THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 580/2017

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE, GRAHAMSTOWN **APPELLANT**

and

WINSTON BOOYSEN **RESPONDENT**

Neutral citation: *DPP v Booysen* (580/2017) [2018] ZASCA 07 (23 February 2018)

Coram: Wallis JA and D Pillay and Schippers AJJA

Heard: 15 February 2018

Delivered: 23 February 2018

Summary: Criminal law and procedure – minimum sentence legislation - respondent convicted on two counts of murder and one count of robbery with aggravating circumstances – court a quo finding no substantial and compelling circumstances but failing to impose prescribed minimum sentences on second count of murder and robbery with aggravating circumstances - minimum sentences of life imprisonment and 15 years' imprisonment imposed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Tilana-Mabece AJ sitting as court of first instance):

The appeal succeeds and paragraphs 16(2), (3) and (4) of the order of the High Court are set aside and substituted with the following:

'(2) The accused is sentenced to life imprisonment on count 2.

(3) The accused is sentenced to 15 years' imprisonment on count 3.'

JUDGMENT

Schippers AJA (Wallis JA and D Pillay AJA concurring):

[1] The respondent was convicted in the Eastern Cape Division of the High Court, Grahamstown, on two counts of murder (counts 1 and 2) and one count of robbery with aggravating circumstances (count 3). The Criminal Law Amendment Act 105 of 1997 (the Act) was applicable, but the trial court found no substantial and compelling circumstances justifying a departure from the minimum sentences specified in the Act. The minimum sentence prescribed in respect of count 1 is 15 years' imprisonment; count 2, life imprisonment; and count 3, 15 years' imprisonment. The trial court imposed the prescribed minimum sentence of 15 years' imprisonment on count 1, but sentenced the respondent to 15 years' imprisonment on count 2 and eight years' imprisonment on count 3. It ordered the sentence on count 2 to run concurrently with the sentence on count 3. Thus, the respondent was sentenced to an effective term of 30 years' imprisonment. The Director of Public Prosecutions (the DPP) now

appeals against the sentence imposed on all three counts, with leave of the trial court.

[2] The basic facts are these. The respondent was in a romantic relationship with Ms Brenda Finnis (Brenda), the deceased in count 1. In November 2015 she wrote a letter to the respondent in which she expressed her wish to terminate their relationship. Her cousin, Ms Zona Ruiters (Zona), testified that Brenda showed her the letter; and that on the day in question they, together with some friends including one Pietie, with whom Brenda wanted to start a relationship, were consuming alcohol at Zona's house in Aberdeen in the Eastern Cape. Later that evening, the respondent arrived and sat outside that house where he drank from a bottle of wine. Zona, Brenda and the others went outside because they were aware that the respondent came to fetch Brenda; they had argued the day before. The respondent grabbed Brenda by the arm, pulled her and wanted her to leave with him. She refused to do so and tried to get away.

[3] The police had been called in the interim and Constable John Jack and two members of the local community policing forum arrived on the scene in a police van, and stopped next to the respondent and Brenda. They saw how the respondent pulled Brenda, forced her to accompany him, and that she resisted. In full view of the police, the respondent stabbed Brenda in the chest and ran away. Constable Jack gave chase in the vehicle but could not apprehend him. Brenda died on the scene. According to the post-mortem report, the cause of death was a stab wound to the chest which penetrated the left lung, pulmonary artery and aorta, with resultant blood loss.

[4] Five days after the first murder, the respondent was at the farm of Mr George Featherstone (Featherstone), the second deceased, which is some 60 km from Aberdeen. Mr Morne Sas (Sas), who lived and worked on the farm, came

across the respondent in an ostrich field some 500 m from the homestead. The respondent had worked for Featherstone in 2014. He asked Sas for tobacco and told him that he was on his way to Aberdeen. The respondent went home with Sas, but remained outside. Sas gave him the tobacco and the respondent left. He told Sas not to tell Featherstone that he had been on the farm. Sas knew that the respondent was wanted for the murder of Brenda. He then telephoned the police to inform them that the respondent was heading to town so that they could apprehend him. However, Sas is Afrikaans-speaking and the person at the other end of the line asked him to speak English and subsequently terminated the conversation. Sas called the police again but could not get through.

[5] On counts 2 and 3, the respondent was convicted substantially out of his own mouth. Pursuant to a trial-within-a-trial, the court a quo ruled that facts stated and things pointed out by the respondent to Captain van der Merwe, a justice of the peace, in relation to the murder and robbery of Featherstone, were admissible in evidence. Captain van der Merwe's evidence may be summarised as follows. The respondent waited outside the home of Featherstone (who was 74) until 20h00, before entering the house through an open door. He removed a firearm from a table in the bedroom and went outside again. Featherstone, who had been watching television, came to the kitchen door. As he did so, the respondent shot him. Featherstone then walked to the telephone and made a call (presumably for help). The respondent fired another shot, which struck him in the stomach. Featherstone went to sit on a chair in the lounge and the respondent again fired a few shots at him. The post-mortem report in relation to Featherstone states that he was shot multiple times and that the cause of death was gunshot injuries to the chest and abdomen.

