

SOUTH AFRICA / JUDGMENT

# Sihlangu and Another v S (CAF 05/2014) [2014] ZANWHC 21 (31 July 2014)

**[2014] ZANWHC 21****COURT**

North West High Court, Mafikeng

**BEFORE**

N. Gutta, R.D. Hendricks, A.A. Landman

**CASE / FILE NUMBER**

CAF 05/2014

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*“IN THE HIGH COURT OF SOUTH AFRICA”*

NORTH WEST DIVISION, MAHIKENG

CASE NO. CAF 05/2014

DATE: 31 JULY 2014

In the matter between:

SAMSON SIHLANGU.....1ST APPELLANT

TSHEPANG MAUMAKWA.....2ND APPELLANT

And

THE STATE.....RESPONDENT

HENDRICKS J, LANDMAN J AND GUTTA J.

CRIMINAL APPEAL

GUTTA J.

A. INTRODUCTION

[1] The appellants were indicted before Gura J on the following counts:

1.1 Count 1 – Murder read section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Act”);

1.2 Count 2 – Housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”);

1.3 Count 3 – Contravention of section 3 of the Firearms Control Act 60 of 2000 (“the Firearms Act”) – Unlawful possession of a firearm;

1.4 Count 4 – Contravention of section 90 of the Firearms Act – Unlawful possession of ammunition.

[2] The appellants were accused 1 and accused 4 in the trial court. They pleaded not guilty and the trial court found them guilty

and sentenced them as follows:

2.1 Count 1 – Life imprisonment;

2.2 Count 2 – 15 years imprisonment;

2.3 Count 3 – 2 years imprisonment;

2.4 Count 4 – 1 year imprisonment.

[3] The trial court dismissed the appellants’ application for leave to appeal. The appellants then petitioned the Supreme

Court of Appeal (“the SCA”), who granted them leave to appeal the sentence.

## B. FACTS

[4] The facts briefly are that on 02 December 2010, at Hartebeesfontein farm, Mr and Mrs Erasmus, an elderly couple were attacked by a group of young men and robbed of their property. Mrs Erasmus was tied with rope, injuries were inflicted and she was strangled. She died as a result of the injuries she sustained. Mr Erasmus was also assaulted. He survived the incident, but ultimately died a few months later from cancer.

## C. GROUNDS

[5] The grounds upon which the appeal is noted are as follows:

5.1 The trial court erred in law and/or fact in finding that there are no substantial and compelling circumstances which justify a lesser sentence than the prescribed minimum sentence on counts 1 and 2;

5.2 The Court a quo erred by ignoring the recommendations by the social worker, in that the prescribed minimum sentence of life imprisonment may not be a suitable sentence to be imposed on the first appellant;

5.3 The Court a quo erred by placing more emphasis on the seriousness of the offences than the personal circumstances of the appellants;

5.4 The trial court overlooked the fact that most of the stolen property was recovered;

5.5 The trial court overlooked the element of rehabilitation, when considering an appropriate sentence.

[6] In the Court a quo, the following personal circumstances of the first appellant were placed on record:

6.1 He was relatively young, 20 years old, at the time of the commission of the offence;

6.2 He was a first offender;

6.3 He had been in custody awaiting the finalisation of the case for a period of two years and six months;

6.4 He was involved in a car accident when he was conveyed to Court in a police vehicle, and he is limping as a result;

6.5 He passed Grade 12. His former teacher described him as one of the best learners in mathematics and physical science;

6.6 He was single with no children;

6.7 He was unemployed.

[7] The following facts in mitigation of sentence were adduced for the second appellant:

7.1 He was 19 years old at the time of the commission of the offence;

7.2 He spent two years and six months awaiting the finalisation of the matter;

7.3 He abused drugs, dagga;

7.4 Some of the stolen items were recovered.

[8] Counsel for the appellants, Mr Skibi, submitted that the following factors should have been considered as substantial and compelling circumstances, which justify the imposition of a lesser sentence:

8.1 The youthfulness of the first and second appellants, who were 20 and 19 years old, respectively, at the time of the commission of the offence;

8.2 Both had already spent two and a half years awaiting trial at the time when they were sentenced;

8.3 Both were from dysfunctional families as they were brought up by single parents, their mothers;

8.4 The first appellant was a brilliant pupil at school as he was assisting other students in mathematics and physical science, and he passed those subjects with distinctions;

8.5 The social worker, in the pre-sentencing report, stated that the second appellant was indulging in drug activities;

8.6 The social worker who compiled the report for the first appellant recommended that direct imprisonment is a suitable sentence

for him, but not the prescribed minimum sentence. Although the Court is not bound by what the social worker recommended, such has a persuasive effect;

8.7 Although the second appellant had a previous conviction of theft on 23 November 2009, it is not an offence where violence was

involved, nor is it relevant;

8.8 Most of the robbed items were recovered still in good condition, with the exception of the Isuzu bakkie.

[9] Mr Skibi further submitted that the trial court erred by failing to consider the element of rehabilitation as the appellants

were youthful offenders.

