparent from the record of the lower court. We are accordingly confined to dealing only with the appeal against conviction and sentence in respect of the count of premeditated murder, pertaining to an incident which occurred on 26 March 2016 (the two counts of attempted murder relate to an entirely separate incident which occurred on 29 March 2016).

[8] Finally on this point, counsel for the parties (*Ms Adams* of Legal Aid for the appellant and *Mr Stephen SC* for the State) were notified prior to the hearing of the concern pertaining to us entertaining argument on counts 3 and 4, and both were given the opportunity to address us thereon. They were *ad idem*, in light of *Chake*, that the appeal in respect of those counts is not properly before us.

[9] *Mr Stephen* suggested that the entire appeal should, in the circumstances, be postponed *sine die* in order to afford the appellant the opportunity to approach the lower court for the required leave. His view was that the appeal in respect of count 1 should properly be considered in light of the evidence led in respect of counts 3 and 4 as well.

[10] After discussion we decided to approach the appeal on count 1 on the basis that if, after hearing argument thereon, we were of the view that it could not be properly determined without considering that other evidence, we would order that the matter be postponed *sine die* and re-enrolled for hearing before us on all counts if the appellant successfully obtained the required leave (whether from the lower court or on subsequent petition). After hearing full argument on count 1, we have concluded that it is not necessary to order such a postponement. The reasons are apparent from what follows.

[11] The charge of premeditated murder was count 1. It was alleged by the State that on 26 March 2016 the appellant murdered the deceased, Mr Chrishna Christo Marais, by shooting him with a firearm. The appellant pleaded not guilty and denied any involvement. During the course of the State's case it emerged that he raised an alibi defence, which was that on the day in question he was with his former girlfriend, Ms Natasha Jooste, at her home.

[12] The State relied on the evidence of the deceased's mother, Mrs Jacqueline Marais, as well as the contents of certain exhibits handed in with consent of the defence. The appellant himself testified and called his mother, Mrs Salome Van Reenen.

[13] The facts pertaining to the incident itself were undisputed. Ultimately the only issue was one of identity, i.e. whether the State had proven beyond a reasonable doubt that the appellant was the perpetrator. I thus briefly set out the relevant material facts.

[14] Mrs Marais testified that at the time of his murder the deceased resided with her and her husband at their home in Potberg Street, Wesbank, Delft. His 6-year old daughter either resided there as well or was visiting at the time (the record is unclear on this aspect).

[15] She had just returned home from shopping at around 10.45am. The deceased was in his bedroom and came out, telling her he was hungry. As she opened a bag of fish and chips she had bought, she looked through the kitchen window and saw three men entering her yard, looking for the deceased who went outside and spoke to them briefly. She could not hear what they said. The deceased returned and when she asked him what they wanted he replied *'nothing'*.

[16] The deceased went into his bedroom and a few minutes later the three men returned. Two waited at the corner and, according to her, it was the appellant who came to stand in the open doorway to her kitchen, telling her that he was looking for the deceased. She went into the deceased's bedroom and he told her to tell the appellant he was not at home.

[17] She returned to the kitchen and told the appellant, but he continued standing in the doorway. Moments later she felt someone brush against her back in the confined space. She turned and saw the appellant pulling out a firearm from behind his back. He was wearing a brown leather jacket. He proceeded to the deceased's bedroom and pushed the door open wide. As soon as she saw the firearm she ran outside screaming. Her husband, who had been standing

on the other side of the kitchen table, stood motionless as he did not know what was happening. Once outside she heard three to four shots being fired and her husband also ran outside.

[18] The appellant thereafter emerged from the open kitchen doorway, holding the firearm. He calmly put it away behind his back, straightened his clothing and walked away as if nothing had happened. She went back into the house and found the deceased lying in his bedroom in a pool of blood.

[19] The forensic report of Warrant Officer Mlalandle, who attended the scene and which was handed in by agreement as Exhibit “B”, reflects that he found one spent cartridge and a bullet on the bedroom floor as well as a spent cartridge on the bed. The post mortem report of Dr Bjorn Swigelaar, handed in by agreement as Exhibit “A”, reflects that the deceased succumbed to two gunshot wounds to the neck. One of these exited on the right lateral aspect of the neck, perforating the spinal column and jugular vein. The other perforated the left lung. It is therefore clear that the perpetrator intended to kill the deceased.

[20] As to the issue of identity, Mrs Marais testified that a week or so before his murder the deceased told her that he had been instructed by certain members of the 28’s gang to murder his own brother, a member of the rival 26’s gang, but he refused. The day of the incident was the first time she had encountered the appellant. A few days thereafter she identified him from a set of photographs shown to her by the police.

