IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **A122/2023**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:18/10/2023

SIGNATURE

26 OCTOBER 2023
DATE

In the matter between:

MISHACK NCUBE **APPELLANT**

VERSUS

THE STATE **RESPONDENT**

Delivered :This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploaded on caselines electronic platform. The date for hand-down is deemed to be 26 October 2023.

JUDGMENT

THE COURT.

Coram : BAQWA J: MOTHA J. YENDE AJ.

INTRODUCTION.

[1] The appellant was convicted and sentenced in the High Court of South Africa, Gauteng Division, Pretoria on the 21 October 2017 on the following:

a. Count 1, murder life imprisonment.
b. Count 3, Contravention of the immigration Act, section 49(1)(a) of Act 13 of 2002, 15 months' imprisonment.

[2] when delivering the sentence, the court of first instance made a misstatement to the effect that the appellant had not presented his personal mitigatory circumstances under oath when in fact the appellant had opted to enter the witness dock in order to testify about all the aspects, he raised what he considered to be mitigating against the imposition of the life sentence.

[3] As a result of this misstatement of fact by the court of first instance, the appellant launched an appeal against the sentence only in respect of the murder on the assumption that " *the aspect of remorse on the part of the appellant was not dealt with and therefore it resulted in the unfortunate result or confusion which the court of first instance arrived at namely that there are no substantial and compelling circumstances attendant to the person of the appellant*"[1] and the court of first instance granted same on 21 October 2021.

[1] CC17/2021 Judgment leave to appeal page 2 line 1-5.

[4] From a perfunctory read of the case record it is evident that the appellant did present his personal mitigatory circumstances and for the purpose of completeness of this judgment same is restated s*eriatim*;

a. *"the appellant was born on 11 May 1965 ,aged 56 years*

b. he is a citizen of Zimbabwe and had no legal status in the Republic of South Africa.

c. both his parents are deceased his mother died in 1970 when he was 5 years old, and his father died in 1981 when he was 16 years old.

d . He was raised by his grandmother.

e .His father remarried, and it was not right to live with his stepmother.

f. His grandmother who looked after him also passed on.

g. He dropped off at school in form 1. They were struggling and could not continue with school.

h. He was married to the deceased. The marriage subsisted for 24 years.

i. He had 6 minor children to maintain. The children were living with their grandmother in Zimbabwe, and he would send them money.

j. The eldest child was 23 years old, the 2nd one was 22 years old, the 3rd was 16 years old, the 4th was 14 years old, the 5th 7 years old and the 6th 4 years old.

k. He was not gainfully employed, and he made a living from part time jobs.

l. He pleaded guilty to the offense and demonstrated remorse.

m. The offence was not pre-meditated and was committed in a spur of a moment in a fit of rage.

n. He allowed jealousy and some provocation to overshadow his judgments.

o. He was in custody from 23 December 2020 to 21 October 2021, that is for a period of 9 months awaiting trial in this matter[2]".

[5] It is further apparent from the record of proceedings that the court of first instance "*did deal with the issues that were raised but it is true that the court of first instance did not mention the aspect of remorse as one of the aspects that the appellant raised when*

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[2] CC17/2021 volume 1 pgs. 22-28.

he testified from the dock but save for that aspect all other aspects were dealt with in the judgment"[3].

[6] The appellant's counsel attacked the sentence on the ground that the court of first instance when it meted out the sentence it mistook that the appellant did not testify in mitigation of sentence, that the aspect of remorse was never mentioned and/or at the least considered by the trial court. Counsel further argued that the appellant was a first offender and was in custody over a period of almost a year, cumulatively taken with the appellant's personal circumstances, constituted substantial and compelling circumstances which should have influenced the trial court to deviate from the prescribed minimum sentences.

[7] Counsel for the appellant argued further that in sentencing the appellant to an effective term of life imprisonment, the sentencing court erred in over-emphasizing the seriousness of the offences and the interest of the society whilst the personal circumstances of the appellant were under-emphasized. That the sentencing court erred in imposing the sentence which is shockingly harsh, and which induces a sense of shock.

[8] It is worth noting that both the Counsel for the appellant and the State are *ad idem* that the court of first instance may have made *bona fide* mistake because the appellant did testify in mitigation of sentence.

[9] It is trite that the offender's personal circumstances, whilst relevant, are not the only paramount considerations in deciding on an appropriate sentence. The court must also consider the nature and the seriousness of the offence and the interest of the society[4].

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[3] CC17/2021 Judgment leave to appeal page 2 para 20.

[4] S v Zinn 1969 (20 SA 537 (A) at 540.

