IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A399/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

30/10/2020

In the matter between:

SANELE SAMUEL MNGOMEZULU — Appellant

and

THE STATE — Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The appellant was arraigned in the Sebokeng Regional Court, together with four other accused, on a count of murder read with the provisions of section 51(1) of Act 105 of 1997. The appellant pleaded guilty on the

terms set out in a section 112(2) of the Criminal Procedure Act, 51 of 1977, statement to the charge of murder on 4 June 2019. The appellant's co-accused pleaded not guilty and the trials were separated. A sentence of 12 years of imprisonment was imposed upon the appellant.

[2] On 2 October 2019 the court *a quo* granted the appellant leave to appeal against sentence.

[3] The appellant enjoyed legal representation in the court *a quo*. The charge of murder was premised upon alleged execution or the furtherance of a common purpose in the commission of the act of murder. In his plea of guilty the appellant denied the execution or the furtherance of a common purpose. The appellant accepted sole responsibility for the death of the deceased.

[4] In the charge sheet, and at the commencement of the trial in the court *a quo*, the appellant was apprised of the fact that the provisions of sections 51(1) and (2) of the Criminal Law Amendment Act, 105 of 1997 (the CLAA) were applicable, particularly in respect of sentencing upon conviction.

[5] As recorded, the State accepted the circumstances under which the act of murder was committed and the facts to which the appellant pled to and is bound thereby. The circumstances and facts are summarised as follows:

(a) The appellant, together with four of his friends that included two young girls, went to a tavern on 4 August 2017 to celebrate the appellant's selection by his school to represent the school at a language competition;

(b) On their arrival at the tavern late that night, the deceased came out of the tavern and approached one of the girls in the group. The deceased tried to pull the young girl away from their group. The girl resisted and one of the other accused, who was part of the appellant's group, reprimanded the deceased.

(c) The deceased was very aggressive and assaulted the appellant's two male friends. The deceased struck both with his fists and knocked them both down.

(d) The appellant tried to intervene, but was also assaulted by the deceased and knocked down.

(e) The appellant stood up and drew a knife to defend himself against the deceased. The deceased ran off. The appellant followed the deceased, caught up with him and stabbed the deceased several times. When the deceased fell down, the appellant walked away.

(f) The deceased passed away on the scene.

(g) None of the other persons (accused) in the appellant's group participated in his pursuit of the deceased, nor in the appellant's attack on the deceased.

[6] The aforementioned facts were accepted by the State. These facts did not include an admission of the execution or the furtherance of a common purpose to commit the crime of murder. In *State v Kekana*,[1] the following was said in respect of the acceptance of an accused's plea that differs from the charge in the indictment:

> *"[17] To my mind, the present case is distinguishable from those where a prosecutor accepts a plea of guilty on a lesser charge, as was the case in Ngubane and S v Tshilidzi 2013 JDR 1356 (SCA) ([2013] ZASCA 78). In this case the appellant had not pleaded to a lesser or alternative charge. He pleaded guilty to murder, subject to the penal provisions of the CLAA. In the former cases the focus is on the type of offence the accused ought to be convicted of. The state is in charge of that process. As Van der Merwe AJA explained in Tshilidzi para 9, the state delineates the lis between it and the accused by deciding to accept a plea on a lesser charge. The acceptance by the prosecutor of the plea of guilty on the alternative charge has the result of removing the main charge from the indictment. It follows that a conviction on the main charge could not stand. In other words, in such a case, it is up to the state to determine the offence that the accused is convicted of. The court has no say in that and must sentence the accused in accordance with the accepted plea."*

[7] It was conceded by counsel, who appeared on behalf of the respondent, that the provisions of section 51(1) of the CLAA were not applicable in view of the acceptance of the appellant's plea that did not include an admission in respect of the allegation of the execution or the furtherance of a common purpose. However, it was submitted on behalf of the respondent that the provisions of section 51(2) of the CLAA remained applicable in respect of sentencing. In this regard it is submitted that the prescribed minimum sentence applicable would be 15 years of imprisonment in that the appellant was a first offender.

[8] It is common cause that the court *a quo* found substantial and compelling circumstances to deviate from the prescribed minimum sentence of 15 years of imprisonment as provided for in section 51(2), read with Part 11 of Schedule 2, of the CLAA. Hence, the imposing of a sentence of 12 years of imprisonment.