[21] She explained in cross-examination that while the appellant was previously unknown to her she did know his two accomplices, Boetie and Markie. When the incident occurred the appellant had not covered his face or head. She was able to see his face clearly, both as he stood in the entrance to the house and when he walked right past her after the shooting. Her other son later told her that his name was *'Naldo'*. When asked if the perpetrator had any distinguishing features, she replied that he had a tear-shaped tattoo below his one eye. She was adamant that he was the one who murdered the deceased.

[22] In his testimony the appellant maintained that he did not even know the deceased. He also initially denied knowing Boetie and Markie. The latter was proved to be demonstrably false. In later cross-examination he conceded that during an earlier stint in prison in 2014 he shared a cell with both of them. He also eventually conceded that at the time of his prior incarceration he was a member of the 28's gang, as were both Boetie and Markie, but claimed that after his release he ceased being a member of that gang and did not associate with these two individuals. It was however never put to Mrs Marais that the appellant did not associate with Boetie or Markie when she testified.

[23] The record revealed that the appellant has a tear-shaped tattoo below his one eye. He conceded, importantly in my view, that it is faded and that someone would have to be in close physical proximity to him to observe it properly.

[24] The appellant's alibi was also demonstrated to be false. His mother in her testimony claimed that he had been looking after his two younger brothers at

her home on the day of the incident and not, as the appellant had alleged, that he was with his former girlfriend at her home at the time.

[25] In argument it was submitted on behalf of the appellant that the identification made by Mrs Marais was unreliable for the following reasons. First, when initially asked about distinguishing facial features she did not mention any. Second, she first testified that the police showed her a set of three photographs, but later that she was shown a lot more. Third, she was in a state of shock at the time of the incident and had limited opportunity to observe the perpetrator, only coming to learn of his name after the offence was committed.

[26] I am unable to agree that any of these grounds have merit. In my view the State correctly submitted in argument that Mrs Marais' opportunity to observe the appellant's face was not limited merely to a passing glance.

[27] Clear visibility at the scene was not placed in issue. Mrs Marais had sufficient opportunity in close enough proximity to look at the appellant's face which he did not try to disguise during the incident. That she must have been in close proximity to him is supported by the appellant's concession that, in order to observe the tear-shaped tattoo on his face, she would have needed to be. Moreover, Mrs Marais was also close enough to observe that the appellant was wearing a brown leather jacket (although he denied owning such an item). She did not try to embellish her testimony, candidly conceding that

although she thought he was also wearing jeans, she had not noticed his footwear.

[28] Her testimony that she identified the appellant from photographs shown to her by the police was not disputed. During cross-examination it also became clear that she was not only shown three photographs, but rather about two pages of them, and that she identified not only the appellant but also Boetie and Markie, hence her reference to three photographs.

[29] The trial court's credibility finding in preferring the evidence of Mrs Marais over that of the appellant was not challenged on appeal. Nor was there any suggestion that he failed to apply the cautionary rules pertaining to a single witness, as well as a single witness identification. In my view the failure to make these challenges was wise, since the magistrate's approach and reasoning cannot be faulted on this score. I have already explained why the attack on the reliability of the identification has no merit. It follows that the appellant was correctly convicted on count 1.

[30] Turning now to sentence. It is of some concern that the State failed to procure the appellant's SAP 69 and that sentencing was approached by the trial court on the assumption that he is a first offender. The reference in the pre-sentence report of the probation officer, handed in by agreement as Exhibit "E" to his *'previous offences'* was also not explored. However we are bound by the record and must therefore consider the sentence of life imprisonment imposed on count 1 on the basis that the appellant is a first offender.

[31] At the time the offence was committed the appellant was 19 ½ years old.[5] The pre-sentence report paints a picture of an individual who grew up in a stable, loving home until the age of 12 or 13 years, when his great-grandparents passed away and he had to move from Beaufort West to Cape Town. The appellant had difficulty adjusting and was also the victim of bullying. He explained to the probation officer that because of the constant bullying he felt forced to join a rival gang for protection. Despite these difficulties, on his own account, the home provided to him by Mrs Van Reenen and her husband was also a stable one. When the family relocated to Parow (a safer area), the appellant instead chose to live with his girlfriend in Wesbank where the gang culture became more entrenched in his behaviour.

[32] The appellant left school in grade 9 due to his gang involvement and his step-father tried to motivate him to live a positive lifestyle by offering him employment in his own construction business. The appellant did not seize this opportunity to better himself but rather became addicted to drugs and robbed people in the community to support this habit. He admitted to the probation officer that he is still a member of the 28's gang.

