IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no: A339/2017

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

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In the matter between:

PHOLO JOHANNES MOSIKILI **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MOULTRIE AJ:

[1] The appellant admitted guilt of the murder in tragic circumstances of his adult son, Vincent Moloyi Mosikili. In passing sentence, the Magistrate concluded that substantial and compelling circumstances existed that justified a departure from the otherwise mandatory minimum sentence of 15 years' direct imprisonment as

contemplated in section 51 of the Criminal Law Amendment Act, 105 of 1997. The appellant was sentenced to 12 years' imprisonment, five of which were wholly suspended for a period of five years on condition that he is not convicted of a similar offence. The Magistrate also declared the appellant unfit to possess a firearm under section 103(1) of the Firearms Control Act, 60 of 2000.

[2] The appellant sought, and was granted, leave to appeal against the sentence of imprisonment. No appeal is directed against the order under the Firearms Control Act.

Interference with sentence on appeal

[3] Sentencing is primarily a matter falling within the discretion of the trial Court. A court considering an appeal against sentence therefore does not have a general discretion to interfere with the sentence. It may do so in two circumstances: firstly, if it is found that there has been an improper exercise of judicial discretion in that the sentence is vitiated by irregularity or misdirection; or secondly, if the disparity between the sentence of the trial court and the sentence which the appellate court would itself have imposed is so marked that it can properly be described as "*shocking*", "*startling*" or "*disturbingly inappropriate*".[1]

[4] In this matter, the magistrate himself remarked in granting leave to appeal that he "*did not even consider*" imposing a sentence of correctional supervision in view of the seriousness of the offence and "*the fact that there is a mandatory minimum sentence involved*". It is thus apparent that the magistrate "*closed his mind*" to correctional supervision as a sentencing option and did not consider either the pre-sentencing report and recommendation prepared by the Department of Social Development ("**the pre-sentencing report**", exhibit "J"), which recommended a sentence of correctional supervision, or the suitability report prepared by the Department of Correctional Services ("**the suitability report**", exhibit "K"), which found that the appellant was a suitable candidate for a sentence of correctional supervision. The Magistrate stated that that these reports would not be "*helpful*" in circumstances where the question was whether there were grounds to depart from

[1] *S v Malgas* 2001 (2) SA 1222 (SCA) at para [12].

the mandatory minimum sentence.

[5] As counsel for the State rightly conceded during argument, and as held in *Ngqandu*, this constituted a misdirection: a sentence of correctional supervision may be considered even in relation to the most serious of offences.[2] In the circumstances, this Court is 'at large' to assess sentence as if it were a court of first instance.

[6] In any event, as will become evident from the discussion and conclusion reached below (i.e. that the appellant should not have been sentenced to direct imprisonment, but should have been sentenced to a lengthy period of correctional supervision), I also consider that the disparity between the sentence of the trial court and the sentence which I would have imposed is so marked that it can indeed be described as "*shocking*", "*startling*" or "*disturbingly inappropriate*".

Approach to sentencing, and correctional supervision in particular

[7] The appellant contends on appeal that direct imprisonment was not an appropriate sentence and that he should be sentenced to a period of correctional supervision.

[8] Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy.[3] When sentencing an accused, a court is required to consider the four objectives of punishment (deterrence, prevention, rehabilitation and retribution) in view of the triad of factors as set out in *S v Zinn*.[4] These factors are (i) the personal circumstances of the offender including his character, conduct in life and personality and everything that influenced the commission of the offence; (ii) the nature and seriousness of the offence committed; and (iii) the interests of the community, including the necessity for a level of uniformity in sentencing.

[9] In view of the seriousness of the crime of which the appellant is guilty (murder, albeit as a first offence), the legislature has decreed that the court is obliged to

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[2] *Ngqandu v The State* [2014] ZAECGHC 87 (15 October 2014) at para [8].

[3] *S v Rabie* 1975 (4) SA 855 (A) at 862G.

