



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

CASE NO: A155/2022

_____ **4 December 2023**

In the matter between:

RADEBE, SIFISO

Appellant

And

THE STATE

Respondent

JUDGMENT

Mdalana-Mayisela J (Moosa J concurring)

- [1] The appellant appeals against the sentence of 15 years direct imprisonment imposed upon him by the Regional Magistrate, Protea on 25 July 2022. The appeal is pursuant to leave having been granted by the lower court.
- [2] He was legally represented throughout the proceedings in the lower court. He pleaded guilty to the charge of murder and handed in a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, as amended. The state accepted his plea of guilty. He was convicted as charged.
- [3] The facts giving rise to the conviction and sentence are as follow. The appellant and Sipiwe Zondi (“the deceased”) were friends. On 30 January 2020, in the morning the appellant met the deceased at Mofolo, Soweto. He gave the deceased his taxi to work with it on that day. They had an agreement that the deceased would give the appellant R550.00 in the evening of the same day. Later that day the deceased came back with a taxi and gave the appellant R250. They had an argument that the deceased breached their agreement. The appellant slapped and strangled the deceased with his arm whilst he was sitting on the driver’s seat. He then removed him from the driver’s seat, opened the taxi’s sliding door and put him inside the passenger section of the taxi. The deceased then admitted that he put the other money in his shoes. The appellant made him take off his shoes and he found R100.00 inside. Thereafter, the appellant continued to assault him by hitting his head against the chairs and strangling him on his neck because he believed that he had hidden more money on his body. The deceased’s body became loose. The appellant let go of him and he fell down. When he realised that he was not responsive, he called his friend to come to the scene and assist him. The friend arrived and they took the deceased to Mofolo clinic where he was declared dead on arrival.
- [4] After the appellant was convicted, the state proved three previous convictions listed as follows.
- [4.1] Unlawful possession of a firearm for which he was sentenced in 2005 to 2 years’ imprisonment suspended for 5 years;

[4.2] Theft and sentenced in 2010 to R200 or 24 months imprisonment wholly suspended on certain conditions; and

[4.3] Housebreaking with intent to steal and theft for which he was sentenced to 3 years' imprisonment.

- [5] The appellant was convicted with murder read with the provisions of section 51(2) and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"). In terms of this subsection the prescribed minimum sentence for this offence is 15 years' imprisonment. Section 51(3) provides that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.
- [6] In determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors - that lessen an accused's moral guilt. It was further held that the specified sentences are not to be departed from lightly and for flimsy reasons.¹
- [7] During the pre-sentencing proceedings the appellant testified in mitigation of sentence and presented the pre-sentencing report prepared by the probation officer, Glad Thabang Mahlala. In aggravation of sentence the state presented the victim impact report prepared by Molefe Moeletsi. I do not find it necessary to repeat the contents of the said reports herein as the lower court dealt with them in its sentence judgment.
- [8] The personal circumstances of the appellant are as follow. He was born on 24 November 1987. He was 35 years old at the time of sentencing. He does not have children. He has a grade 8 level of education. He was employed as a taxi driver since 2008 earning between R800 – R1000 per week. He is in good health. He spent approximately 5 weeks in custody awaiting trial before being released on bail. He

¹ *S v Malgas 2001 (1) SACR 469 SCA*

pleaded guilty. He has 3 previous convictions that are more than 10 years old. He apologised to the deceased's family, the court and community for this offence during his evidence in mitigation of sentence. He also apologised during the interview with the probation officer. His family made a request to meet the deceased's family in order to apologise but it was refused.

