IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

Appeal No: AR 187/21

In the matter between:

LONWABO "PRO" KHONJWAYO	**FIRST APPELLANT**
LUPHELILE NQOBILE "MANAGER" KHONJWAYO	**SECOND APPELLANT**

and

THE STATE	**RESPONDENT**

ORDER

The following order is issued:

1. The appeal against the first appellant's sentence is upheld;
2. The sentence imposed by the court a quo is replaced with the following: 'Accused 1 is sentenced to 20 years' imprisonment, ante-dated to 30 October 2019.'
3. The appeal by the second appellant is dismissed.

APPEAL JUDGMENT

Hiralall AJ (Chetty J concurring):

Introduction

[1] The appellants were convicted of murder read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act) in the Regional Court, Ntuzuma.

The State alleged that the offence was committed by the appellants acting in common purpose. Both appellants were sentenced to life imprisonment on 30 October 2019. Mr *Chiliza*, counsel for the appellants, confirmed that the appeal is against sentence only.

[2] The deceased in this matter was 69 years old at the time of her death. She was a pensioner and lived alone on the property that she owned, where she rented out premises to various tenants, including the second appellant. According to the deceased's tenants, Bongeka Maduna (Maduna) and Nathi Mabhungu (Mabhungu), the deceased was asleep in her home on the evening of 4 August 2018 when at approximately 22h00 she was awoken by the first appellant knocking on her door. She answered the door and let in the appellants as they were known to her. The deceased was stabbed repeatedly by the second appellant, and assaulted with a hammer. Maduna testified that the second appellant stabbed the deceased repeatedly and the first appellant went to fetch a hammer with which he proceeded to assault the deceased. Mabhungu testified that it was the second appellant who stabbed the deceased and then went to fetch a hammer with which he proceeded to assault the deceased. She stated that prior to the arrival of the appellants, she had heard chanting of words to the effect, 'We want to kill the witch'. The post mortem report confirmed that the deceased sustained multiple stab wounds and deep scalp bruising, and that the cause of death was an incisional wound of the chest.

[3] It was correctly conceded on behalf of the appellants that it would be difficult to contend for a case of mistaken identity against the overwhelming evidence presented by the State witnesses. Both appellants lived in the vicinity of the crime scene and were known to the State witnesses. The witnesses had ample opportunity to observe the appellants before, during and after the attack on the deceased. It was also correctly conceded that although there is a contradiction as to the exact role that was played by the first appellant, the State witnesses placed both appellants at the scene of the crime. I agree with the trial court's findings that it was proved beyond a reasonable doubt that both appellants acted with a common purpose and intention to kill the deceased.

[4] The court a quo correctly found both appellants guilty on the charge of murder.

Sentence

[5] It is trite that the task of imposing sentence is pre-eminently a matter which falls within the domain and discretion of the trial court, and an appeal court should be slow to interfere with such discretion unless it 'has not been judicially and properly exercised'. The test 'is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate'.[1] I consider the trial court's judgment on sentence with this in mind.

[6] The trial court took into account the three primary considerations in the well-known triad in *S v Zinn*,[2] namely, the crime; the offender and the interests of society.

[7] In respect of the mitigating circumstances, the following factors were considered: the appellants were brothers aged 27 and 28 years' respectively at the time of sentencing; both have only a grade 7 education, and both were employed earning R5 000 per month. Both appellants are in good health, and each lived with his girlfriend. Their parents are still alive. Their mother is a housewife and their father, who is a responsible person and was gainfully employed, is now a pensioner.

[8] The first appellant has no children but assisted his parents and four siblings financially. He has no previous convictions and was out on bail whilst awaiting trial. The second appellant has two children, aged two and one. Up until his arrest he maintained his household, his girlfriend and two children, but there was evidence that his girlfriend and the children have moved back in with her family and that she receives child support grants. He has a previous conviction for culpable homicide in 2007 where he apparently shot and killed his friend with a firearm. He had been in custody for one year and two months whilst awaiting trial.

[9] The court took into account the interests of the community, the fact that this was a prevalent crime in the court's jurisdiction, the seriousness of the crime, and that the deceased was a member of a vulnerable group in society.

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[1] *S v Combrink* 2012 (1) SACR 93 (SCA) para 20; *S v Rabie* 1975 (4) SA 855 (A) at 857D-E.
[2] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

[10] In respect of aggravating circumstances, the trial court considered that this was a heinous crime; a brutal and vicious attack on a vulnerable elderly woman in her own home. The appellants invaded that space, repeatedly stabbing her even though she was defenseless and posed no threat to them. The appellants on the other hand were two young and very strong men. The court found that there was no reason to kill the deceased. She was the second appellant's landlord and provided housing for him. She was a productive member of society and a breadwinner for her own family. They gave no motive for their actions. The only motive to be inferred was from the evidence of Simphiwe Khonjwayo, their cousin, who testified that the second appellant went to a traditional healer who told him that the reason his children were not sleeping was because his landlady 'sent things that would be walking on the roof of his room'. The appellants were 26 and 27 years of age respectively at the time of committing the offence and were sufficiently mature adults to appreciate the consequences of their conduct.