[4] *S v Zinn* 1969 (2) SA 537 (A).

impose a minimum sentence of 15 years' direct imprisonment unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.[5] In considering whether such circumstances exist and, if so, what sentence is appropriate, it is necessary to examine the circumstances of the offence intensively and attempt to determine the exact degree of seriousness of the particular act in respect of which the accused has been found guilty as well as the personal circumstances of the accused and the interests of the community.

[10] The imposition of a sentence of correctional supervision is provided for in section 276(1)(h) of the Criminal Procedure Act, 51 of 1977 ("**the CPA**") and falls under the general rubric of "*community corrections*" addressed in chapter VI of the Correctional Services Act, 111 of 1998 ("**the CSA**"). The laudable objectives of community corrections are recorded in section 50(1)(a) of the CSA as being:

> *"(i) to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner;*
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> *(ii) to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future;*
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> *(iii) to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and*
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> *(iv) to enable persons subject to community corrections to be fully integrated into society when they have completed their sentences."*

[11] The courts have held that the introduction of correctional supervision has sought to distinguish between two types of offenders – those who should be removed from society and imprisoned and those who, although deserving of punishment, should not be so removed.[6]

[12] In *S v Samuels*, the Supreme Court of Appeal held that "*with appropriate conditions, correctional supervision can be made a suitably severe punishment,*

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[5] Section 51(2)(a) read with section 51(3)(a) of the Criminal Law Amendment Act.

[6] *S v Ingram* 1995 (1) SACR 1 (A) at 9d-e.

even for persons convicted of serious offences".[7] The SCA again referred to this case recently when it held in circumstances that are notably similar to those applicable in the current matter that the appellant, who was also found guilty of murder to which a mandatory minimum sentence would otherwise have applied …

> *"… certainly does not fall within the category of persons who need to be removed from society. Imprisonment could, and probably would, have a devastating effect on her, particularly taking into consideration that over a period of 30 years she was subjected to assaults and abuse by the deceased. I am of the view, in all the circumstances, that consideration should be given to the imposition of a sentence under s 276(1)(h)".*[8]

[13] The courts should be cautious not to debase the currency of correctional supervision as a form of punishment, especially in the case of serious offences. If, however, it is used in appropriate cases and applied to those likely to respond positively to its regimen, it can serve to protect society without the destructive impact incarceration can have on a convicted person's innocent family members.[9]

[14] As noted above, the existence of a mandatory minimum sentence does not, in itself, exclude a conclusion that correctional supervision is potentially an appropriate sentence when substantial and compelling circumstances are indeed found to exist.

Analysis

[15] In this instance, the circumstances of the murder insofar as they are relevant to the assessment of sentence emerge from the oral evidence given by Warrant Officer Tshabalala at the trial, from the appellant's admissions in terms of section 220 of the CPA, and from the pre-sentencing and suitability reports, the contents of which were not disputed when admitted into evidence at the trial.

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[7] *S v Samuels* 2011 (1) SACR 9 (SCA).

[8] *Botha v The State* [2017] ZASCA 148 (8 November 2017) at para [46].

[9] *S v Schutte* 1995 (1) SACR 344 (C) at 350c-e; *S v Potgieter* 1994 (1) SACR 61 (A) at 88d and *S v Ingram* (above) at 9h.

[16] Having regard to all of the circumstances of the case relevant to the so-called "*Zinn triad*", I am of the view that there are substantial and compelling circumstances justifying the departure from the mandatory minimum sentence. Furthermore, in deciding what would be a just and justifiable sentence, I do not believe that imprisonment is the only appropriate punishment in the circumstances and consider that all four theories of punishment are adequately met by a sentence of correctional supervision for the maximum period of three years[10] with appropriate conditions[11] largely reflecting those proposed in the suitability report.

[17] I say so for the reasons set out below.

The nature and seriousness of the offence committed

[18] The crime of murder is a serious crime. In this instance, the appellant collected his firearm from his motor vehicle and decided that he was going to shoot his son. There is no indication that the deceased was armed at any time during the altercation that preceded the shooting, even prior to the time that he initially left the house before the arrival of the police. The appellant shot the deceased five times at close range. The deceased was only about 28 years of age, and was the father of a young child.

