IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR50/2023

In the matter between:

MTHOKOZISI MCAZELENI NKWANYANA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: Vryheid Regional Court (Magistrate Mhlongo sitting as court of first instance):

1. The appellant's appeal against his conviction and sentence is dismissed.

JUDGMENT

E Bezuidenhout J (Gwagwa AJ concurring):

Introduction

[1] The appellant was convicted on 30 August 2022 of the murder of Mrs Buyeleni Zwane (the deceased), a 78-year-old woman, in the Vryheid Regional Court. The appellant was sentenced to life imprisonment on the same day. The appellant appears before us by virtue of the provisions of section 309(1)*(a)* of the

Criminal Procedure Act 51 of 1977, which affords him an automatic right of appeal against both conviction and sentence.

Facts of the case and evidence

[2] The State led the evidence of three witnesses, whereas the appellant testified in his defence and called no witnesses. The facts of the matter on the State's version are these. On the evening in question, at around 19h00, Ms Nondumiso Nkwanyana (Nondumiso), heard the appellant, whom she described as her brother, quarrelling with her elderly neighbour, the deceased, about the appellant taking oranges from her yard. Nondumiso went outside and called the appellant's name, trying to calm him down and told him to go and sleep. He was very aggressive. He uttered the words 'I am going to kill you, I am not a Dube, local person, I am from Emondlo, I am going to kill you'. These words were directed at the deceased. The appellant then left.

[3] Nondumiso returned home and later went to bed. She heard the appellant calling out to her, saying 'sister I am going to kill this dog'. She went outside and noticed that the appellant had a knife in his hand. He jumped over the deceased's gate and went towards the deceased's home. Nondumiso followed him and jumped over the gate. She saw that the appellant had already grabbed hold of the deceased and lifted the knife towards her. She tried to grab the appellant by his vest or T-shirt and begged him not do it, but the appellant continued grabbing hold of the deceased. He then pushed the deceased down and stabbed her in the back. He also turned her over and stabbed her in the front of her body. Nondumiso kept pulling him by his vest and pleaded with him not to do it, but to no avail. The appellant insulted her and she became worried that he might do the same to her. She then ran away, crying, and proceeded towards his homestead. She met up with her mother, Mrs Zanele Nkwanyana (Zanele) at the deceased's gate. Nondumiso proceeded to the Mothe homestead where the appellant was staying and reported to her maternal aunts that the appellant had stabbed the deceased.

[4] A while later, the appellant arrived at the homestead. He was confronted by Nondumiso's brother, Sifiso, but he proceeded to assault Sifiso. Some boys from the

area arrived, grabbed the appellant and tied him up with a rope. The appellant was then assaulted by some of his relatives. Subsequently, the police arrived.

[5] Zanele testified that the incident in question took place before 19h00. She stated that Nondumiso reported to her that the appellant was quarrelling with the deceased. She went outside and told the appellant to go to sleep. He then proceeded to the Mothe homestead. The appellant is her brother's son. A while later, she heard the voice of the appellant saying 'I am now going to stab him'. It is perhaps an interpretation error as she clearly understood it to mean the deceased. Her daughter, Nondumiso, went outside while she was looking for her shoes. She subsequently followed Nondumiso to the deceased's homestead. As she was about to enter the deceased's homestead, Nondumiso came out, crying. Zanele found the appellant stabbing the deceased. She tried to reprimand the appellant by shouting his name, but he ignored her. She heard a gunshot being fired from the road, where people had been gathering. She left the deceased's homestead and proceeded to the Mothe homestead, whereafter the appellant arrived. She further testified that four boys emerged, who then tied the appellant's hands and feet. The police arrived a while later.

[6] Both Nondumiso and Zanele were cross-examined at length, and much was made of insignificant contradictions about whether the appellant was wearing a vest or a T-shirt and/or a coat and what the colour of his shorts was. In our view, nothing turns on these immaterial contradictions. It was put to Zanele that she and members of her family were fabricating the case against the appellant and that it was furthermore too dark to make a reliable identification. It was further put to the witnesses that the appellant would deny that he was involved. Both Nondumiso and Zanele were adamant that they saw the appellant stabbing the deceased.