[11] The trial court found that both appellants showed no remorse whatsoever and professed their innocence until the end. In *S v Seegers*[3] the following was stated with regard to remorse:

'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'

[12] The probation officer's report confirmed the personal circumstances of the appellants and recorded that the first appellant's parents and his cousin, Simphiwe Khonjwayo, spoke positively about him. They said that he was humble, supported the family financially, and was not violent. According to their knowledge, and from the information from the second appellant, the first appellant had done nothing wrong, it was the second appellant who was responsible for the death of the deceased. They described the second appellant as a violent and aggressive person, especially when he consumed alcohol, and someone who did not fulfil his promises and was not a first-time offender.

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[3] *S v Seegers* 1970 (2) SA 506 (A) at 511G-H.

[13] According to the probation officer, it was an aggravating factor in respect of both appellants that they refused to take responsibility for the offence committed and showed no remorse. Therefore, imprisonment was viewed as an appropriate sentence since this would afford each of them an opportunity to take responsibility for their actions and rehabilitate.

[14] In an interview with the deceased's son, Njabulo Duma, the probation officer established that the family was not coping well emotionally and financially since the family members were close to the deceased and she had been supporting the family financially.

[15] Having considered all of the above, the trial court found no substantial and compelling circumstances to depart from the minimum sentence prescribed by s 51(1) of the Act and sentenced both appellants to life imprisonment.

Submissions

[16] It was submitted by Mr *Chiliza* that, whilst both appellants were convicted on the charge of murder, it was only the second appellant who inflicted injuries on the deceased. He relied on the version of Mabhungu who stated that it was the second appellant who had stabbed the deceased and then went to fetch a hammer with which he assaulted her. He submitted that it was the stab wound to the chest, reflected on the post mortem report as an incisional wound, which was the cause of death. He confirmed that although he represented both appellants there was little to argue in relation to the sentence imposed on the second appellant. He had a previous conviction and he was the one who reacted to information from a traditional healer that the deceased was the reason his children were not sleeping. He was the one, so it was submitted, who stabbed and assaulted the deceased, whereas the first appellant had no previous convictions and did nothing to the deceased, according to Mabhungu.

[17] Ms *Ramkhilawon*, counsel for the State, acknowledged that there were two versions as to who assaulted the deceased with the hammer. She submitted that irrespective of this, the first appellant was equally guilty of the crime as he prevented the deceased from escaping despite the injuries which she had already sustained. Although the first appellant had no previous convictions, it was submitted that he

participated in a cowardly act when he showed no compassion to an elderly woman. Ms *Ramkhilawon* also submitted that Mabhungu testified that she had heard chanting of words to the effect, 'We want to kill the witch', which showed that the two appellants had a common purpose, and it was the first appellant who had knocked on the door of the deceased. .

[18] Responding to the State's submission about the chanting, Mr *Chiliza* submitted that one cannot selectively choose portions of Mabhungu's testimony. According to Mr *Chiliza,* Mabhungu was the only person who testified that she heard chanting prior to the commission of the offence. However, Mr Chiliza also relied on Mabhungu's version that it was not the first appellant who went to fetch the hammer as will be seen later in this judgment.

Evaluation

[19] The charge of murder, read with Part I of Schedule 2 of the Act, calls for a minimum sentence of life imprisonment on conviction unless there are substantial and compelling factors which warrant a deviation from the prescribed minimum sentence.[4] It has already been mentioned that the trial court found no substantial and compelling factors.

[20] Commenting on the offences listed in Part I of Schedule 2, the court in *S v Malgas*[5] stated as follows:

'. . .an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society. It was of course open to the High Courts even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. *The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer "business as usual" when sentencing for the commission of the specified crimes.*' (My emphasis.)

[21] The court went on to state in *Malgas* that deviation from the prescribed minimum sentences should not be done for flimsy reasons. However, if the prescribed

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[4] Section 51(1) and 51(3)(a), Criminal Law Amendment Act 105 of 1997.
[5] *S v Malgas* 2001 (1) SACR 469 (SCA) para 7.

sentences would be unjust or disproportionate to the offence, then it must be departed from.

[22] In *S v Vilakazi*,[6] Nugent JA held as follows:

'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 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, and those seem to me to be the kind of "flimsy" grounds that *Malgas* said should be avoided.'