[19] On the other hand, both the broader context and precise circumstances of the crime are compellingly extenuating.

[20] Following his return from initiation school, the deceased became disrespectful and terrorised his immediate and extended family, making life unbearable for them. He was violent and had assaulted his parents (the appellant and his wife), as well as his girlfriend when drunk and had caused damage to property on numerous occasions. In one instance, he had broken all the windows in his girlfriend's house, and the appellant had to replace them. In 2013, the deceased assaulted the appellant with a spade. The deceased had taken the appellant's firearm without permission from the safe. He regularly arrived at the house "*in a wounded state*" being pursued by community members who wanted to assault him. A protection

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[10] CPA, section 276A(1)(b).

[11] CSA, section 52.

order was obtained against the deceased in November 2013. The pre-sentencing report records that according to the deceased's brother, he failed to respond to many calls to change his behaviour. The Magistrate concluded that …

> *"…the deceased's hostility and unbecoming violent conduct towards the other members of his family was a time bomb which his father stepped on and triggered the event that led to the deceased's own demise."*

[21] On the day in question, the deceased again arrived at the house drunk and assaulted his mother, as well as a cousin. When the deceased's mother was medically examined some days later, it was recorded that she still had facial and upper body injuries as a result of an assault with a solid brass object. When the cousin was examined on the day, his clothing was found to be stained with blood and he had sustained a laceration above his eye.

[22] The South African Police Service (SAPS) were contacted, and the deceased left the house before they arrived. Shortly after the SAPS arrived, however, the deceased returned. The deceased then spoke to the SAPS who listened to him sympathetically. He taunted them, challenging them to arrest him, saying he had done nothing wrong and showing them his injuries from a previous occasion when the appellant had injured him with hot water during an altercation. It was then that the appellant shot the deceased several times.

[23] While the fact that a shooting occurs in the presence of the police may in some circumstances be regarded as an aggravating factor, I consider that the true significance of the presence of the police in this instance is the fact that their arrival appears to have had little impact on the deceased, who arrogantly taunted them to arrest him. This behaviour signalled that his arrest would change nothing, and that the cycle of violence and impunity was destined to continue. Not even the police could assist the family. In a sense, therefore I consider that the presence of the police and their seeming inability to assist in ensuring a lasting solution to the untenable position that the appellant's family found itself in constitutes a mitigating factor. The appellant indicated that he felt a sense of anger, frustration and hopelessness after the physical assault by the deceased on his mother and cousin on the night in question, and that he felt that even the police could not assist him.

He told the author of the pre-sentencing report that he had resolved to kill both the deceased and himself "*so that the violence could be stopped permanently*". This only serves to confirm the appellant's hopelessness.

[24] I accept that the conduct of the deceased, both prior to the shooting and on the day in question, was a contributory (albeit not exculpatory) cause of his own demise, in that it triggered the breakdown of the appellant that led to the murder.

[25] The appellant at no stage intended to cause physical harm to anyone other than the deceased and himself, and in fact did not do so.

The personal circumstances of the offender

[26] The appellant is a married father, 58 years of age, who maintains the deceased's child (his grandchild). The appellant obtained grade 7 as his highest level of education and has been employed as a driver for most of his working years. Although the wife of the appellant is also employed, it appears that he is the primary breadwinner in the family. He continues to support and take care of the deceased's son, who lives with him, and is putting him through school. All of these are mitigating factors.[12]

[27] The appellant is a first offender, which is highly valued as a mitigating factor.[13] He should not be sent to prison if it can be avoided.[14] This fact, combined with the late middle age of the appellant, as well the appellant's motivation for perpetrating the offence constitute substantial and compelling circumstances justifying departure from the mandatory minimum sentence.

[28] Despite the pain and humiliation that the appellant and his family experienced at the hands of the deceased, the appellant had continued to assist him through financial and other support.