[33] It is convenient to quote from the comprehensive pre-sentence report in which the probation officer, Mr J Kessie, set out his opinion:

> *'It is the view of the probation officer that even though the accused appeared to have been a victim of unfortunate circumstances, he was presented with*

[5] There was some confusion about his age in the lower court but Exhibit "E" reflects his date of birth as 22 August 1996.

opportunities to redirect his life in a positive manner when the family moved out of the gang-ridden community and he was surrounded with strong support from his mother and her life partner but chose to succumb to the social pathologies of gangsterism.

The coldblooded nature in which the offence was committed is also indicative of the deep-seated anger within the accused which unless he is able to deal with through a process of introspection and honesty will remain ingrained with him and thus place a high risk on re-offending. It is the opinion of the probation officer that the accused would be better suited with a custodial sentence as to prevent him from continued offences within the community and give him opportunity for self-reflection and possible healing…'

[34] In his judgment the magistrate considered the brazen, callous manner in which the murder was committed by the appellant. He also highlighted the devastating effect of the murder on Mrs Marais and other family members, including the deceased's young daughter, and the scourge of rampant gangsterism in the area. Although he took into account the appellant's youth, he concluded that there were no substantial and compelling circumstances to justify a deviation from the minimum sentence of life imprisonment.

[35] This court can only interfere with the sentence if satisfied that the magistrate made a material misdirection or that the sentence imposed is shocking, startling or disturbingly inappropriate. In *S v Malgas*[6] it was made clear that although the prescribed minimum sentences are *'ordinarily appropriate'* where there is no strong justification to impose a lesser sentence, courts nevertheless have a duty to approach sentencing on an individualised basis. Accordingly, if a court is satisfied, for objectively convincing reasons, that the

[6] 2001 (1) SACR 469 (SCA) at paras [22] to [25].

circumstances of a particular case would result in the minimum sentence being disproportionate to the crime concerned, the offender and the legitimate needs of society, such circumstances will be considered to be *'substantial and compelling'*.[7]

[36] In *S v Vilakazi*[8] this principle was again emphasised but an important qualification added, namely that in cases of serious crime the personal circumstances of the offender, by themselves, will of necessity carry less weight, although they are nonetheless relevant in another respect, which is whether the accused can be expected to offend again.[9] Our law is also that it is appropriate to take into account, as one of the factors, the period of imprisonment spent by an accused awaiting trial.[10] In the present case the appellant was incarcerated as an awaiting trial prisoner from the time of his arrest on 10 April 2016, i.e. just over 2 years, but this was not only as a result of count 1 but also counts 3 and 4.

[37] This was an extremely serious crime with equally serious aggravating factors, and the appellant's personal circumstances, to the extent they can be considered favourable (i.e. youth and a first offender) must therefore necessarily recede into the background. It was argued by *Ms Adams* that, given his age and that he is a first offender, the trial court misdirected itself in failing to attach appropriate weight to his prospects of rehabilitation. While the

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7 Confirmed by the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC) at para [40].
8 2009 (1) SACR 52 (SCA) at para [18].
9 At para [58].
10 See *inter alia Director of Public Prosecutions, North Gauteng, Pretoria v Gcwala and Others* 2014 (2) SACR 337 (SCA) at paras [15] to [19].

appellant may have such a prospect, what must also be weighed into the balance is that on the uncontested contents of the pre-sentence report the indications are that, at least for a lengthy period going forward, this is unlikely to be the case.

[38] It bears emphasis that merely because we might have imposed a different sentence, this is not the test on appeal (as set out above). Having considered all relevant factors I cannot find that the trial court materially misdirected itself, or that the sentence imposed was disturbingly inappropriate or disproportionate in the sense set out in *Malgas*. It follows that the appeal against sentence on count 1 must also fail.

[39] As matters stand at present the sentences in respect of counts 3 and 4 automatically run concurrently with the sentence of life imprisonment in terms of s 39(2)(a)(i) of the Correctional Services Act.[11] We are mindful that the appellant might subsequently successfully petition the Supreme Court of Appeal and that a sentence less than life imprisonment on count 1 might ultimately be imposed.

[40] We have carefully considered the potential ramifications of such a course of events, and have arrived at the conclusion that, should that turn out to be the case, there will be no prejudice to the appellant in respect of the sentences imposed on counts 3 and 4 since the court dealing with that appeal will already be apprised of the outcome of that process. The logistics pertaining to

[11] 111 of 1998.

the enrolment of any appeal to the high court on counts 3 and 4 can be arranged between counsel for the parties, who are both senior experienced practitioners.

[41] **The following order is made:**

1. **The appeal against conviction on count 1, namely premeditated murder, is dismissed and the conviction is confirmed.**
2. **The appeal against sentence in respect of count 1 is dismissed and the sentence of life imprisonment is confirmed.**
3. **The matter is referred back to the trial court should the appellant wish to apply for leave to appeal against the convictions and/or sentences imposed on counts 3 and 4.**

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J I CLOETE

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S HOCKEY