REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES

CASE NO: A412/2016

16/2/2018

In the matter between:

MARIO FERNANDO CONZO **APPELANT**

And

THE STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] The appellant appeared in the regional court, Vereeniging facing various charges, namely, 10 counts of housebreaking with intent to steal and theft; 1 count of theft; 2 counts of housebreaking with intent to rob and robbery with aggravating circumstances; 1 count of robbery with aggravating circumstances; 1 count of attempted murder; 1 count of murder; 1 count of unlawful possession of a fire-arm and 1 count of possession of ammunition . He was found guilty on all counts except count 2 and 3. He was positively linked to the crime scenes in counts 1 and 4 to 12 by his fingerprints which were uplifted from the various

scenes of crime. The crime scenes were situated in different areas from Virginia in the Free State Province to Boksburg and Springs in Gauteng Province . The offences were committed over a period of approximately nine years, starting from 2002 and culminating in 2010. As regards the other counts the appellant was positively identified by some of the State's witnesses as the person who committed those crimes.

[2] The trial court imposed the following sentences in respect of the convictions: 5 years imprisonment for each of the 10 convictions of housebreaking with intent to steal and theft; 5 years imprisonment for theft; 15 years imprisonment for each of the 2 convictions of housebreaking with intent to rob and robbery with aggravating circumstances; 15 years imprisonment for robbery with aggravating circumstances; 5 years for attempted murder; life imprisonment for murder; 3 years for possession of an unlawful firearm and 1 year for possession of ammunition. The trial court made an order for the sentences to run concurrently as follows: the sentences in counts 1 and 4; the sentences in counts 5 and 6; the sentences in counts 7, 8, 9, 10 and 11; the sentences in counts 12, 13 and 14; and the sentences in counts 15, 16, 17 and 18. The appellant was also declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000.

[3] It appears from the perusal of the appellant' s notice of appeal and the heads of argument that the appeal is only against the conviction of murder and the resultant sentence of life imprisonment. The appellant is, thus, before us having exercised his automatic right of appeal in terms of s 309 (1) *(a)* of the Criminal Procedure Act 51 of 1977 read with s 10 of the Judicial Matters Amendment Act 42 of 2013. He is, thus, appealing both the conviction and sentence in count 15.

[4] The factual background as regards count 15 is as testified by the deceased's wife, Maria Magdalena Jansen, his daughter Adele Lotz and the deceased' s nephew, Gavin Fouche, who were present at the time the deceased was shot. It appears from the evidence that the deceased was shot at his house whilst sleeping by one of the two black men who accosted them in the early hours of the morning. The deceased was asleep in bed with his wife when the two men entered their bedroom. The two men had obtained access into the

house through one of the windows in Adele's bedroom. Adele was woken up when a light was shined on her face. The two men moved from Adele's bedroom to her parents' bedroom where they shot and killed the deceased. During the time they were ransacking the house they also went to the bedroom where Gavin was sleeping and that is when he (Gavin) saw them and was able to positively identify the appellant in an identification parade .

[5] Before us, the appellant's counsel, correctly so, did not pursue the conviction appeal and conceded that the trial court had correctly convicted the appellant on that charge. She only proceeded to argue the appeal on sentence.

[6] The ground raised by the appellant for the appeal in his heads of argument is that the trial court misdirected itself in not finding that the cumulative effect of the following factors as well as the personal circumstances of the appellant amounts to substantial and compelling circumstances, namely-

6.1 The age of the appellant in that he was relatively young at 31;

6.2 That the appellant spent almost 5 years in custody awaiting trial; and

6.3 He was a first offender, and can be rehabilitated.

The contention is that the cumulative effect of these factors should have persuaded the trial court to find substantial and compelling circumstances to exist.

[7] It was submitted on behalf of the respondent that there were no substantial and compelling circumstances which would have empowered the trial court to deviate from the prescribed minimum sentence- of life imprisonment. According to the respondent , the appellant was a first offender and his age could not be taken as a mitigating factor but a neutral factor and the time spent in custody awaiting trial is only one of the factors to consider. A further factor was that the appellant was convicted of a number of offences but showed no remorse for those offences. In this regard the respondent's counsel referred us to the judgment in *5 v Matyitji* 2011 (1) SACR 40 (SCA) paras 18 and 23 and to the unreported judgment in *5 v Solomon Nendangwana Oupa Mashile* A360/15

delivered by Mabuse J on 29 April 2016 paras 14 and 15.

[8] The trial court was well aware that the offence in count 15 was a murder committed during a robbery and that more than one robbery was committed during the murder, therefore, it had the jurisdiction to impose a sentence of life imprisonment unless it found substantial and compelling circumstances.[1]

[9] It is trite that in determining whether there are substantial and compelling circumstances the sentencing court must consider all the factors traditionally taken into

account when sentencing, that is, the nature and gravity of the offence, the personal circumstances of the offender and the interest of society.[2]

[10] From the perusal of the record it is quite clear that the trial court took into account the traditional triad of sentencing and came to a conclusion that there are no substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment and hence the sentence of life imprisonment meted.