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[1] 2019(1) SACR 1 SCA at [17]

[9] The grounds upon which the appellant relied in his appeal against the sentence imposed by the court *a quo*, were as follows:

(a) With reference to the particular and specific facts under which the crime of murder was committed, as accepted by the State, the provisions of section 51(1) of the CLAA found no application. As recorded, this was conceded by the respondent;

(b) The court *a quo* failed to give adequate consideration to the prospects of rehabilitation in the light of the appellant's age, his plea of guilty upfront, the appellant's acceptance of full responsibility for his actions and his personal circumstances;

(c) The sentence imposed is out of proportion with the common cause facts of the matter.

[10] It is trite that a court of appeal can only interfere with a sentence imposed if it finds that the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.[2]

[11] It is submitted on behalf of the appellant that this court may interfere with the sentence imposed by the court *a quo* for what follows.

[12] When weighing up of the personal circumstances of the appellant as opposed to the gravity of the offence and the issue of retribution, the court *a quo* overemphasised the latter two factors.

[13] The attack on the deceased was found by the court *a quo* to have been violent and severe in that the appellant had stabbed the deceased 13 times, all but two of the stab wounds to be in the chest area. Two were to the head of the deceased. However, in this regard the post-mortem report indicates that the two wounds to the head were lacerations, and did not penetrate. Of the balance of the wounds to the chest, two were posterior and were lacerations. The majority of the wounds to the chest were lacerations. Three of the wounds to the anterior chest were penetrating wounds, of which one was deep penetrating. The latter apparently nicked the heart and led to the deceased bleeding to death. It is not stated in the post-mortem report that any of the other wounds, and in particular the other penetrating wounds, were lethal and potentially life threatening. In my view, the attack was to an extent indiscriminate and randomly executed committed in anger.

[14] In his plea explanation, the appellant accepted that his actions could cause the death of the deceased, the so-called *dolus eventualis* actions on the part of the appellant.

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[2] *Director of Public Prosecutions, Kwa-Zulu-Natal v P* 2006(1) SACR (SCA) at [10]; see also *S v Boggards* 2013(1) SACR 1 (CC) at [41]

[15] The court *a quo* dealt comprehensively with the devastating effect on the deceased's next of kin, in particular the elderly mother of the deceased. No doubt that such untimely death of a child is devastating, but no consideration was given to the society in general which would include the parents of the appellant, his fellow peers and the society that he served as an upright member. He was a leader and assisted the young with their school work. He served the community well.

[16] The court *a quo* primarily held that the young age of the appellant, that he was a first offender, a pillar in the community and leader in the community at such a young age and further had the potential to serve society, were the mitigating factors that outweighed the aggravating factors and constituted substantial and compelling reasons. Despite the probation officer's report that the appellant was a good candidate for rehabilitation, the court *a quo* underplayed that factor.

[17] In my view, a deviation from the minimum sentence of 15 years of imprisonment to that of 12 years is shockingly and disturbingly inappropriate and warrants an interference.

[18] The unfortunate incidence occurred late at night and at a tavern. Although no evidence was led in that regard, in all probability the appellant's group had already imbibed in alcoholic drinks earlier and was on a celebratory excursion. The appellant was enraged at the audacity of the deceased's actions and his arrogance therein. The deceased was the original aggressor. That attitude enraged the appellant and led to the unfortunate retaliation for which the appellant verbalised his sincere remorse. The appellant accepted the sole responsibility of the deed.

[19] In view of the foregoing, the court *a quo* paid lip service to the true circumstances that constituted substantial and compelling reasons for a proper deviation from the prescribe minimum sentence of 15 years of imprisonment.

[20] On behalf of the appellant it was submitted that an appropriate sentence would have been one of 8 years of imprisonment of which 4 years were to be conditionally suspended for 5 years. On behalf of the respondent it was accepted that an appropriate sentence would have been one of 8 years of imprisonment without any portion thereof suspended.

[21] I agree that in this matter and with reference to the particular and specific common cause facts enunciated above, an appropriate and proportionate sentence to the facts of this matter would be one of 8 years of imprisonment.

[22] It follows that the appeal against sentence stands to be upheld.

I would propose the following order:

(1) The appeal against sentence is upheld;

(2) The sentence of 12 years of imprisonment imposed by the court *a quo* is set aside and substituted with the following sentence:

"*The accused is sentenced to 8 years of imprisonment*"

(3) The sentence is ante-dated to 20 September 2019;

(4) The balance of the order granted by the court *a quo* on 20 September 2019 remains in force.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

I agree

N SKIBI
ACTING JUDGE OF THE HIGH COURT

It is so ordered.

On behalf of Appellant: Ms L Augustyn
Instructed by: Legal Aid SA

On behalf of Respondent: Ms M J Makgwatha
Instructed by: Director of Public Prosecutions