REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)
Case No: A 155/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 2018/4/19
SIGNATURE

In the matter between:

Solomon Machane — Appellant

And

The State

JUDGMENT

Maumela J.

1. This matter came before court as an appeal with leave of the court *a quo*. The appeal is against sentence only. Together with another, appellant who was accused number 1 appeared before the Regional Court in Mamelodi Pretoria, in the

Regional Division of Gauteng, (the court *a quo)*. The two were charged with murder. In the indictment the charge read as follows: "Murder read with the provisions of Section 51 (1) of the Criminal Law Amendment Act 1997: (Act No: 105 of 1997).

2. The allegations against the two were that upon or about the 20th of July 2008, at or near Pretoria, in the Regional Division of Gauteng, the accused did unlawfully and intentionally kill Daniel Sobuyeleni Mahlangu by hitting him with a spade. Appellant and his co-accused pleaded not guilty. In explaining his plea appellant told the court *a quo* that on the day of the incident there was an argument between him and the deceased over rental money. He stated that he was assaulted on the head and he got injured.

3. He stated that after being assaulted he set out to go and wash because he wanted to go to hospital. On his way he met his co-accused. Together they went to the latter's place where he aimed to wash. Before he could finish washing the police arrived. On seeing that he had blood all over, the police deduced that he is the culprit and thus arrested him. Appellant denied having killed the deceased. The state led evidence as did the defence. The court upheld the version of the state and rejected that of the appellant. He was found guilty as charged.

4. Both the state and the defence made submissions concerning sentence. Appellant was sentenced to undergo 15 years imprisonment. He was also declared to be unfit to possess a firearm. This appeal is against the sentence imposed.

EVIDENCE.

5. **Wonder Maloma** was the **first** witness to be called by the state. Under oath he told court that on the 20th of July 2008, a Sunday, at around 18h30 he was at Mamelodi hostel where he stayed with the deceased amongst others. He knew the deceased as Mr. Mahlangu. He said that accused number 1 was there together with a group of people including accused

number 2. A fight broke out where accused number 1 and 2 fought against someone else. He said that the fight was about rental money. According to this witness the deceased attempted to intervene in the fight.

6. He stated that he saw appellant who was accused number 1 before the court a quo, wielding a spade. He said that appellant hit the deceased on the face with the sharp point of the spade. The deceased fell to the ground. Appellant continued to hit him several times more with the spade on the face and the head. According to him there were several people standing by. While appellant continued to hit the deceased with the spade, the latter lay on the ground. Some people drifted nearer aiming to restrain appellant. Noticing this, appellant stopped hitting the deceased further.

7. He said that no sooner had appellant stopped his attack against the deceased than appellant and the group in his company fled the scene, leaving the deceased lying on the ground. Because he concentrated on appellant who wielded a spade, he did not notice the specific role accused number 2 played in the fight. According to him appellant was drunk. He said that appellant and his friends had with them some Paarl Perle' brand of wine in a box.

8. He said that somebody summoned the ambulance which arrived after a long delay of around an hour. The deceased was declared to be dead on the scene. According to him Ephraim Sibanda, Manganye and Roy were around as well as one Moses who is the one who volunteered to go and show the police where appellant can be found.

9. Under cross examination this witness stated that among the people who were arguing he only knew the deceased but he also realised that he plays soccer with one of the said people. That before the assault, the person with whom appellant was arguing told them that appellant demanded money from him.

At that time, this person was staying at the hostel in block K. He stated that the deceased did not involve himself physically but only reprimanded the quarrelling parties through word of mouth. He said that while the appellant assaulted the deceased he and others ran to their hostel because there were people who were throwing stones. He stated that after the stone throwing had stopped he and others exited the hostel only to find the appellant continuing to hit the deceased with the spade.

10. The witness stated that there was an Apollo light, a high mast light on which shed light. It is positioned between Block L and Block K. He said that the Apollo light was about 50 meters from where the incident was happening. He said that about 60 to 80 hostel in-dwellers gathered to watch the incident. More people than just he and Mahlangu tried to intervene while the fight was ongoing. He explained that others who tried to intervene like Manganye and Roy became reluctant to feature as witnesses.

11. The witness stated that there was so much blood on the face of the deceased that it was difficult to observe the injuries he sustained with precision. He said that appellant's attack upon the deceased was ongoing at the time when he and others ran into the hostel for safety. After the stone throwing stopped, he and others came out from the hostel only to find appellant still busy attacking the deceased with the spade. He views that shouts by the bystanders prompted a stop of the attack against the deceased.

12. He said that an Apollo light shed light in the area but some of the people stood under the shadow of a wall which caused less visibility. He was able to identify some of the people because of the languages they were speaking. The group in the company of the appellant were speaking a non-South African language. They were not residents at the hostel. They were armed with stones. At the beginning it was only the

appellant who engaged in the fight. As the fight progressed the group in the appellant's company picked up stones. The group that was with the deceased spoke a South African language.