[7] The State also called Constable NK Mavimbela. He arrived on the scene and found the appellant tied up. The majority of his evidence was inadmissible.[1] The prosecutor, Mr Sibiya, proceeded to lead the inadmissible evidence without missing a beat. The magistrate, Ms Mhlongo, in turn allowed the prosecutor to lead this evidence without batting an eyelid. Counsel for the appellant during the trial, Mr

[1] It consisted *inter alia* of a confession made to a constable.

Nkosi, did not object to the clearly inadmissible evidence when it was being led. Despite its inadmissibility, the magistrate referred to the evidence in her judgment. Fortunately for the State, she placed no apparent reliance on it when convicting the appellant.

[8] The State handed in a number of documents, such as the post-mortem report and a photo album. We will return to the post-mortem report in due course.

[9] At the commencement of the trial, the appellant, through his counsel, gave a brief plea explanation, setting out the following basis of his defence. The appellant was at home at around 22h00 that evening, at the Mothe homestead. He was watching television when he heard that a person had been found dead at one of his neighbours. The appellant's aunt, Ms Tholakele Nkwanyana, arrived with a group of men and asked him to come out, which he did. He was grabbed by these men and assaulted. They handcuffed his hands and feet and wanted to fetch petrol and matches to set him alight. The police then arrived and he was arrested. The appellant knew nothing of the deceased's murder.

[10] The appellant testified that he was at home around 19h00. He only learnt about the incident at 22h00. He further disputed that he was caught by two people, and stated that he was caught by four people. He testified that he was assaulted by these men, his head was hit against the wall, he was assaulted with fists, and sustained injuries to his face and teeth. He stated that he last saw the deceased two weeks before the incident. This was never put to either Nondumiso or Zanele. He testified that he and the deceased had a good relationship, but that he, Zanele and Nondumiso were not on good terms. During his cross-examination, he indicated that the deceased normally called him to clean her yard or to help in the yard. The appellant conceded that it was never put to the State witnesses that he was not on good terms with Zanele and Nondumiso. The appellant mentioned the names of four cousins in whose company he was on the evening in question. None of them were called to testify and confirm his alibi. During extensive questioning by the magistrate, it emerged that the appellant only arrived at the Mothe homestead at around 21h30 that evening. He did not explain where he was before he got there. None of this was

put to the witnesses during cross-examination nor was it mentioned by the appellant during his evidence in chief.

Analyses and legal principles

[11] The main issue raised by the appellant in the heads of argument filed on his behalf related to the identification or identity of the person who stabbed the deceased. Reference was made to *S v Miggel*[2] in support of the submission that it is always necessary for a court to approach the evidence of identification with caution. However honest and reliable a witness may seem, his or her evidence about the identity of an accused may be unreliable, which justifies the existence of a cautionary rule applicable to evidence of identity.

[12] It was submitted on behalf of the State that the two identifying witnesses are family members of the appellant who know him very well and have known him for a number of years. This was not disputed by the appellant. Both witnesses were grabbing at the appellant when he was stabbing the deceased. The appellant had furthermore told Nondumiso that he was going to stab the deceased. It was also submitted that there would have been sufficient ambient light for the witnesses to see the appellant's face. We were referred to *R v Dladla*[3] where it was found that:

'One of the factors which in our view is of the greatest importance in a case of identification, is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased . . . What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.'

It was also submitted that although the appellant raised an alibi, he failed to call such alibi to verify and corroborate his version.

[13] The magistrate analysed the evidence and came to the conclusion that the eye witnesses corroborated each other when they said that they saw the appellant's face. The appellant was furthermore a person well known to the witnesses. Both Nondumiso and Zanele could furthermore recognise his voice without seeing him.