[29] The appellant will forever be haunted by the fact that he killed his own son and took the life of his grandson's father. He is clearly undergoing intense emotional

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[12] *S v Mnguni* 1994 (1) SACR 579 (A) at 583b-d.

[13] *S v Stonga* 1997 (2) SACR 497 (O) at 501b-c.

[14] see e.g. *S v Van Wyk* 1997 (1) SACR 345 (T) at 366h-i.

suffering as a result of his conduct: he occasionally sits for hours alone looking into the distance and not speaking to anyone. As the defence pointed out, the appellant is, in a sense, already serving a sentence. There is little or no need for retribution in this case. The pre-sentencing report states that:

> *"the punitive element is covered to a satisfactory level. Also it may also be considered that rehabilitation is not an element of serious consideration because the odds of him committing the same offence are almost non-existent. Therefore monitoring him from home and referring the entire family to counselling may seem to be the necessary measures to be imposed."*

[30] Given the unique circumstances and motivation for the crime in the context of a close family relationship that had soured over many years, the appellant's late middle age, and his clean record, I consider that there is little risk of recidivism. In such cases, the penal objective of prevention is only relevant in the context of the deterrent effect any sentence may have on prospective offenders,[15] a factor that I consider below.

[31] Although the appellant initially entered a plea of not guilty, the defence relied upon was of a purely technical nature (sane automatism). The appellant, however, changed attorneys after the evidence of Tshabalala was led by the State and once his new attorney had taken "*proper instructions*" and advised him, he made a comprehensive admission in terms of section 220 of the CPA. It is thus apparent that the appellant recognises the unlawfulness of his conduct and is remorseful, which is an important ameliorating consideration. It is significant that the appellant was out on bail throughout the trial but (as the Magistrate observed), he never missed a day of court. Bail was granted after conviction and the prosecution did not oppose bail, even after sentence and pending the appeal.

[32] In my view, the relatively low risk that the appellant will re-offend, combined with his remorse renders a sentence of correctional supervision more likely to achieve the goal of rehabilitation than other potential sentencing option, particularly in view of the Magistrates' conclusion that the appellant lacks coping mechanisms, which

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[15] *S v Ingram* (above) at 9a-b.

may be expected to be addressed in the course of the treatment, development and support programmes that would be available to him in the course of correctional supervision.

[33] The imprisonment of the appellant would be expected to have negative consequences for his family and constitute a punitive measure for them even though they have already suffered the effects of the crime and the loss of the deceased. Apart from a loss of income, the imprisonment of the appellant would break up the family and deprive it of a person that the pre-sentencing report refers to as a "*loving and respectful*" husband and father with "*good interpersonal relations*". A factor that weighs heavily in this regard is also the best interests of the child of the deceased, who is taken care of by the appellant and his wife, and the impact of sentence on him. The child of the deceased has been residing with the appellant and his wife since he was a baby.

[34] The pre-sentencing report recommends correctional supervision and the suitability report indicates that the appellant is a suitable candidate for this form of punishment provided that suitable conditions (which are specifically and carefully considered) are imposed.

The interests of the community

[35] A sentence does more than deal with a particular offender: it constitutes a message to the society in which the offence occurred.[16] While there are cases where the interests of society must outweigh the personal interests of the accused because of the seriousness of the offence and in such cases, correctional supervision is not an appropriate sentence,[17] this is not such a case.

[36] While the appellant poses little threat to society at large,[18] it is (as noted above) necessary to consider the deterrent effect of the sentence on prospective offenders. While deterrence calls for a measure of emphasis, appellants should

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[16] *S v Sinden* 1995 (2) SACR 704 (A) at 709b.

[17] *S v Erasmus* 1998 (2) SACR 466 (SE) at 472b, citing *S v Blank* 1995 (1) SACR 62 (A).

