IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED: **NO**

DATE: **8 August 2022**

SIGNATURE: .....

Case No. A26/2022

In the matter between:

NKOSI, SIYABONGA SAKHILE **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Millar J & Monyemangene AJ

Heard on: 27 July 2022

Delivered: 8 August 2022 - This judgment was handed down electronically by

circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 8 August 2022.

Summary: Criminal law – appeal against sentence – appellant pleaded guilty to murder - whether individually or cumulatively personal circumstances of appellant sufficiently substantial and compelling to justify deviation from imposition of minimum life sentence – such circumstances and in particular youthfulness sufficient– appeal upheld.

ORDER

It is Ordered:

1. The appeal against sentence is upheld.

2. The sentence of the trial court is set aside and replaced with a sentence of 25 years imprisonment of which 5 years is suspended.

JUDGMENT

MILLAR J

1. This is an appeal against sentence only. On 24 August 2021 the appellant was arraigned in the Benoni Regional Court on 1 count of murder. He was informed that the respondent would seek the imposition of the minimum sentence prescribed by law for the offence for which he had been charged.[1] The appellant was legally represented throughout the proceedings. He pleaded guilty. The Court accepted his plea and he was convicted on 24 August 2021.

2. In consequence of the guilty plea, the appellant was sentenced to life imprisonment.

3. The appeal in this matter is brought in terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977.

4. It was held in S v Kumalo 1973 (3) SA 697 (AD) at 697B-C that *"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. The last of these four elements is often overlooked."*

5. The test to be applied, when considering sentence on appeal is set out in S v Kgosimore[2] - "*It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when the Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All of these formulations, however, are aimed at determining the same thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence."*

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[1] In terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997

[2] 1999 (2) SACR 238 (SCA) at paragraph 10

6. No *viva voce* evidence was led in regard to sentencing. Sentence was argued having regard to a pre-sentence psychosocial report prepared in respect of the appellant. No victim impact report was obtained or tendered into evidence by the respondent. The report was accepted into evidence.

7. The appellant was convicted of a crime referred to in Part 1 of Schedule 2 of The Criminal Law Amendment Act 105 of 1997 and the court a quo was obliged to impose the prescribed minimum sentence of life imprisonment in terms of Section 51(1)(a) of that Act, absent substantial and compelling circumstances. See S v Malgas[3].

8. Consideration must be had to whether the prescribed minimum life sentence was appropriate or whether there were substantial and compelling circumstances to impose a lesser sentence.

9. The appellant was 22 years old at the time of the commission of the offence. He has had a troubled life. His mother was deceased in 1998, a year after his birth and his father in 2001 when he was 4 years old. He is the youngest of 4 children. He did not enjoy the privilege of a stable family or upbringing and was raised by a number of different people over the course of his youth – firstly by an aunt, then by one of his primary school teachers. In 2016 he relocated from rural Kwa Zulu Natal to Gauteng to reside with the deceased, his maternal grandmother.

10. He is unmarried and has no dependant children. His highest scholastic achievement was the successful completion of grade 11. He worked for a short while as a tractor driver.

11. His relationship with his maternal grandmother was not a particularly good one and he had been subjected to rumor and allegations by other family members that his

[3] 2001 (1) SACR 469 (SCA) at paragraph 8

maternal grandmother was a practitioner of witchcraft. His grandmother's relationship with other members of the family was also not particularly good and that she had evicted his sisters from her home and had obtained a protection order against them.

12. Two incidents not long before the murder, one involving the death of his grandmother's dog and the second, the death of his sister's 8-month-old child had convinced him that there was truth to what had been said about is grandmother being a witch.

13. He had confided to 2 of his friends his view that his grandmother was a witch and it was they who had informed him of what they said needed to be done – the murder of his grandmother. He had gone along with it and associated himself with it although disavowed the actual commission of the murder.

14. The appellant expressed remorse for what he had done and for the death of his grandmother.

15. In its evaluation of the evidence before it, the trial court did not overemphasize the interests of the community and was not dismissive of the personal circumstances of the appellant. However, the particular circumstances surrounding the murder together with the youthfulness of the appellant were not considered by the trial court to constitute substantial and compelling reasons for the imposition of a lesser sentence than life imprisonment. The fact that the minimum sentence for premeditated murder is also the maximum sentence that any court could impose cannot be overlooked.