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[2] *S v Miggel* 2007 (1) SACR 675 (C).

[3] *R v Dladla and others* 1962 (1) SA 307 (A) at 310C-E, the appellate court quoting with approval what was stated by the trial court.

They were both in close contact with the appellant. Nondumiso testified that she tried to grab the appellant by his vest and begged him to not do it, but the appellant continued grabbing hold of the deceased and then pushed her down and stabbed her in the back. This was also corroborated by Zanele, who testified that when she was at the scene, she reprimanded the appellant by calling out his name. The magistrate also, quite rightly, took into account that the appellant gave a different version when he testified in court to that contained in his plea explanation.

[14] Save for our concerns about the magistrate's lack of understanding of the inadmissible evidence of Constable Mavimbela, we agree with the findings by the magistrate that the evidence of the two eye witnesses was clear and reliable and that there was no reason not to accept the evidence of the State witnesses. They knew the appellant well and had stayed with him for a long time.

[15] Ms Hulley, counsel for the appellate, properly and correctly indicated at the commencement of the hearing before us that she had no further submissions to make and would rather concentrate on the issue of sentence. We are accordingly of the view that the magistrate correctly convicted the appellant based on the admissible evidence before the trial court. If the two eyewitnesses falsely implicated the appellant, it would mean by implication that they are shielding the true culprit who violently attacked and killed their neighbour in front of them, which in our view is highly unlikely and improbable. The state clearly proved its case beyond a reasonable doubt.

[16] As far as sentence is concerned, the appellant was sentenced to life imprisonment in accordance with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), the State alleging and proving that it was premeditated murder. In terms of section 51(3)*(a)* of the CLAA, a court is obliged to impose the prescribed minimum sentence unless it finds that 'substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.

[17] The appellant was 20 years old at the time he committed the offence and was also a first offender. He had one child who was residing at his family homestead. The appellant was still schooling, busy with grade 12, when he was arrested. It further

appears from the record that he spent just over three years in custody, awaiting trial. He was arrested on 7 July 2019 and was convicted on 30 August 2022. There was initially a delay to the start of the trial as the appellant had been sent for mental observation. Ms Hulley submitted that the magistrate failed to find that the combination of these factors established substantial and compelling circumstances, justifying a deviation from the prescribed minimum sentences.

[18] As far as the seriousness of the offence is concerned, one only has to glance at the post-mortem report to form a picture of the degree of violence perpetrated by the appellant on the deceased. She sustained multiple stab wounds to her chest, back, arm and face. It is clear that it was a brutal, vicious attack on a woman almost 60 years older than the appellant, which in a time of constant public awareness campaigns about violence against woman, is inexcusable.

[19] It has been held in *S v Malgas*[4] that a court must weigh all the traditional considerations and should depart from the prescribed minimum sentence when it will be unjust to impose it.

[20] Counsel for the State, Mr D Naidoo, submitted in his heads of argument that a court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court.[5] With reference to *S v Van de Venter*[6] and *S v Truyens,*[7] we were reminded of the instances where interference would be warranted, such as a misdirection or where the court failed to exercise its discretion judicially.

[21] It is clear from the record that the magistrate failed to take the period that the appellant spent in custody awaiting trial into consideration. She does not mention it at all, despite the fact that the appellant's evidence was led in this regard. To her credit, we must add that the appellant's counsel did not address her on this aspect and did not refer her to any authorities.

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[4] *S v Malgas* 2001 (2) SA 1222 (SCA).
[5] *S v Rabie* 1975 (4) SA 855 (A).
[6] *S v Van de Venter* [2010] ZASCA 146; 2011 (1) SACR 238 (SCA).
[7] *S v Truyens* [2011] ZASCA 110; 2012 (1) SACR 79 (SCA).

[22] In *S v Vilakazi*[8] it was held that:

'. . . it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.'