[11] The trial court took into account the seriousness of the offence in that the offence of murder is a very serious offence. It considered the interest of society in that the society expected it to mete out a sentence which will prohibit the society from taking the law into their hands. In this regard it relied on the judgment in *State v Naidoo* 2000 (1) SACR 361 (SCA) at p 364(E) and *R v Kark* 1961(1) SA 231 (AD) at p 2368 - C.

[12] In regard to the personal circumstances of the appellant the trial court had the benefit of a pre-sentence report which was compiled by Gauteng Province Social Development and forms part of the record. The personal circumstances of the appellant were fully addressed t herein . In addition it considered the factors put forward in argument for mitigation on behalf of the appellant, that is, the age of the appellant being 31 years old; the fact that the appellant had a clean record and stood before it as a first offender; the fact that the appellant had a stable life prior to his arrest, which was January 2011 and also that [….]. The request was that these factors be taken cumulatively as forming substantial and compelling circumstances.

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[1] See section 51 (1) of the Criminal Law Amendment Act 105 of 1997).

[13] It is my **view** that the trial court's finding that there are no substantial and compelling circumstances cannot be faulted.

[14] The appellant appeared before the trial court as a first offender even though, in addition to the murder conviction, he was convicted of a plethora of offences. I am of the view that the murder conviction should not be taken in isolation from these convictions. With all the offences taken together, it can be noted that the appellant was on a crime spree. The offences were committed over a considerable number of years, from 2002 until 2010. It is, indeed so, that at the time when he started committing the offences he was 17 years old, in 2010 he was already 24 years and at the time he appeared before the trial court was 31 years old. In such circumstances I have to hold that the fact that the appellant was a first offender and his relative youth at the time of commission of the offences do not carry any weight because it does not seem as if the appellant was in any way prepared to leave his life of crime.

[15] In the light of these two factor s, the trial court went to the extent of considering the possibility of rehabilitation and found the appellant not a suitable candidate for rehabilitation, in particular, because he showed no remorse. It, in that respect, made the following findings:

> "what is important to note is that the offences were committed over a period of time from 2002 to 2010, and the gravity of the offences increased from housebreaking and theft to housebreaking with the intent to rob and robbery, theft of a motor vehicle, attempted murder and eventually murder .
>
> The accused had the opportunity to rehabilitate himself since 2002 and not commit anymore offences. If you look at the years in which the offences were committed it is clear to the court that there was a route of a spree for the accused to commit an offence.
>
> Except for counts 15 and 18, which were committed on the same day and the same incident as well as counts 13 and 14, which were committed on the same day, the other offences were committed in a very close proximity from each other."

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[2] See S v Malgas 2001 (1) SACR 469 (SCA) p 470.

[16] The findings of the trial court are supported by the findings of the probation officer in the pre-sentencing report who reported as follows:

> "The appellant denies having committed any of the offences he is convicted of in circumstances where his fingerprints connected him to the crimes and was positively identified at an identity parade. Even at the time he was being interviewed by the social workers the appellant kept giving the social workers instructions to inform the court that he was innocent. The finding of the probation officer is that the appellant did not accept the court's finding of guilt. He also refused to accept responsibility for his actions and kept shifting the blame. He showed no remorse for the crimes committed and was not prepared to take responsibility for his actions and he believed in his own innocence which will make the process of rehabilitation very difficult."

According to the probation officer, except that the appellant was a first offender, there was nothing else in the appellant's personal circumstances that could be used in mitigating his sentence. She took into account the many people who were involved in the crimes committed by the appellant as an aggravation in the interest of society.

[17] The period spent in custody awaiting trial is a factor which does not, in the circumstances of this instance, assist the appellant . This factor has been held by the Supreme Court of Appeal[3]as one of the factors to be taken into account when considering whether substantial and compelling circumstances exist and ought to be weighted with other circumstances. On its own, it does not constitute a substantial and compelling circumstance. [4]

[18] The sentence of life imprisonment imposed by the trial court, in my view, does not constitute misdirection and does not as such call for interference. The sentence is just and appropriate, it fits the crime and the offender and it is in the interest of the society. The appeal against sentence ought to be dismissed.

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[3] See S v Radebe and Another 2013 (1) SACR 165 (SCA.)
[4] See the unreported judgment in S v Solomon Nendangwana Oupa Mashile above para 14.

[19] I make the following order:

The appeal on conviction and sentence is dismissed .

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E.M.KUBUS

JUDGE OF THE HIGH COURT

I concur

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F. DIEDERICKS,

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant: Ms: **P. VOSTER**

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