- [9] During the address on sentence in the lower court, the appellant's counsel submitted that the following factors cumulatively taken, amounted to substantial and compelling circumstances. The appellant lost his father at an early age, he showed remorse, he pleaded guilty, the offence was not planned, there was no direct intention to kill and he was a youth at the time of the commission of the offence. The state argued that those factors were not substantial and compelling because the plea of guilty was tendered 2 years after the commission of the offence, the appellant showed no genuine remorse and the offence is very serious.
- [10] The lower court found that the appellant's personal circumstances are not substantial and compelling for the following reasons. The appellant was 33 years old at the time of the commission of the offence and therefore, he was not a young naïve person. He had an uncle who played a role of a father and a loving family that took care of him. He pleaded guilty 2 years after the commission of the offence and the matter was ready for trial since April 2021. He did not show genuine remorse because firstly, he had minimised the brutality of the manner in which he killed the deceased during his interview by the probation office; and secondly, Moeletsi in his victim impact report, reported that the deceased's brother, Xolani Zondi had informed him that the appellant had been bragging that he was out on bail, and the case was not going anywhere. The lower court then imposed a prescribed minimum sentence.
- [11] The appellant noted this appeal against sentence on the grounds that the court *a quo* erred in finding that there are no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence, considering his personal circumstances, his plea of guilty, circumstances around the commission of the offence in that there was some measure of provocation, and his conduct after the commission of the offence showing he is remorseful; that the court *a quo* over-emphasized the seriousness of the offence and its prevalence and thus overlooked his personal circumstances; and that the imposed sentence induces a sense of shock. It was also

submitted on behalf of the appellant that the previous convictions ought not to have carried much weight given that they were more than 10 years old and further they did not involve an element of violence.

- [12] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. The test for interference with the sentence imposed by the trial court is not whether or not the appeal court would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when it imposed the sentence. The appeal court will interfere where the imposed sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court or it induces a sense of shock.²
- [13] It was submitted on behalf of the appellant that the lower court committed a material misdirection when it made a finding based on inadmissible evidence that the appellant showed no genuine remorse. The report made by Moeletsi and relied upon by the lower court that the deceased's brother, Xolani Zondi had informed him that the appellant had been bragging that he was out on bail, and the case was not going anywhere was hearsay evidence and therefore inadmissible. Xolani Zondi did not testify, and the appellant disputed this report when put to him by the lower court during his evidence in mitigation of sentence. There was no agreement between the parties in the lower court that the hearsay evidence should be admitted. The state made no application for admission of that hearsay evidence.
- [14] It was further submitted that given the importance of this report by Moeletsi, and the fact that it was disputed by the appellant, the lower court ought to have raised the issue of its admissibility before admitting it. In this regard, we were referred to the previous authority of *S v Ramavhale*³, where the Appellate Division held that "*if at the stage when this (hearsay) evidence was given the Judge thought that it was going to be important (I do not think that he then did) he should have raised the question of admissibility: or, if not then, then at a sufficiently early stage. It is a duty of a trial Judge to keep inadmissible evidence out, not to listen passively as the record is turned into a papery*

² *S v Nkosi and Another* 2011(2) SACR 482 (SCA); *S v Kgosimore* 1999 (2) SACR 238 SCA; *S v Obisi* 2005(2) SACR 350 (WLD); *S v De Jager* 1965 (2) SA 616 (A) at 628; *S v Sadler* 2000 (1) SACR 331 (SCA).

³ 1996 (1) SACR 639 (A).

sump of 'evidence'." I agree with counsel for the appellant that the said report is hearsay and inadmissible. The lower court committed a material misdirection in considering this inadmissible evidence against the appellant.