13. From the beginning appellant had a spade in his possession. At that stage he did not see accused number 2. The witness agreed that initially appellant fought against Ephraim Sibanda and Prince Ndlovu. When it was put to the witness that the fight was about rental money he stated that he is not sure about that because there is no rental payable at the hostel. He said that he does not know anything about allegations that the deceased made the appellant and another to pay rental when none was payable.

14. The witness disputed that appellant was struck by a stone, fell down and upon rising, he left the scene bleeding. He stated that the deceased was a peacemaker at the hostel who treated all equally without favour or prejudice. He denied that he told the police that the deceased was felled by a stone blow.

15. **Petrus Manganye** was the **second** witness to be called by the state. Under oath he told court that he knew the appellant from before the day of the incident. He said that on the day of the incident two incidents happened. In the first incident he was in his room at the hostel when he heard noises and commotion. Upon exiting the room he found several people outside including the appellant. He said that appellant and the people who were in his company are Zimbabwean. He saw a man lying on the ground who had been assaulted by the appellant and the group in his company.

16. According to him appellant and the people in his company left the scene. He and others remained attending to the man lying on the ground. While he and others tried to assist the fallen man appellant returned leading a group and wielding a spade. The witness stated that another fight broke in which the

deceased was struck by a stone which felled him. He said that he was standing close to the deceased when the latter was struck by a stone. He and others immediately tried to come to the assistance of the deceased while he lay fallen. The group that had launched an attack returned. The other people dashed for cover and he remained. He said that the appellant started hitting the deceased with a spade on his face. He stated that appellant struck the deceased no less than three times with the spade. He, the witness, tried in vain to intervene. Under cross examination this witness stuck to his version

17. The state called **Roy Stemmer Aphane** as its **third** witness. Under oath this witness stated that at the time of the incident in this case he had been staying at Mamelodi Hostel Block 14 for the past 10 years. He said that appellant and his co-accused before the court *a quo* were also staying there. He said that appellant, who was accused number 1 before the court *a quo* was 11 years of age when he arrived to stay at the hostel. Around the time of the incident he was 18 years of age. He said that he remembers the incident of the 20th of July 2008.

18. He said that on that day around 18h00 he was asleep. He was awoken by the sound of commotion and he stepped outside. He said that he drew nearer and found the appellant and his co-accused quarrelling with someone labeling him a thug. The deceased arrived and interfered. He strove to restrain the appellant for the police to get involved. He advised the deceased to join him in moving away . No sooner had he advised the deceased than stones started being thrown around. Accused number 2 before the court *a quo* hit the deceased with a brick felling him. Appellant then hit the deceased with a spade on his face. His co-accused also took the spade and continued hitting the deceased with it. He said that the deceased was hit several times with the spade on his head. They hit him with the sharp end of the spade. When he

tried to draw nearer the two threatened to attack him. He drew further. The two then laughed before they fled.

19. He stated that when the ambulance came it took only the other person, a Zimbabwean who was injured, and left the deceased behind because he had already passed on. He said that in the area there was an Apollo light which illuminated the area. He said that he does not know the cause of the fight. According to him it is not unusual at the hostel for bystanders to stand around without assisting or interfering. He said that except for the appellant and his co-accused none of the bystanders participated in the fight.

20. **Ryan Bloementhal** was the **fourth** witness to be called by the state. His qualifications and status as a forensic pathologist were not questioned by the defence. From the year 2001 he has been conducting autopsies. He became a specialist in 2005. He conducted a post-mortem on the body of the deceased, Daniel Mahlangu. He said that he compiled a report pertaining to the post mortem on Mr. Mahlangu. Paragraph 4 and 5 of the GW7/15; with Death Register number 1301/2008 of his report read as follows:
Paragraph 4: *"an adult black male with signs of mixed sharp force and blunt force trauma to the head, after the compound fracture of the jaw was present. The face was swollen and* ***edemitis,*** *death was due to brain injury"*
Paragraph 5.
"That as a result of my observations I included that the cause of death was mixed sharp and blunt force trauma to the head."

21. He said that most of the injuries on the deceased were concentrated on the head including the back of the head. This witness testified about the sizes and disability of the wounds obsessed on the deceased, which evidence was not challenged by the defence. He said that most of the wounds appeared to have been caused by a sharp, bladed instrument with blunt force components. After this witness the state

closed its case.