In S v Vilakazi the Supreme Court of Appeal cautioned that :

" 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 questions of 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 that period should be....But they are nonetheless relevant in another aspect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted, his or her circumstances might assist in making at least some assessment ..."[5]

[10] In Rex v Dhlumayo and Another 1948 (2) SA 677 (A), the appellants argued that by failing to attach due weight to certain relevant factors and to take others into account, the court had misdirected itself; that these misdirections had vitiated the exercise of its discretion as to sentence; that therefore the appeal court was entitled to interfere with the sentence, Greenberg JA held as follows at p 702 A-B:

"Indeed, even in a written judgment it is often impossible, without going into the facts at undue length, to refer to all the considerations that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in the judgment - more especially, of course, if that judgment be an oral and extempore one - they have not been taken into account by the trial Judge in arriving at his decision. No judgment can ever be perfect and all-embracing. It would be most unsafe invariably to conclude that everything that is not mentioned has been overlooked."

Van Winsen AJA, facing similar circumstances in S v Fazzie and Others 1964 (4) SA 673 (AD) at p 684 A - B, echoed Greenberg JA and said: "Does this failure ... constitute a misdirection? ... In the exercise of this function the trial Judge has a wide discretion in deciding which factors - I here refer to matters of fact and not of law - he should in his opinion allow to influence him in determining the measure of the punishment. See R. v S., 1958 (3) SA 102 (AD) at p. 106."

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[5] S v Vilakazi 2009 (1) SACR 552 (SCA) at 574

Dismissing appeal against sentence, Trollip JA succinctly described misdirection in S v Pillay 1977 (4) SA 531 (A) at p 535 E to G, thus :

"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 inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection 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."

[11] Counsel for the appellant contends that the aspect of remorse on the part of the appellant was not dealt with nor did it find its way in during the sentencing stage. The record is crisply clear in this regard that the appellant proffered to the trial court that "*he regrets his actions and that he would like to apologise to the family of the deceased, his wife the mother of his children and his children. The appellant also stated that he committed this gruesome unproved attacked on his wife out of rage thus killing his wife*".

[12] In this regard it is worthy to observe what the Supreme Court of Appeal in S v Matyityi per Ponnan JA's meticulous explanation on when a plea of guilty is indicative of remorse and what constitutes real remorse:

"It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor ... There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely

remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions[6]".

[13] *In casu* the appellant's plea of guilty was inescapable. The appellant attacked and stabbed the deceased in broad daylight at a public place in an informal tuckshop and in full view of eyewitnesses. The appellant knew that he stood no chance in the face of an overwhelming direct evidence. This court shares the sentiments echoed by Ponnan JA in S v Matyityi mentioned *supra* that "a plea of guilty in the face of an open and shut case against an accused person is a neutral factor" the appellant faced a clear "open and shut case" and his personal mitigatory factors are devoid and/or cannot translate to genuine remorse.

CONCLUSION

[14] There is overwhelming indication from the record that the court of first instance took into consideration the appellant's personal mitigatory circumstances and this court finds that the trial court's *bona fide* mistake to not explicitly express, in its reasons for judgment, whether it found the appellant to be remorseful or not and the impact which such a finding has on sentence does not constitute a misdirection. The entire trial court record speaks for itself in that the appellant did present his personal mitigatory factors and the trial Judge *bona fide* erred and mistook the appellant as not having testified in mitigation of

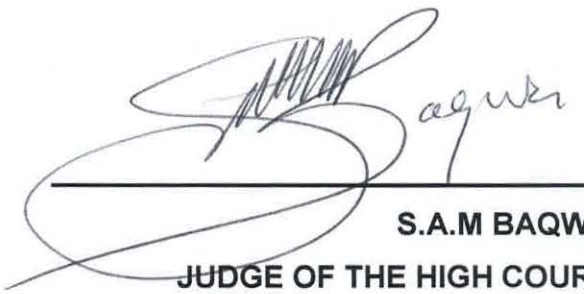
[6] 2011 (1) SACR 40 (SCA) at p 47 A-D.

sentence. In the circumstances we do not find any justification for interfering with the sentence handed down by the court of first instance.

Order

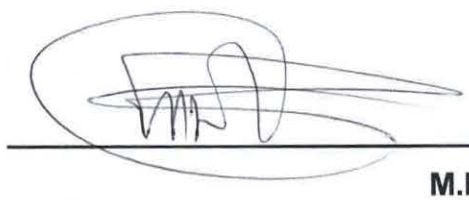
[15] Consequently, the following order is granted:

[15.1] The appeal is dismissed.



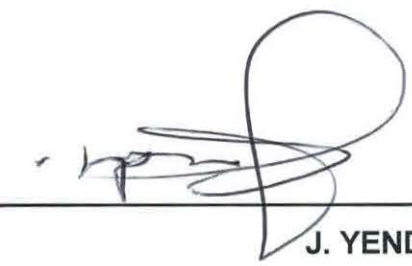
S.A.M BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur.



M.MOTHA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur.



J. YENDE
ACTING JUDGE OF THE HIGH COURT
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Heard: 16 October 2023

Judgment: 18 October 2023