- [15] It was also submitted that the lower court committed another material misdirection when it stated that the appellant did not show genuine remorse because he minimised the brutality of the manner in which he killed the deceased to the probation officer. The appellant admitted to the probation officer that he killed the deceased by assaulting and strangling him. In his section 112(2) statement he gave a detailed description of how he assaulted and strangled the deceased. I agree with counsel for the appellant that this was another material misdirection because the details of the brutality were contained in the section 112(2) statement which carries more weight than the probation officer's report. The lower court relied on those details when it concluded in its judgment that this was a brutal murder.
- [16] The lower court made a finding that the guilty plea carried no weight because it was made in 2022 whereas the matter was ready for trial since 2021. With due respect to the lower court, this finding is farfetched. The appellant pleaded guilty the first time the charges were formally put to him. There is no reason stated in its judgment why the matter did not proceed to trial when it became ready in April 2021. The unexplained delay could not be used against the appellant. Further, there is nothing on record that shows that the lower court in sentencing the appellant, took into account the fact that the appellant was the one together with his friend that took the deceased to Mofolo clinic, he reported the murder to the police and made a confession on the same day the murder was committed. He did not challenge the confession at the commencement of the trial instead he pleaded guilty. These were material factors that should have been taken into account. I find that the lower court committed a material misdirection in this regard.
- [17] Further, the lower court did not attach sufficient weight to the fact that the appellant verbalized his remorse to the probation officer. He testified in mitigation of sentence and took the court into his confidence. He apologised to the court, deceased's family and community. His family requested a meeting with the deceased's family to tender the apology, but it was refused.

- [18] Having regard to what has been said in paragraphs 13 to 17 above, it is my view that the appellant expressed, and his conduct after he killed the deceased showed, genuine remorse. The lower court committed a material misdirection when it made a finding that he did not show genuine remorse.
- [19] It was further submitted on behalf of the appellant that the lower court overemphasized the seriousness and prevalence of the offence. The lower court was correct to state that the offence of murder is serious and prevalent in the society, and that the courts should protect the society and send a clear message that this kind offence would not be tolerated. However, the sentence must be individualized, and each matter dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence, a balance has to be struck.⁴ I would add that the balancing exercise must not be just a lip service.
- [20] In considering the seriousness of the offence, the lower court overlooked the circumstances surrounding the commission of the offence. It is common cause that the appellant and the deceased were friends. There was an agreement between them that the deceased would work with the appellant's taxi and in return he would give the appellant R500.00. The deceased did not honour the agreement. He was not honest to the appellant. He hid some of the money in his shoes and that led the appellant to believe that more money was hidden on his body. In his section 112(2) statement he stated that he assaulted and strangled the deceased with this belief and to force him to give him more money. He foresaw that his conduct was likely to cause death of the deceased. Clearly, the facts of this case show that there was no prior planning to kill the deceased. The appellant had no direct intention to kill the deceased. There was some measure of provocation. There was evidence before the lower court that after the appellant lost his father, he had anger issues. The lower court misdirected itself by overlooking these circumstances in considering whether there are substantial and compelling circumstances.

⁴ *S v Samuels 2011 (1) SACR 9 (SCA)*.

- [21] I find that the lower court committed material misdirections referred to above. In the circumstances, this court is entitled to interfere and consider whether there are substantial and compelling circumstances and if so, to impose an appropriate sentence.
- [22] Having regard to the appellant's personal circumstances and what has been said in paragraphs 13 to 20 above, I find that the plea of guilty, genuine remorse, some measure of provocation, no prior planning and no direct intention to commit murder, cumulatively taken, amounted to substantial and compelling circumstances. This court is entitled to deviate from the prescribed minimum sentence and impose a lesser sentence.
- [23] In considering an appropriate sentence, I take into account what the lower court said about the impact of the offence on the deceased's family, the interests of society, the seriousness and prevalence of the offence, appellant's personal circumstances, mercy, and the purposes of punishment, which are aimed at rehabilitation, deterrence and retribution.
- [24] In my view the appropriate sentence which fits the appellant as well as the crime is the one that follows.

ORDER

[25] Accordingly, the following order is made.

1. The appeal against sentence is upheld.

2. The sentence of 15 years' imprisonment imposed by the Regional Court, Protea is set aside and substituted with the following order:

"The accused is sentenced to 12 years' imprisonment for murder."

3. The sentence set out in paragraph 2 above is antedated to 25 July 2022.

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division, Johannesburg

I agree

C I Moosa
Judge of the High Court
Gauteng Division, Johannesburg

Date of delivery: 4 December 2023

Appearances:

On behalf of the appellant: Adv EA Guarneri

Instructed by: Legal Aid SA

On behalf of the State: Adv MM Mbaqa

Instructed by: National Prosecuting Authority