[23] In *S v Radebe*[9] it was held that:

'. . . the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed . . . whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'

[24] In *S v Ngcobo*[10] Pillay AJA held that 'a pre-conviction period of imprisonment is not, on its own, a substantial and compelling [factor]' but merely a factor in determining whether a sentence is unjust or disproportionate. In particular, it was held that a period of two years would only make a marginal difference to the sentence of life imprisonment and accordingly did 'not render the sentence shockingly disproportionate'.[11]

[25] Before us, Mr Naidoo submitted that whilst the circumstances of the offence are extremely serious, which do not warrant a lesser sentence than that of life imprisonment, any sense of an unjust sentence could be mitigated by simply antedating the sentence of life imprisonment to the date of the appellant's arrest. This would have the effect of moving the date when he would become eligible for parole forward by just over three years. Whilst on the face of it this appeared to be an imminently sensible proposal, which would still recognise the extreme seriousness of the offence whilst balancing it with the personal circumstances of the appellant, such an order would not be permissible. Section 282 of the Criminal Procedure Act 51 of 1977[12] only allows a sentence to be antedated to a specific date '…which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed'. The section furthermore only allows for the

[8] *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 60.
[9] *S v Radebe and another* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) para 14.
[10] *S v Ngcobo* [2018] ZASCA 6; 2018 (1) SACR 479 (SCA) para 14.
[11] Ibid para 21.

antedating of a sentence if a sentence is set aside on appeal or review and a new sentence of imprisonment is thereafter imposed.

[26] In *S v Hawthorne en 'n ander*[13] it was held that it is not possible to order that a sentence be antedated to the date of arrest. The headnote reads as follows:

'In terms of s 32(1) of the Prisons Act 8 of 1959 a sentence of imprisonment takes effect on the day upon which that sentence is imposed and a court cannot order that such sentence should run from the date of the accused's detention. It speaks for itself, however, that a trial Judge, in imposing sentence, can take into account the fact that the accused has been in detention for a long time, and he can apply that fact for the benefit of the accused, *inter alia*, by making the period of imprisonment which is actually imposed shorter than it would otherwise have been. The principle which appears in s 32 (1) is peremptory and not merely directory.'

[27] In *Hiemstra's Criminal Procedure*[14] it was stated that 'the commencement date of the sentence can never be earlier than the date of the original sentence'. Reference was made to *S v Jacobs*[15] where the sentence was antedated to the date of incarceration, which was a date before the original sentence was imposed, and it was submitted that the court in that matter had erred when it antedated the sentence. Reference was also made to section 39(1) of the Correctional Services Act 111 of 1998, which provides that a sentence of imprisonment takes effect from the date when it was imposed.

[28] As far as the appellant's personal circumstances are concerned, there is nothing special that in our view would qualify as substantial and compelling. An accused's personal circumstances tend to fade into the background when he has

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[12] Section 282 provides as follows: 'Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.'

[13] *S v Hawthorne en 'n ander* 1980 (1) SA 521 (A) at 521.

[14] A Kruger *Hiemstra's Criminal Procedure* (SI 17, 2024) at 28-44.

[15] *S v Jacobs* 2021 (2) SACR 644 (WCC) para 36.

been convicted of a serious offence warranting a lengthy period of imprisonment.[16] In our view, the magistrate did not misdirect herself when sentencing the appellant as she did. She correctly took into account the seriousness of the offence as well its prevalence. As mentioned above, the appellant brutally attacked and killed the deceased, an elderly and vulnerable member of society, which in our view outweighs the rather ordinary personal circumstances of the appellant. Despite the appellant's apparent youthfulness, the degree of violence involved in the commission of the offence fortifies our view that the appellant was correctly sentenced to life imprisonment.

Order

[29] We accordingly make the following order:

1. The appellant's appeal against his conviction and sentence is dismissed.

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E BEZUIDENHOUT J

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GWAGWA AJ

Date of hearing: 15 March 2024

Date of judgment: 25 March 2024

Appearances:

[16] *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 58.

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