[10] Counsel for the respondent, Mr Maema, submitted that the Court a quo balanced the offence with the interests of the community

and the seriousness of the crime. He dealt with these three elements succinctly in his heads of argument, which bears repetition and is stated hereinbelow.

#### THE SERIOUSNESS OF THE CRIME

[11] Under this heading, Mr Maema submitted that the trial court correctly considered the following factors in aggravation of sentence:

11.1 the offence was a farm attack, which is very prevalent within the North West Province, which is part of the maize triangle of South Africa. The effect of offences such as these is that farmers will abandon their farms and run to towns and there will be no one to run the risky business of farming;

11.2 the crime was planned by the appellants, together with another who has since run away. After the deceased and his wife were

subdued, the appellants were not in a hurry, they took their time in choosing the articles that they loaded into the van, to take them away;

11.3 the victims of this crime were senior citizens who had no strength to defend themselves against the brutal attack by the appellants. The first appellant was previously employed by the victims at this farm and must have used his inside knowledge of the farm to his advantage and was thus in a position of trust, which he abused;

11.4 the attack on the deceased was shockingly brutal. The family of the deceased was deeply traumatized by what they saw after the attack, before the deceased was moved to hospital. Both the deceased's feet were tied with a long rope at the ankles and her wrists were also tied with a rope. She was cut with a sickle, an instrument normally used to cut grass used to roof houses. She was also throttled with a cloth which was left tied around her neck;

11.5 the van which was used to transport the stolen items was found in a damaged state. Although some of the property was recovered after the robbery, not all were retrieved, the money was obviously already used. The recovery was not at the instance of the appellants, was it not for the parents of one of the appellants, the goods might not have been recovered;

11.6 the deceased's husband was at the time of the attack suffering from cancer and he passed away six months later.

#### THE INTERESTS OF THE COMMUNITY

[12] Mr Maema stated that the trial court also considered the interests of the community in aggravation of sentence as following:

12.1 ordinary law abiding citizens look upon the courts to deal firmly with violent crime in particular, where people are attacked in the privacy of their own homes. Failure to respond to this plight of communities may lead to lack of confidence in the criminal justice system, to the extent that people may tend to take the law upon themselves;

12.2 the Court also considered the interests of the closer family of the deceased, the deceased's children and the victim's

grandchildren, who suffered pain and shed tears as a result of this tragedy. A valuable family member had been killed, another had been assaulted and deprived of their property;

12.3 the community had also lost someone who was a good Samaritan to them, as she used to help community members in the vicinity of her farm with transport to pension pay points without being paid for it.

#### THE PERSONAL CIRCUMSTANCES OF THE APPELLANTS

[13] Mr Maema submitted that the court also considered the appellants' personal circumstances as well as the social workers' reports, which are referred to supra.

#### D. ANALYSIS

[14] It is trite that the imposition of a sentence is a matter for the discretion of the Court tasked with imposing same. A court of appeal will generally only interfere with the sentence imposed by a lower court in circumstances where the reasoning of the trial court is vitiated by misdirection or where the sentence imposed is startlingly inappropriate and induces a sense of shock or where there is a striking disparity between the sentence imposed and that which a Court of appeal would impose. In *S v Kgosimore* 1999 (2) SACR 238 (SCA) at 241G–H, where the Court held that the true enquiry is:

*“ . . . whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. . . . Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere, if it was not, it is free to do so.”*

See also *S v Coetzee* 2010 (1) SACR 176 (SCA); *S v Matlala* 2003 (1) SACR 80 (SCA).

[15] This offence is a serious offence which was catered for by the legislature under the Act. The trial court correctly referred to case authorities where serious offences falling under the minimum sentence provisions were dealt with in accordance with the minimum sentence provisions. See *S v Swarts* 2004 (2) SACR 370 (SCA); *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Matyityi* 2011 (1) SACR 40 (SCA).