[6] After the respondent had shot Featherstone whilst he was sitting in the chair, he put the gun down next to Featherstone and stole food from the fridge

as well as Featherstone's Toyota delivery vehicle, which was parked under a carport with the keys in it. As he was driving Featherstone's vehicle on the farm road he saw the lights of oncoming vehicles. He stopped, abandoned the vehicle and fled into the bush. The respondent pointed out the place where he waited and entered the house; the table from which the firearm was removed; the telephone; the chair where Featherstone had been sitting when he was shot; and the place from which Featherstone's vehicle was removed and where it was abandoned.

[7] The respondent did not testify in his defence. The version put to the State witnesses in cross-examination concerning the first murder was one of self-defence: Brenda, it was put, was armed with a knife, stabbed the respondent thrice, and he took the knife and stabbed her. The witnesses denied that Brenda was armed. As regards the murder of Featherstone, it was put to Sas that the night before the murder, the respondent and Mr Andries Williams (Andries) spent the night at his home on the farm. The next day the three of them went to Featherstone's house. They got to the door of the house and the next thing, they saw Featherstone. Sas produced a firearm and shot him more than once. Andries had taken Featherstone's vehicle, the respondent jumped into it and they left Sas at the house. Sas denied these allegations. As Andries and the respondent were leaving the farm, they saw the lights of oncoming vehicles and abandoned Featherstone's vehicle. But all of this was not evidence: the respondent chose not to testify, called no witnesses and closed his case.

[8] The respondent was duly convicted on all three counts. Section 51(2)*(a)*(i) of the Act applies to count 1. It provides inter alia that a high court shall sentence a person convicted of an offence referred to in Part II of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years. In terms of s 51(1), a high court is enjoined to sentence a person

convicted of an offence referred to in Part I of Schedule 2, to life imprisonment. Murder, when planned; or the death of the deceased in the commission of a robbery with aggravating circumstances, is such an offence. So, the minimum sentence that had to be imposed on count 2 was life imprisonment. Count 3 also falls within the ambit of s 51(2)*(a)*(i) of the Act, which prescribes a minimum sentence of 15 years' imprisonment for robbery where there are aggravating circumstances or the robbery involves the taking of a motor vehicle. This is such a case. The respondent used a firearm, inflicted serious injuries on Featherstone which resulted in his death, and removed his vehicle.

[9] The trial court concluded that the minimum sentence specified in the Act had to be imposed on each count. It referred to *Malgas*,[1] and considered whether there were substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence. The court was not persuaded that the respondent's personal circumstances and other factors submitted by the defence justified a deviation from the prescribed sentence. It found that the killings of a 20 year old defenceless woman and an elderly vulnerable man were senseless; that the respondent had no respect for human life and the law; and that he already had a list of previous convictions. It concluded that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence than what the lawgiver had ordained.

[10] Consequently, the trial court imposed the minimum sentence of 15 years' imprisonment on count 1. Counsel for the DPP submitted that this was a misdirection, and that the court should have imposed a sentence of 20 years' imprisonment in light of the following aggravating circumstances: the respondent killed his girlfriend, a defenceless young woman, in full view of the police because she had broken up with him; and murder is indicative of a

[1] *S v Malgas* 2001 (1) SACR 469 (SCA).

particular arrogance and utter disrespect for the law and the life of another. Alternatively, it was submitted that the sentence was shockingly inappropriate.

[11] It is trite that sentencing is within the discretion of the trial court and that an appeal court can interfere with sentence only where there has been an irregularity that results in a failure of justice; or where the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is shockingly inappropriate.[2]

[12] In my view, it cannot be said that the sentence imposed on count 1 is shockingly inappropriate. The aggravating factors submitted are not of the sort that justify a sentence in excess of the prescribed period, and counsel for the DPP rightly did not press the argument that the trial court should have imposed a harsher sentence. Further, as was held in *Malgas*,[3] in deciding whether the circumstances of any particular case warrant a departure from the prescribed sentence, courts are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified. And the prescribed sentences are the sentences that should ordinarily be imposed. As was said in *Malgas*:

'Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification, be imposed for the listed crimes in the specified circumstances.'[4]

[13] The sentences imposed on counts 2 and 3 however, were inappropriate. Having found that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence, the trial court was obliged to impose

[2] *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA), affirmed in *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC).
[3] *Malgas* fn 1 para 18.
[4] *Malgas* fn 1 para 25 emphasis in the original; affirmed in *S v Dodo* 2001 (3) SA 382 (CC) para 10.

life imprisonment on count 2, and 15 years' imprisonment on count 3. Indeed, in both the respondent's written and oral submissions it was fairly conceded that the trial court's failure to impose the prescribed sentences on counts 2 and 3 was a misdirection; and that the appeal against the sentences imposed on those counts should be upheld.

[14] It follows that the sentence imposed by the trial court on counts 2 and 3 must be set aside. The following order is made:

The appeal succeeds and paragraphs 16(2), (3) and (4) of the order of the High Court are set aside and substituted with the following:

'(2) The accused is sentenced to life imprisonment on count 2.

(3) The accused is sentenced to 15 years' imprisonment on count 3.'

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A Schippers
Acting Judge of Appeal

APPEARANCES

For Appellant:	JPJ Engelbrecht
	Instructed by:
	Director of Public Prosecutions, Grahamstown
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	PW Nel
	Instructed by:
	Justice Centre, Port Elizabeth
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