[18] cf. *S v Ferreira* [2004] 4 All SA 373 (SCA) at para [46].

not be visited with punishment to the point of being "*broken*".[19] The Constitutional Court, however, has approved the observation of Kriegler AJA (as he then was) that correctional supervision "*should not be categorised as a lenient alternative to direct imprisonment*" and that "*[i]t can, depending on the circumstances, involve an exacting regime, even house arrest*". The Constitutional Court went on to agree with Conradie J (as he then was) that "*[i]n some ways it is harder than imprisonment. … It involves a good deal of psychological strain, it takes a great deal of restraint and determination on the part of a probationer. It can be very stressful*".[20]

[37] A long period of correctional supervision combined with rigorous conditions is likely to send a strong signal to the community that conduct such as that of the appellant is not to be condoned.

[38] Furthermore, as is apparent from section 52(1)(b) of the CSA, a sentence of correctional supervision may include a condition requiring the performance of community service "*in order to facilitate restoration of the relationship between the sentenced offenders and the community*". I consider that the imposition of such a condition would adequately meet the interests of the community in this instance.

Order

[39] The appeal succeeds and the sentence of the trial court is set aside and replaced with the following order:

> "1. The appellant is sentenced to 36 (thirty-six) months' correctional supervision, during which period the following conditions shall apply:
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> i. House detention at 1998 Indianapolis Street, Phase 1 Beverly Hills, Evaton during the times determined from time to time by the relevant supervision committee referred to in section 58 of the Correctional Services Act ("**the supervision committee**"), provided that the

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[19] *S v Sparks* 1972 (3) SA 396 (SCA).

[20] *S v M (Centre for Child Law intervening as amicus curiae)* 2007 (2) SACR 539 (CC) at para 63, citing *S v R* 1993 (1) SA 476 (A); *S v E* 1992 (2) SACR 625 (A) at 633a-b and *S v Harding* SS61/92, 23 September 1992, unreported.

supervision committee shall have the power to suspend any period of house detention on such conditions as it deems fit, or thereafter, for as long and under such conditions as it deems fit, reintroduce such house detention.

ii. Should the appellant cease employment for whatever reason, he shall make reasonable attempts to find employment and will furnish the supervision committee with proof of these attempts.

iii. The appellant may not change his home or work address without prior permission of the supervision committee.

iv. The appellant may not leave the magisterial districts of Vereeniging and Vanderbijlpark without prior permission of the supervision committee.

v. The appellant shall perform free community service for a total period of 16 hours per month for each month of the sentence. The nature of the community service, the place where and the times during which such service is to be performed, will be determined by the supervision committee, provided that the supervision committee is empowered to add additional community service in order to promote the fulfilment of the sentence; if merited, to suspend a part of the period of community service on such conditions as it deems fit, or, thereafter, for as long and under such conditions as it deems fit, to reintroduce such community service.

vi. The appellant shall take part in orientation and life skills programmes and such further treatment, development and support programmes as determined by the supervision committee following assessment by social workers of the Department of Correctional Services.

vii. The appellant shall contribute financially towards the cost of the correctional supervision in the amount as determined by the National Commissioner of Correctional Services, which shall be within the means of the appellant. For this purpose, the appellant shall without

delay provide the Commissioner with a statement of assets and liabilities.

viii. The appellant shall refrain from abusing alcohol or illegal drugs and shall refrain from visiting shebeens, taverns and bars for the duration of the sentence.

ix. The appellant shall report within 48 hours after this order is made to the Admissions Officer, Ms G Chauke at Department of Correctional Services, Vereeniging Community corrections, 28 Market Avenue, Vereeniging.

2. The supervision committee is directed to monitor the fulfilment of the abovementioned conditions by the appellant.

3. The appellant is declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act, 60 of 2000."

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RJA MOULTRIE
Acting Judge of the High Court
Gauteng Division, Pretoria

RABIE J:

I agree and it is so ordered.

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CP RABIE
Judge of the High Court
Gauteng Division, Pretoria

DATE HEARD: 30 April 2018

JUDGMENT DELIVERED: 3 May 2018

APPEARANCES

For the Appellant: Adv R Van Wyk

Instructed by: BMH Attorneys, Vereeniging

For the State: Adv C Pruis

Instructed by: Director of Public Prosecutions, Pretoria