SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1094/2015

In the appeal between:

DAVID LICHTENSTEIN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lichtenstein v S* (1094/2015) [2016] ZASCA (132) (29 September 2016)

Coram: Maya, Tshiqi, Theron, Seriti JJA and Dlodlo AJ

Heard: 18 August 2016

Delivered: 29 August 2016

Summary: Sentence: Minimum sentence regime: principles to be applied: absence of substantial and compelling circumstances: imposition of minimum sentences justified.

ORDER

On appeal from: North West Division, Mahikeng (Hendricks and Kgoele JJ and Chwaro AJ, sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Seriti JA (Maya DP, Tshiqi, Theron JJA and Dlodlo AJA concurring):

[1] The appellant, Mr David Lichtenstein, together with his co-accused appeared in the North West Division of the High Court sitting at Mogwase on 2 June 2014 (Gutta J). They faced one charge of murder and another of robbery with aggravating circumstances as defined in s (1)*(b)* of the Criminal Procedure Act 51 of 1977. Before pleading to the charges, the appellant and his co-accused were advised that in the event of a conviction, the State intended to invoke the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 which prescribes minimum sentences for certain specified offences.

[2] On the same day, the appellant and his co-accused pleaded guilty to the two charges and they were convicted. On 4 November 2014 the appellant was sentenced to life imprisonment for the murder charge and 15 years' imprisonment for robbery. The sentences were ordered to run

concurrently.

[3] The appellant applied for leave to appeal against the sentences. He was granted leave to appeal to the full court. On 27 August 2015 the full court of the North West Division, Mahikeng (Hendricks and Kgoele JJ and Chwaro AJ) dismissed the appellant's appeal. The appellant, with leave of this Court, now appeals against his sentences only.

[4] The issue in this appeal is whether the trial court erred in concluding that there are no substantial and compelling circumstances that justify the imposition of lesser sentences than the prescribed minimum sentences of life imprisonment on the murder charge and 15 years' imprisonment on the robbery charge.

[5] The facts of this case appear on the appellant and his co-accused's written pleas made in terms of s 112(2) of the Criminal Procedure Act. The relevant parts of the appellant's plea read as follows:

'Count 1 (Murder):

(a) On the 11 September 2012, I was present at 25 Geelhout Street, Protea Park, Rustenburg, in the district of Rustenburg.

(b) I admit to behaving wrongfully, unlawfully and intentionally by grabbing the deceased, pushing him on the ground and strangling him to death with an electrical cable. My action had caused the death of the deceased.

(c) The complainant was known to me, and there was no tension between us.

(d) As such my conduct was not justifiable.

(e) I had taken my co-accused who was my girlfriend for the past three months to the house of the deceased to spent the night there.

(f) I had known the deceased since I was a very young boy. My mother, W[...] B[…] was employed by the deceased for a period of approximately 10 years. The deceased was like a father to me.

(d) The deceased, my co-accused, Petro, and myself were consuming alcohol together.

After a while my co-accused told me that the deceased was attempting to fondle with her private parts. This angered me and I attacked the deceased. I assaulted him with the intent to kill him and I then strangled him with the electrical cord until he died. I then removed the deceased's belongings from [his] . . . house and placed it in the [his] . . . motor-vehicle. My intention was to steal the belongings of the deceased. I drove off in the deceased's motor vehicle with my co-accused, Petro Bezuidenhout.

. . .

(f) I am sorry and deeply regret my wrongful action.'

[6] The s 112(2) statement of the appellant's co-accused is almost similar to that of the appellant, but the relevant part I want to refer to reads as follows:

'. . . I then covered the deceased's body with a blanket and together with my co-accused took the deceased's belongings and placed them in [his] . . . motor-vehicle. My intention was to steal the deceased's personal belongings. My co-accused and I drove off in the deceased motor-vehicle with the intention of stealing the vehicle and the belongings of the deceased.

We intended to sell the items and leave the city with the money that we would have received for those items.'

[7] The deceased's belongings that the appellant and his co-accused took are a VW City Gold, electric plug, Okapi knife, cosmetics, a door key and various clothing items.