[23] Mr *Chiliza* submitted that the first appellant was less culpable because of the role he played in the murder of the deceased. He relied on Mabhungu's version who said that it was the second appellant who went to fetch the hammer and proceeded to assault the deceased with it, and not the first appellant as Maduna had testified. The trial court commented that discrepancies in the two witnesseses' testimony could be attributed to inter alia the time that had passed since the incident and the lighting as it was late at night. The incident was described as a 'moving scene' where the two eye-witnesses, although standing together at the same doorway in close proximity to the entrance of the deceased's room, had different points of view as to what was happening inside the room. However, there was a distinct difference in the two versions as to which of the appellants left the scene and went to fetch the hammer with which to assault the deceased. The trial court did not deal with this particular discrepancy. Although the finding that Maduna and Mabhungu made a good impression on the court as honest witnesses, cannot be faulted, Mabhungu's version of events, that it was the second appellant who fetched the hammer and assaulted the deceased with it, which was confirmed by Simphiwe Khonjwayo in material respects is an important fact. In fact, the court also recorded incorrectly in the judgment that 'the second witness (Mabhungu) elaborated on the fact that the hammer or the item *accused 1* went to fetch...looked like a hammer'. Mabhungu testified that it was the second appellant who did so. The trial court's failure to deal with this discrepancy made no difference to the common purpose between the appellants, but it was a relevant

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[6] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58.

factor in consideration of the sentence that was to be imposed.[7] The trial court clearly erred in this regard.

[24] The court may deviate from the prescribed minimum sentence where there are substantial and compelling factors which warrant a deviation, and the role played by an accused person can be such a factor. In *S v Ngwadla*,[8] it was held that the absence of evidence that the accused had landed the fatal stab wound was sufficient to warrant a deviation from imposition of a life sentence:

'[23]. . .Chances are that it was not the appellant that actually landed the blow to the head of the deceased that caused the blade of the knife to stick in the head of the deceased because he was still in possession of his knife.

. . .

[26] The absence of clear and satisfactory evidence that it was indeed the appellant who landed the fatal stab wound in the head of the deceased to the extent that the blade broke off from the handle is in my view, compelling enough to warrant a deviation from imposing life imprisonment as a sentence.'

The court found that a sentence of 18 years' imprisonment was just and appropriate in the circumstances of the case.

[25] In *S v Ntshaba and others*,[9] the court found that it was significant that the accused's role in the actual attack was confined in comparison to that of her co-accused:

'[11] Similar substantial and compelling circumstances exist in the case of Ms Kwakwa. In addition to pleading guilty and being a first offender, Ms Kwakwa's role in the actual attack was confined in comparison with Mr Ntshaba. This is significant. In *S v Ngwadla*, the court held that absence of evidence that the appellant had landed the fatal stab wound was sufficient, seemingly on its own, to warrant a deviation from imposition of life imprisonment. Similarly, in *S v Skhosana*, the "oblique" intent of the appellants, who had been convicted of murder based on common purpose, coupled with their lack of previous convictions, resulted in the court deviating from the prescribed minimum sentence and imposing 18 years' imprisonment for murder.

[12] Nevertheless, Ms Kwakwa acted with common purpose on the evening in question, participating in the discussion that preceded the murder and actively involved in tripping and holding down the deceased.' (Footnotes omitted.)

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[7] *S v Ngwadla* 2021 JDR 1423 (NWM) para 23-6
[8] Supra.
[9] *S v Ntshaba and others* (57/2021) [2022] ZAECMKHC 22 (18 March 2022).

The court imposed a sentence of 17 years' imprisonment.

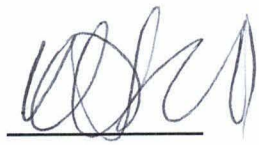
[26] Ms *Ramkhilawon* was correct in submitting that even if the first appellant did not assault the deceased with a hammer, he was the one who knocked on her door and was heartless in his actions in preventing the deceased from escaping the attack despite her serious injuries. He also provided a false alibi and showed no remorse for his actions. However, something must be said for the fact that the first appellant had no previous convictions and that there was no clear and satisfactory evidence that he inflicted any injuries on the deceased.

[27] I find that the trial court's imposition of a sentence of life imprisonment on the second appellant cannot be faulted. However, the court erred in its finding that there were no substantial and compelling circumstances permitting a deviation from the prescribed minimum sentence in respect of the first appellant, taking into account his diminished role in the attack on the deceased in contrast to his co-appellant. In the circumstances, I find that a sentence of 20 years' imprisonment in respect of the first appellant is just and appropriate.

Order

[28] Accordingly, I propose the following order:

1. The appeal against the first appellant's sentence is upheld;
2. The sentence imposed by the court a quo is replaced with the following: 'Accused 1 is sentenced to 20 years' imprisonment, ante-dated to 30 October 2019.'
3. The appeal by the second appellant is dismissed.



Hiralall AJ

Chetty J

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This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be on 5th JUNE 2023 at 10:00