22. The appellant, Solomon Machane, was accused number 1 before the court *a quo* testified under oath in his defence. He confirmed that around the time of the incident, the 20th of July 2008 he was resident at Mamelodi Hostel Bloch K. He is of Zimbabwean origin. On the day of the incident some gentlemen approached him demanding payment of rental. He refused to pay rental. His fellow Zimbabweans joined the resistance against demands for the payment of rental and a fight broke out between two groups comprising of Zimbabwean citizens. He said that the people who demanded payment of rental were Ephraim and Prince Ndlovu. Amidst the fight stone throwing started. There were many people milling around. A stone struck him on the back of his head and he took flight to his friend Cosmo's place at "Block J". While he was there the police arrived with one Prince Ndlovu and arrested him.

23. He said that the police told him that they are looking for a group of Zimbabwean citizens. According to him accused number 2 before the court *a quo* was not present when the incident took place. He said that on that day he never went to the scene of the fight. He never wielded a spade. He hit no one with a spade; neither did he ever throw a stone at anyone, including the deceased. He said that he only arrived at the scene after past 5h00 or 6h00 in the evening. He denied having quarreled with anyone. Under cross examination he admitted that he stays at the same place with the witnesses in this case. However he said that he did not know where accused number 2 stayed. He does not dispute that the witnesses know him.

24. He stated in the 2nd commotion on that day he was struck by a stone. He said that he had been at Cosmo's place for about 30 to 40 minutes when the police arrived and arrested him. He does not know the time at which the deceased was killed so,

he cannot tell where he was when the deceased was killed. He said that he learnt that Cosmo has been repatriated back to Zimbabwe. He said that the police noticed the injury where he had been struck by a stone and they took him to hospital for medical attention. He admitted that he fought Prince and Ephraim. He thinks that by the time the deceased was killed he might have already arrived at Cosmo's place. He agreed that the witnesses who testified, some of whom are of Zimbabwean citizenship, bore no grudge against him. He quarreled with none among them on the day of the incident. He said that before he was arrested Cosmo had gone out looking for money so that he could go and seek medical treatment in hospital. He said that accused number 2 before the court *a quo* had just arrived from work when the police arrived.

25. Before the court *a quo* **Menand Moyo**, who was accused number 2 also testified in defence. He said that on the 20th of July 2008, he returned from his workplace to his place of abode. He met appellant on the road and together they entered his place. After a short while police arrived saying that they are looking for a group of Zimbabwean citizens. The police were accompanied by someone who is of Zimbabwean origin. This witness said that the police told him that since they are looking for a group of Zimbabwean citizens, they will have to take him along as well because he is part of the group they are looking for.

26. He denied knowledge of the fight or the attack upon the deceased in this case. He denied ever having assaulted Mr. Malhangu. Around that time he was staying at Mamelodi Hostel Block J. Under cross examination he stuck to his version

27. The court *a quo* took into consideration the crime committed, the interests of society and the circumstances of the appellant and it determined a fitting sentence to be imposed upon the

appellant. In that regard it sentenced appellant to undergo 15 years imprisonment. Appellant was also declared to be unfit to possess a firearm terms of section 103 (1) the Firearms Control Act[1]. Appellant successfully applied applied for leave to appeal against sentence only.

RE SENTENCE.

28. The offence of which appellant stands convicted is very serious. It involved the application of extreme violence where bricks, stones and a spade were used to attack the deceased. From the evidence tendered the deceased did nothing more than to attempt to restrain appellant until the arrival of the police, which would in effect have been a citizen's arrest. The deceased did not attack the appellant in any way.

29. Evidence showed that when the deceased was struck by a stone he fell to the ground. It further shows that after falling the deceased was in such a state of well-being that he needed attention by sympathetic bystanders, among them, Roy Stemmer Aphane, who was the third witness to testify for the state. It is then that appellant and his co-accused before the court *a quo* repeatedly and in turns attacked the deceased with a spade targeting his head. It is a well-known fact that with injury to the head an array of adverse health consequences may eventuate including death. Yet appellant and his accomplice continued hitting the deceased's head repeatedly, using the sharp end of the spade.

30. Realizing that they have effectively rendered the deceased to be in effective and immobile they continued to hit him on the head with a spade. In doing so they meted out heartless cruelty and immeasurable violence against the deceased who was defenseless at the time. In the case of S v Mnguni[2], the court stated that: *"there is aggravation where an accused person inflicts a brutal, cruel, and inhuman attack on a*

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[1]. Act 60 of 2000.

[2]. 1994 (1) SACR 579 (A), at page 583 paragraph E.

helpless, unarmed harmless victim."