[16] The trial court considered the fact that the appellants were young offenders and had spent a substantial time in custody awaiting

trial and referred to the case of *S v Dlamini* 2014 (1) SACR 530 (GP).

[17] The trial court also correctly took the fact that the appellants showed no remorse for the offence they had committed, into

account.

[18] In deciding whether there were substantial and compelling circumstances which justified departure from the prescribed minimum

sentence, the trial court held:

*“And I have taken all these factors, mitigating in favour of the accused, the accumulative effect, and I have measured them*

*against the cumulative effect of the aggravating features in the case and asked myself whether in view of these factors, there are substantial and compelling factors justifying deviation from the minimum sentence in respect of the first count.*

*My view is that the savage nature of the attack and the surrounding circumstances, I have laid out the aggravating features, speaking loud that there is no other sentence except the ultimate sentence.”*

[19] The issue of age of a youthful offender was succinctly captured in the SCA decision of *S v Matyityi* supra at 45b–48c,

paragraphs [9]–[14], where the Court held:

*“As to the question of age, a person of 20 years or more had to show by acceptable evidence that he or she was immature to the extent that the immaturity was a mitigating factor. At the age of 27 the respondent was hardly a callow youth. At best, his age was neutral factor and it did not serve without more to reduce his moral blameworthiness.”*

[20] In *S v Cunningham* 2004 (2) SACR 16 (E) at 21, murder was premeditated and the deceased was shot at point-blank range, the callousness of the crime and the 19 years old appellant’s lack of remorse caused the Court to find substantial and compelling circumstances to be absent.

- [21] In casu, there was no evidence presented that the appellants were immature, lacked insight, discernment and experience, and that their age reduced their moral blameworthiness. A bold statement that the appellants are youthful and that their age should be considered as substantial and compelling to justify a deviation from the minimum sentence is insufficient, when measured against a calculated, savage attack.
- [22] In *S v Malgas* supra at 481j–482a, the Court held that the prescribed minimum sentence should not be departed from lightly
- or for flimsy reasons. Also see *S v Kwanape* 2014 (1) SACR 405 (SCA).
- [23] The SCA in *S v Vermeulen* 2004 (2) SACR 174 (SCA), held that in considering whether substantial and compelling circumstances exist, mitigating factors cannot be considered in vacuo, but due weight must be given to them in the context of each given case, together with other factors before the Court, such as the aggravating features of the case and the interests of the community.
- [24] The deceased and her husband were elderly members of the farming community, who were subjected to a brutal attack on their person and property, in the sanctity of their home. The appellants showed no mercy in the treatment meted out to the deceased, who was executed with callous brutality.
- [25] When considering the appellants' ages, the time they spent in prison as awaiting trial prisoners, the pre-sentencing report, specially the fact that they are from dysfunctional families, these factors constitute mitigating factors which courts have found to be substantial and compelling, however, these factors should not be considered in isolation, but should be viewed cumulatively with the circumstances of the case, and the aggravating factors. When viewed in totality, the aforesaid factors cannot be said to be substantial and compelling to justify an interference with the minimum sentence.
- [26] After considering the triad as set out in *S v Zinn* 1969 (2) SA 537 (A), namely, the interests of society, the seriousness of the offence as well as the personal circumstances and mitigating factors

of the appellant, and having taken cognisance of the recognised objectives of sentencing, namely, punishment, deterrence, retribution

and rehabilitation, I am of the view that the sentence imposed by the trial court of life imprisonment is neither vitiated by misdirection,

nor is it startlingly inappropriate nor does it induce a sense of shock, nor is there disparity between what the court trial imposed

and what this Court of appeal would impose.

[27] The trial court, in my view, correctly found that the brutality of the offence and the interests of the community outweigh the personal circumstances of the appellants, and as such the minimum sentence had to be imposed. Hence, there exists no reason to interfere with the sentence imposed.

E. ORDER

[28] In the circumstances, I make the following order:

a) The appeal on sentence is dismissed.

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS

A.A. LANDMAN

APPEARANCES

DATE OF HEARING : 27 JUNE 2014

DATE OF JUDGMENT : 31 JULY 2014

COUNSEL FOR APPELLANTS : ADV N.L. SKIBI

COUNSEL FOR RESPONDENT : ADV G.S. MAEMA

ATTORNEYS FOR APPELLANTS : MAFIKENG JUSTICE CENTRE

ATTORNEYS FOR RESPONDENT : THE DIRECTOR OF PUBLIC PROSECUTIONS

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