

SOUTH AFRICA / JUDGMENT

Mashishi v S (CAP 3/14) [2014]

ZANWHC 10 (23 May 2014)

[2014] ZANWHC 10

COURT

North West High Court, Mafikeng

BEFORE

A M Kgoele, A A Landman, N Gutta

CASE / FILE NUMBER

CAP 3/14

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IN

THE NORTH WEST HIGH COURT

MAFIKENG

CAP

3/14.

In

the matter between:

JOE

MASHISHI.....Appell

ant

and

THE

STATE.....Respond

ent

FULL

BENCH CRIMINAL APPEAL

LANDMAN

J, KGOELE J & GUTTA J

DATE

OF HEARING : 05 MAY 2014

DATE

OF JUDGMENT : 23 MAY 2014

FOR

THE APPELLANT : Adv. Janse van Rensburg

FOR

THE RESPONDENT: Adv. Nontenjwa

JUDGMENT

KGOELE J:

[1] The appellant pleaded guilty and was subsequently convicted on the 2 May 2006 by Gura J. sitting at Ga-Rankuwa Circuit Court on the following:-

Count 1 = Murder

Count 2 = Housebreaking with intent to steal and theft

Count 3= Unlawful possession of a firearm

Count 4 = Unlawful possession of ammunition.

[2] He was sentenced on the same day as follows:-

Count 1 - Twenty two (22) years imprisonment

Count 2 - Three (3) years imprisonment

Count 3 - Three (3) years imprisonment

Count 4 - Two (2) years imprisonment.

The sentences imposed in Counts 2 up to 4 were ordered to run concurrently with the one imposed in Count 1. He was granted

leave to appeal against sentence only, hence this appeal.

[3] The summary of the facts are that on the 2nd of September 2002 the appellant together with his friend, armed with an unlicensed firearm and ammunition, broke and entered the bottle store of Wilheminah Madise at Makapanstadt and stole items valued to R9426,50 plus an unknown amount of cash from the pool table and juice box machine. In the process, they also killed a security officer Robert Matedi by shooting him with a firearm.

[4] The appeal is based on two grounds. As far as the first ground is concerned, the appellant's counsel submitted that the Trial Court erred in finding that the murder was premeditated because the housebreaking was planned and the appellant together with his co-perpetrator had armed themselves in order to overcome any resistance whereas the statement made by the appellant in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977 (The section 112 (2) statement) which was accepted by the trial court was clear that "the intention to shoot and subsequently kill the deceased was formulated at the time when the guard resisted to lie down". According to the appellant's counsel the contents of the statement clearly indicates that appellant therefore acted on the spur of the moment and the killing of the security guard was not pre-meditated.

- [5] In relation to the second ground of appeal the counsel for the appellant submitted that the Trial Court erred in finding that because the murder was premeditated, the minimum sentence of life was applicable when neither the state in the charge sheet, nor the Trial Court at the outset of the trial proceedings informed the appellant that the state would rely on the provisions of Section 51 of Act 105 of 1997 (Minimum Sentence legislation) for the purposes of sentence.
- [6] Counsel for the State, Advocate Nontenjwa conceded at the outset of his submissions and indicated without hesitation that the appellant was never charged in terms of the Minimum Sentence legislation. He further submitted that although the Trial Court indicated in its judgment that it deviated from imposing the minimum sentence of life imprisonment on the appellant because he was relatively young, 22 years imprisonment is still unreasonably severe as the appellant was only 16 years of age at the time of the commission of the offence.
- [7] This concession by the State was in my view correctly made therefore the second ground of appeal by the appellant can be summarily

disposed of. A perusal of the indictment and the record of the proceedings in the Trial Court are indicative of the fact that the

appellant was never warned nor informed that the charges he was facing were subject to the provisions of the Minimum Sentence legislation. It is trite law that an accused person must be informed, through an indictment, that he is facing a charge where the provisions of this legislation are applicable and the implications thereof. It is therefore clear that the Trial Court by making reference to the minimum sentence legislation misdirected itself in approaching the question of sentence as if life imprisonment was applicable. In my view, this misdirection had in all probability influenced the Trial Court when deciding for the period

of time that the appellant should be incarcerated.

- [8] A further consideration that must be mentioned in regard to the minimum sentence legislation, is that in terms of the decision in *Centre for Child Law v Minister of Justice* 2009 (2) SACR 477 (CC) the minimum sentence legislation is not applicable to children under the age of 18 years.
- [9] The submissions by the appellant's counsel, in as far as the first ground of appeal is concerned, have merit as well. The appellant pleaded to the charges preferred against him. The trial court accepted the Section 112 (2) statement made by the appellant which amongst others specified when the intention to kill was formulated. No evidence as to how the offence was committed was led during the Trial Court's proceedings. The only witness called by the state was the complainant who testified about the amount of cash and the goods stolen as this was the only issue in dispute. Although in some cases pre-meditation of the offence can be inferred, such inference can only be made from the proven facts of that particular matter. It is therefore obvious that in an instance where the accused pleaded guilty and his statement, explaining how the incident occurred, has been accepted by the

court and he is subsequently convicted, he cannot be sentenced on contrary facts or inferences. In my view, the Trial Court also misdirected itself in this regards.

- [10] Sentence is primarily in the discretion of the Trial Court and a Court of Appeal will not lightly interfere with a sentence imposed by the Trial Court. Only where it is clear that the discretion of the Trial Court was not exercised judicially or reasonably will a Court of Appeal be entitled to interfere. In *S v Malgas* 2001 (1) SACR 466 (SCA); 2001 (2) SA 1222 (SCA) it was held:-

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of the discretion, an appellate court is of course entitled to consider the question of sentencing afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as shocking, ‘startling’ or ‘disturbingly inappropriate”.

- [11] This Court is therefore entitled to interfere with the sentence imposed by the Trial Court as there was a material misdirection on the part of the Trial Court when it considered the sentence it imposed on the appellant.
- [12] The appellant was relatively young at the time of committing these offences. He pleaded guilty to all the charges. The murder was not premeditated. He is a first offender. It appears that the Trial Court also accepted the fact that the appellant had smoked dagga and was under the influence thereof when committing these offences. All of these factors coupled with the fact that the detention of child offenders must be a last resort and that if detention cannot be avoided such detention must be only for the shortest appropriate period of times, are strong mitigating factors that weighs heavily in favour of the appellant.

I am of the view that having taken all the circumstances of this matter into consideration a lesser term of imprisonment will still

serve the intended purpose of sentencing.

- [13] The following order is made:-

13.1 The appeal is upheld

13.2 The sentence imposed by the Trial Court in respect of the murder count is substituted with the following:-

“Fifteen

(15) years imprisonment”

13.3 The sentence in Count 2,3 and 4 are ordered to run concurrently with the sentence in Count 1.

13.4 The sentence is antedated to 2 May 2006.

A M KGOELE

JUDGE OF THE HIGH COURT

I agree

A A LANDMAN

N GUTTA

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