31. It is submitted on behalf of appellant that the sentence imposed upon him by the court *a quo* is extremely harsh, much as it induces a sense of shock. The state submits that the sentence suits the offence committed. The appellant argues that the court *a quo* misdirected itself while imposing a sentence on him. He argues that the court *a quo* should have taken the following into consideration:
    18.1. That appellant is a 1st offender who is 29 years of age.
    18.2. That appellant went only as far as Grade 7 at school.
    18.3. That appellant was provoked after a fight broke out between some individual and a group of Zimbabweans. There was stone throwing during the fight were the appellant was among those who were struck by a stone as a result of which he bled profusely. The deceased and others attempted to effect a citizen's arrest against the appellant and his friends believing that they participated in the attack that happened earlier. This led to stone-throwing and the deceased was struck by a stone. He fell down whereupon appellant hit him with a spade.
    18.4. The appellant was arrested on the 20th of July 2008 and was only sentenced on the 27th of September 2010 having been subjected to 2 years of pre-trial incarceration.
    18.5. The offence was not premeditated.

32. The charge put to appellant was read with the provisions of section 51 (1) of the Criminal Law Amendment Act[3]. Appellant contends further that considering is personal circumstances as outlined above, the court *a quo* have found substantial and compelling circumstances to be attendant to his person so that it should have found reason to avoid the prescribed minimum sentence upon him. Our case law holds the view that the imposition of minimum prescribed sentences should not be

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[3]. Act number 105 of 1997.

avoided on account of flimsy reasons.

33. It is trite that in imposing sentence the trial court is to take into consideration the offence committed, the interests of the accused and the interests of society. In the case of S v Zinn[4], the court stated that: *"in imposing sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community."* In S v Kumalo[5], this approach was endorsed where the court stated: "*Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances*"

34. It is so that sentences imposed upon convicted persons have to be tinged with a measure of mercy. In S v V[6], Holmes JA emphasised that *"the element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked."* The judge added that mercy was an element of justice and referred with approval to S v Harrison[7], where the learned judge had said that, 'justice must be done; but mercy, not a sledge-hammer, is its concomitant'. Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe.

35. Having said that considerations of the appliance of mercy in the exercise of imposing sentence should not be overemphasised at the expense of justice and equity. Each case is to be approached in accordance with its individual merits. In the case of S v Malgas[8], the court ruled that the court should not avoid the imposition of a minimum sentence prescribed for an offence for flimsy reasons. On page 479 of this case, the court stated: *"When applying the provisions of*

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4. 1969 (2) SA 537 (A).
5. 1973 (3) SA 697 (A), at 698 a.
6. 1972 (3) SA 611 (A), at page 614 D – E.
7. 1970 (3) SA 684 (A), at page 686 A.
8. 2001 (1)SACR 469 SCA.

section 51, a trial court is not in trial mode. It is not confronted by a prior exercise of judicial discretion attuned to the particular circumstances of the case and which is ***prima facie*** *to be respected. Instead it is faced with a generalized statutory injunction to impose a particular sentence, which injunction rests, not upon all the circumstances of the case, including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is a provision which vests the sentencing court with the power, indeed the obligation to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist, which justify it".*

36. It is also trite that instances where appellate courts might interfere with sentences imposed by trial courts should be among others those where trial courts this directed themselves or misapplied the law of the facts in determining a fitting sentence to be imposed. This does not entail whether or not the appellate court is or is not in favour of the sentence passed. In S v Pillay[9] Trollip JA stated: *"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing sentence exercised its discretion properly and judicially, a mere discretion is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."*

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[9]. 1977 (4) SA 531 (A), at page 535 E – F.

37. This was clearly enunciated in the case of S v Rabie[10] where the court stated the following: *"In every appeal against sentence, whether imposed by a magistrate or a 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 that discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised."
    The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

38. The state views that the seriousness of the offence committed should be taken into consideration. It is trite that once the court finds that the offence committed is serious, consideration of the circumstances of the accused finds lessened emphasis. In the case of S v Vilakazi[11] the court stated the following: *"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what the period should be".*

39. Our courts have held the view that sentencing is intrinsically a matter for the discretion of the trial court. The court has to determine whether or not the court *a quo* misdirected itself in imposing sentence against the appellant. It means therefore that this court does not have a free hand in terms of interfering with the sentence imposed by the court *a quo*. In the case of S v Rabie[12], the court stated as follows: *"The decision as to what*

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10. 1975 (4) SA 855 (A).
11. 2009 (1) SACR 552 SCA.
12. 1974 (4) SA 855 (A).

an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode that discretion and would be justified to intervene only if the trial court's discretion was not "judicially and properly exercised" which would be the case if the sentence that was imposed is "vitiated by irregularity or misdirection or is disturbingly inappropriate."

40. In this case the appellant has not demonstrated that the court *a quo* misdirected itself in imposing sentence against him. Consequently the appeal against sentence stands to be dismissed.

ORDER.

1. The appeal against sentence is dismissed.

T. A. Maumela.
Judge of the High Court of South Africa.

I concur.

V.T. Mtati
Judge of the High Court of South Africa.