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

Case No: **AR162/22**

In the matter between:

NHLANHLA MCHUNU **APPELLANT**

and

THE STATE
RESPONDENT

Coram: Mossop J (Seegobin J concurring)

Heard: 24 February 2023

Delivered: 24 February 2023

ORDER

On appeal from: Pietermaritzburg Regional Court (sitting as court of first instance):

1. The appeal against the sentences imposed is dismissed.

JUDGMENT

Mossop J (Seegobin J concurring):

[1] This is an appeal against the sentences imposed upon the appellant on 27 July 2018 when he was convicted in the Pietermaritzburg Regional Court on charges of conspiracy to commit robbery with aggravating circumstances, murder, unlawful possession of a firearm and unlawful possession of ammunition. On the conspiracy count and on the count of unlawful possession of ammunition, he was sentenced to six years' imprisonment and on the charge of unlawful possession of a firearm, he was sentenced to 12 years' imprisonment. These three sentences were ordered to run concurrently with the sentence of 20 years imposed on the murder count.

[2] The appellant's application for leave to appeal was directed only against the sentences that were imposed upon him. That application was not heard by the regional magistrate who convicted him, but was heard, and granted, by another regional magistrate on 14 December 2021. The regional magistrate hearing the application was of the view that another court might come to a different view on the sentences imposed upon the appellant.

[3] It is worth mentioning, again, that the mere existence of a different view on the appropriateness of sentences imposed is insufficient when it comes to an appellate court. As Maya DP stated in *S v Hewitt*:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'[1] (Footnotes omitted.)

[1] *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8.

[4] In the absence of any such misdirection, an appeal does not have encouraging prospects.

[5] The appellant was one of three accused persons who originally stood trial. Their trials were separated after the appellant's co-accused indicated that they were pleading not guilty whilst the appellant was prepared to make substantial admissions. So substantial were those admissions, which included admissions made in terms of section 220 of the Criminal Procedure Act 51 of 1977, that upon the appellant pleading and making those admissions, the State closed its case without leading any evidence. The accused, in turn, also closed his case without himself testifying or calling any evidence. After argument on the merits, the appellant was convicted on the four charges that he faced and received the sentences against which he now appeals.

[6] The facts of the matter are not complex. The appellant was approached by the other two accused with whom he initially stood trial. It was proposed to him that they should all go and steal diesel from a nearby construction site. The appellant agreed with the idea and supplied seven 20 litre containers, presumably for the stolen diesel to be decanted into. Later the same day, one of his co-accused and two other unknown persons returned in a bakkie to where the appellant was and they loaded the containers onto the bakkie and then left to pick up the other accused. The construction site was in a plantation and it was getting dark when they arrived in its vicinity. The appellant and his co-accused alighted from the bakkie and one of the accused gave the appellant his licenced firearm. The accused who gave the appellant the firearm apparently realised that he worked with the guards who were guarding the construction site and may thus have been recognised by them had he gone any closer. The appellant and the other accused proceeded onwards to the construction site. Two security guards were noted sleeping next to a fire. The appellant, armed with the firearm, woke one of them up. The guard grabbed the firearm and they struggled over the firearm. The appellant fired a shot from the firearm. According to the post mortem report, which was admitted, the deceased guard received a penetrating shot to his heart, which killed him. The other security guard fled, as did the other accused in the company of the appellant, and as, indeed, did the appellant.

[7] This course of conduct, and the accompanying consequences, came about because the appellant was promised, as his share of the enterprise, an amount of R1 000.

[8] It is to the appellant's credit that, unlike his co-accused, he was prepared to acknowledge his conduct and assume responsibility for it. There must, nonetheless, still be consequences imposed upon him for his criminal conduct. Those consequences must involve a lengthy term of imprisonment given the seriousness of that conduct. It is difficult to conceive of a crime more serious than murder. Until relatively recently, the law permitted a sentence of death to be imposed for murder, so serious is that offence viewed by society.

[9] Sight must also not be lost of the fact that the sentences for two of the offences in respect of which the appellant was convicted attract minimum sentences in terms of the Criminal Law Amendment Act 105 of 1997. The minimum sentence on the murder charge is life imprisonment and the minimum sentence on the charge of unlawfully possessing a firearm is 15 years. It is so that such minimum sentences may be avoided if the sentencing court is satisfied that there are substantial and compelling circumstances that allow for a lesser, but just sentence to be imposed. However, as Mr Singh, who appears for the State, pointed out in his heads of argument, the prescribed minimum sentences are not to be departed from 'lightly or for flimsy reasons'.[2]

[10] The court a quo did not impose the minimum sentences on either of the two counts that attract a minimum sentence. Life imprisonment on the murder count was reduced to 20 years' imprisonment and the 15 years' imprisonment on the charge of possession a firearm was reduced to 12 years.

[11] In sentencing a convicted person, the sentence 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.[3] This, in my view, is precisely the approach adopted by the court

[2] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.
[3] *S v Rabie* 1975 (4) SA 855 (A) at 862; *Ex Parte Minister of Justice (In re R v Berger & another)* 1936 AD 334 at 341.

a quo when it determined the sentences that it decided to impose upon the appellant. The court gave due consideration to the appellant's personal circumstances, particularly his age, his familial responsibilities and the fact that he had not wasted the court's time with a spurious defence. The court also took account of the fact that he was not the mastermind behind these unfortunate events and that he had a clean criminal record. It concluded, after a balanced consideration of all relevant factors, that substantial and compelling reasons existed to justify a departure from the prescribed minimum sentences. Those reasons were to be found in the appellant's personal circumstances and the fact that there was no evidence that the appellant could not be rehabilitated. The prescribed minimum sentences were accordingly not imposed.

[12] Ms Hulley, who appears for the appellant, submitted that the sentence of 20 years' imprisonment on the count of murder was so grossly inappropriate as to induce a sense of shock. The factors referred to by her in her heads of argument as being factors that the court had allegedly failed to attach sufficient weight to were, in fact, the very factors that the regional magistrate had taken into account when deciding that the minimum sentences should not be imposed. It follows that I am unable to share Ms Hulley's sense of shock. On the contrary, I am of the view that the appellant has received a just sentence that has adequately taken account of the competing interests that are applicable when it comes to the imposition of sentence.

[13] There is, furthermore, no evidence of any misdirection committed by the regional magistrate when expressing himself on sentence. In such circumstances, any interference with the sentences imposed by the court a quo cannot be countenanced.

[14] I would accordingly propose that the appeal against the sentences be dismissed.

____

MOSSOP J

I agree and it is so ordered.

____

SEEGOBIN J

APPEARANCES

Counsel for the appellant	:	Ms A Hulley
Instructed by:	:	Legal Aid 187 Hoosen Haffejee Street Pietermaritzburg
Counsel for the respondent	:	Mr R Singh
Instructed by	:	National Prosecuting Authority Pietermaritzburg
Date of Hearing	:	24 February 2023
Date of Judgment	:	24 February 2023