FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO

Case No: A91 /2022

In the matter between: -

MICHAEL MPOTLA MKHWANAZI **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: DANISO J & BOONZAAIER AJ

JUDGMENT BY: BOONZAAIER, AJ____

HEARD ON: 6 MARCH 2023

DELIVERED ON: 9 MARCH 2023

INTRODUCTION:

[1] The Appellant, appeals against the sentence handed down by the Regional Court Magistrate Welkom on **4th March 2022.** (hereinafter called "the court *a quo"*).

FACTUAL BACKGROUND:

[2] The Appellant was convicted and sentenced as follows:

2.1 Charge 1: Robbery with Aggravating Circumstances- Life imprisonment

2.2 Charge 2: Possession of firearm -

2.3 Charge 3: Possession of ammunition -

Both charges 2 and 3 are taken as one for the purpose of sentence, and Appellant is sentence to 5 (five) years direct imprisonment.

2.4 Charge 4: Murder- Life imprisonment

2.5 Charge 5: Contravention of Section 49(1)(a) of the **Immigration Act 13 of 2002-**

1 (one) year imprisonment

It was further ordered that all the counts run concurrently.

[3] The Appellant has an automatic right to Appeal.

3.1 The Appellant`s Appeal is directed against the Sentence and the grounds are as follows:

3.1.1 The court in sentencing the Appellant to life imprisonment is shockingly, inappropriate based on the following reasons:

3.1.2 As it is out of proportion to the totality of the accepted facts in mitigation.

3.1.3 That it is excessive under the circumstances and induce a sense of shock.

3.2 That the court erred by not imposing a shorter term of imprisonment and

that the court *a quo*;

3.2.1 Did not have regard to the personal circumstances of the Appellant,

3.2.2 Gave a different sentence for the co-Accused even though they were found to have acted in common purpose.

3.2.3 Did not consider the element of rehabilitation.

3.3 That the court overemphasized the principle of punishment, namely deterrence, retribution over the principle of rehabilitation, the interest of society and the seriousness of the offences.

FACTS OF THE CASE

[4] On the 17 November 2018 the two Accused persons were in an open field near Unitas School, near the railway line. The deceased a Mr., Neil Scott Horrocks approached Accused 1 to buy dagga he wanted a smoke. While he was speaking to the deceased Accused 2 arrived and asked why he was speaking to the deceased. Accused 1 indicated that Accused 2 (Appellant) would be able to find a dagga Rizzler for him. The deceased offered Accused 2, R28 which he took out of his wallet. Accused 2 took the money and left but returned to confront the deceased. There was no argument between them.

[5] Accused 2 took the lead and used the firearm, a 9mm pistol to rob and killed the deceased. Accused 2 tied up the deceased`s hands and feet with a wire. The deceased`s bag was searched, and a cellphone and R 300 was found which the Accused 2 took. Accused 1 `s version was from the start that he was under duress and only followed Accused 2 `s instructions. They went to number 3 -shaft near Human motors where there was a dumping site. Accused 2 took out a blue plastic bag which contains ammunition. He

loaded some bullets into the firearm. They went to a bush where they put the ammunition into the bag. The firearm and the cell phone was handed to Accused 1 to try and switch on the deceased`s phone, without any success.

[6] They dug a hole and buried the firearm in the hole. They proceeded to another dumping site where there were some stones. There, Accused 2 put the cellphone and the firearm underneath the stones. Accused 2 also told Accused 1 that he has a plan. He wanted to buy some petrol and set the body of the deceased alight. They went to town and split. From there Accused 1 asked an elderly man he knows to accompany him to the Police station where he told the Police everything. He also accompanied them to point out all the evidence. At that time the police treated him as a witness, he was later added as an Accused. He pleaded guilty to the charges. Accused 1 and 2 are from Lesotho and participating in Zama-Zama activities, being illegal in the country. Accused 2 was arrested at Steps Tavern in town for drinking in public

AD SENTENCE:

[7] The mitigating circumstances of the Appellant were argued as follows:

7.1 The Appellant was 37 years old at the time of sentence.

7.2 He was married with two children.

7.3 The Appellant completed standard 7.

7.4 The Appellant did odd- jobs and earned approximately R100 – R150 per day and with his earnings, he supported his wife and children.

7.5 He was incarcerated from 17 November 2018.

7.6 The Appellant admitted some of his involvement in the offences.

7.7 The Appellant`s sentence should be blended with mercy and the reformation factor must also be considered.

7.8 The Appellant was a first offender.

[8] The aggravating circumstances were considered during the Judgment on the Sentence

8.1 That the offence was of a serious nature.

8.2 That the offence is prevalent.

8.3 The Appellant took the lead in the offences pertaining to counts 1, 2 3, and 4.

8.4 The Appellant was economical with the truth as to what transpired at the scene of the crime.

LEGAL PRINCIPLES:

[9] In the matter of **S v Rabie**[1] , the principle regarding appeals against sentence was stated to be:

i. "In every appeal against sentence, whether imposed by a magistrate or Judge, the Court hearing the appeal -

a. Should be guided by the principle that punishment is "pre- eminently" a matter for the discretion of the trial court" and

b. Should be careful not to erode such discretion: hence the further principle that the sentences should only be altered if the discretion has not been 'Judicially and properly exercised".

ii. The test under "b" is whether the sentence is vitiated by irregularity or misdirection or

[1] 1975 (4) SA 855 (A) at 857 D-F

is disturbingly inappropriate."