16. Two circumstances in this particular case may well be 'substantial and compelling' in regard to the consideration of sentence. The first is the appellant's belief in witchcraft and the second his youthfulness.

17. In regard to witchcraft, in Phama v S[4] it was stated that:

> *"Modern South African courts have for over a hundred years been passing sentence in cases where the background to or motivation for a killing is a belief in witchcraft. In many cases this has been regarded as strong mitigation: cases where the accused and the victim come from a primitive society steeped in superstition, where the accused and his immediate family have been exposed to disease, death and disaster, and where the accused kills the deceased because in his mind this is the only way to put a stop to the curse which he firmly believes has been put on him and his family by supernatural means. This degree of mitigation is not present here. The accused is uneducated and from a simple rural background, but he is not a tribesman from some remote district completely cut off from the influences of modern civilisation. He did not believe that he or his immediate family were under imminent threat from the powers of darkness, that he or they were about to follow Thembisa. These killings were more an act of vengeance than a misplaced act of prevention or self-protection. Far from being cut off from the mainstream of civilisation, the accused was brought up in an area of developed farmlands. He now lives in a suburb in quite a large, developing town which is the local political and commercial capital. He is able to function properly, to hold his own in modern society".*

18. In the present matter, it cannot be said that the appellant was either 'uneducated' or, notwithstanding his troubled upbringing, can it be said that he was from a 'simple rural background'. By all accounts, the appellant was well able to function and to 'hold his own in modern society' and so his belief in witchcraft does not to my mind rise to the level of being either a substantial or compelling circumstance.

19. In regard to his youthfulness, in S v Ngoma[5] it was stated that:

> *"Having considered all the relevant circumstances, the youthfulness and immaturity of the appellant, his lack of education and unsophisticated*

[4] [1997] 1 All SA 539 (E) at 542i – 543b
[5] 1984 (3) SA 646 (AD) at 676D-E

background and the circumstances of the crime, and paying some regard to the fact that it was

committed with dolus eventualis, I am of the opinion that the only reasonable conclusion is that extenuating circumstances were present. I do not think that in all the circumstances the commission of the crime should be attributed to inherent wickedness ("inherente boosheid") on the part of the appellant. The majority finding of the Court a quo that there were no extenuating circumstances should consequently be set aside and a verdict of murder with extenuating circumstances substituted".

20. The circumstances of the appellant in the present seem to me to fall squarely within those set out above. While his troubled upbringing and relative lack of education, although he was not uneducated by any means, having regard to his plea of guilty and the explanation, there can be no doubt that his participation in the crime was in consequence of a lack of maturity and insight. I find that in the circumstances, his participation in the crime was not as a result of any 'inherent wickedness'.

21. There is no doubt that a custodial sentence for a substantial length of time is an appropriate sentence. However, the youthfulness of the appellant and the particular circumstances, seem to me to be sufficiently substantial and compelling to warrant the imposition of a sentence other than the minimum sentence applicable in this case.

22. In this regard, I am of the view that the learned Magistrate misdirected himself in disregarding the plea of guilty, the facts set out in the plea explanation and in particular, the youthfulness of the appellant as being cumulatively sufficiently substantial and compelling[6] so as to warrant the imposition of a sentence for a period less than the minimum of life imprisonment prescribed by law.

[6] S v Salzwedel & Others 2000 (1) ALL SA 229 (AD) at 232I

23. On consideration of the matter as a whole, I am of the opinion that a more appropriate sentence is one of imprisonment for a period of 25 years. Since the appellant is a first offender and having regard to the circumstances under which

the offence was committed, it would be appropriate for 5 of the 25 years to be suspended.

24. In the circumstances, I make the following order:

24.1 The appeal against sentence is upheld.

24.2 The sentence of the trial court is set aside and replaced with a sentence of 25 years imprisonment of which 5 years is suspended.

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A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE

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T MONYEMANGENE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	27 JULY 2022
JUDGMENT DELIVERED ON:	8 AUGUST 2022

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