[10] In the case of **S v Malgas**[2]**, Marais JA** stated:

> "A court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentences if it were the trial court and then substitute the sentence arrived at by it simply, because it prefers it. To do so would be to usurp the sentencing discretion of the trial court."

The Supreme Court of Appeal, went on to say at 478 E-H:

> "Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate ". It must be emphasized that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court, or the court prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation

[2] 2001 (1) SACR 469 SCA at 478 D-E

exists in the former situation."

[11] An appeal court is loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division in the case of **R v Maphumulo and Others**[3] stated that:

> "The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

The exception being where there is evidence indicating that it was activated by a material misdirection or that the sentence is disturbingly inappropriate, or that it induces a sense of shock.

[12] In **R v Zulu and Others**[4] it was stated:

> "Where no such grounds exist, the appeal court will not interfere merely because the appeal judges considered that they themselves will not have imposed the sentence."

[13] In **R v S**[5] , the court stated with regards when a court would interfere:

> "There are well recognised grounds on which the court of appeal would interfere with the sentence. Where the trial judge or magistrate, as the case may be, has misdirected himself from the law or facts or has exercised his discretion capriciously or upon a wrong principle or

[3] 1920 AD 56 at 57
[4] 1951 (1) SA 489 (N) 496 at 497
[5] 1958 (3) SA 102 at 104

so unreasonable as to induce a sense of shock."

[14] There is what is known as a basic *triad* when fundamental policy with respect to sentencing is considered. In **Zinn v S** [6]. Rumpff J stated that the assessment of a sentence, the following must be considered - namely that it is a "triad consisting of the crime, the offender, and the interests of society."

[15] With this in mind, the main purpose of punishment has been described by the appellate division as: Firstly deterrent. Secondly preventative. Thirdly reformative. Fourthly retributive as stated in both **R v Swanepoel**[7] ; and **S v Rabie,** supra.

[16] At the same time the words of **Holmes JA in S v Sparks** [8] should not be forgotten:

"Punishment should fit the criminal as well as the crime, be fair to the State and to the accused and blemished with a measure of mercy."

[17] In **S v Theron**[9] , Botha JA in referring to what an appropriate sentence is, said that the trial judge weighs up the various factors, which forms part of the court's discretion as to what, under the circumstances an appropriate sentence should be.

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[6] 1969 (2) SA 537 (A) 540 G
[7] 1945 AD 444 at 455
[8] 1972 (3) SA (396) (A) 410 H
[9] 1986 (1) 826 (A) 896

[18] In **S v Matyityi**[10] , the court increased the sentence which was originally imposed by the trial court from 25 years to life imprisonment based on the factor that the respondents conduct themselves, was a flagrant disregard for the sanctity of human life or individual physical integrity. In the case of the court stated that the case of **Matyityi** shows that:

> " Where people acted in a manner that was unacceptable in any civilised society particularly one that ought to be committed to the protection of the rights of all persons including women",

no mercy should be accepted.

[19] In the Appellants case with regards to count 1 and 4 there is a minimum sentence applicable. The court is expected to impose the minimum sentence unless if there there are substantial and compelling circumstances, warranting a deviation since the minimum sentence on count 2 and 3 it is up to 15 years imprisonment unless there are substantial or compelling circumstances. The offence is serious, the circumstances surrounding the killing are aggravating because the deceased was a soft target and could not defend himself against the firearm of Accused 2.

[20] This court is sensitise to what was said in the case of **S v Rabie** supra, where the court was asked to blend its sentence with mercy as sentence is not aimed at breaking the accused but also to assist with rehabilitation.

[21] The Appellant asks this court to deviate, based on the substantial and compelling factors listed. On a balanced consideration of the totality of the evidence, this court finds no substantial and compelling circumstances to deviate from the minimum sentence and accords with

[10] (2011) SACR (1) 40 (SCA) para 13

the court *a quo* that the sentence is proportionate to the crime, the criminal and the legitimate needs of society. (own emphasis)

[22] Hence, having regard to the case law and how the *court a quo* applied the law, I can find no reason to interfere with the trial court`s discretion on sentence.

ORDER:

[23] The appeal with regards to sentence is dismissed.

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A.S. BOONZAAIER, A J

I agree. It so ordered.

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NS DANISO, J

For the Appellants: Adv. S Kruger
Instructed by Legal Aid South Africa
BLOEMFONTEIN

For the Respondent: Adv.Tunzi
Instructd by Director of Public Prosecutions
BLOEMFONTEIN