[8] The post-mortem report indicates that the chief findings were the following:

'White adult male with a history of strangulation found in the bathroom. Deep friction abrasion around the neck. Subaponeurotic haemorrhages. Haematoma over the cervical spine with fracture C6 and dislocated. Spinal cord transacted at C6 level. Blood in the trachea. Multiple petechial haemorrhages.'

The cause of death is described as '[m]ultiple injuries, anoxia, cervical spine fracture.'

[9] The appellant's SAP69 was read into the record. It indicates that:

(a) On 11 October 2000, appellant was found guilty of malicious damage to property and was fined R600 or 60 days' imprisonment;
(b) On 14 September 2001, he was found guilty of abuse of dependence-producing substance and sentenced to pay a fine of R1 000 or three months' imprisonment wholly suspended for five years on certain conditions;
(c) On 14 August 2004, he was found guilty of assault with intent to do grievous bodily harm and two counts of malicious damage to property. All counts were taken as one for purpose of sentence. A fine of R1 000 or six months' imprisonment was imposed;
(d) On 16 February 2006, he was found guilty of theft and a fine of R1 800 or six months' imprisonment was imposed, of which R1 000 or four months' imprisonment were suspended on certain conditions;
(e) On 18 April 2006, he was found guilty of assault and sentenced to pay a fine of R1 000 or two months' imprisonment wholly suspended for five years on certain conditions;
(f) On 13 August 2007 he through an admission of guilt was found guilty of assault and was fined R300;
(g) On 2 July 2009, he was found guilty of theft and sentenced to pay a fine of R2 000 or two months' imprisonment wholly suspended on certain conditions;
(h) And on 6 January 2009, he was found guilty on two counts of theft. The two counts were taken together for purpose of sentence. Four years' imprisonment was imposed.

[10] The appellant did not testify in mitigation of sentence. He was content to have his personal circumstances stated by his legal representative from the bar.

[11] In mitigation of sentence, the appellant's counsel advised the trial court that the appellant was born on 12 December 1981 and that at time of the commission of the offences he was 30 years old. He was employed and earning R8 000 to R9 000 per month. He is single but has two minor children and he is paying maintenance for one of the minor children. The appellant was an awaiting trial prisoner for two years. The appellant's counsel further advised the trial court that the appellant had an alcohol and drug abuse problem since an early age and that at the time of the commission of the offences he was highly intoxicated and had been under the influence of drugs. Counsel further submitted that the appellant pleaded guilty and that that showed remorse.

[12] In his heads of argument, the counsel for the appellant submitted that it is common cause that the minimum sentences are applicable in respect of both offences. The relevant parts of s 51 of the Criminal Law Amendment Act read as follows:

'**Discretionary minimum sentences for certain serious offences**

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

. . .

(3) *(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence'.

The offence of murder committed by the appellant and his co-accused falls under Part I of Schedule 2, whilst that of robbery with aggravating circumstances falls under Part 2 of Schedule 2.

[13] In *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA), the correct approach to establishing whether or not substantial and compelling circumstances exist was set out in para 25 as follows:

'What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.

In Summary:

A. Section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. 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.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe standardised and consistent response from the courts.'

[14] The appellant's counsel before this Court contended that the appellant pleaded guilty which is a sign of remorse. In *S v Mashinini* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA) para 24, Mhlantla JA held:

'The appellants did not verbalise any remorse. It was submitted on their behalf that their plea of guilt may be an indication of remorse. This submission cannot prevail. It must be borne in mind that the complainant knew the first appellant therefore the issue of identification of him as one of the rapists was not in dispute . . . It is therefore clear that there was overwhelming evidence against the appellants. They had no choice, but to plead guilty. Their plea under such circumstances can never be interpreted as remorse'.

[15] The appellant was arrested the day after the murder of the deceased. He was found driving the deceased's motor-vehicle and items stolen from the deceased's home were recovered in it. In my view, the appellant pleaded guilty because of the overwhelming evidence against him. His plea of guilty can therefore never be interpreted as remorse.

[16] In his s 112(2) statement, the appellant stated that he is sorry and deeply regrets his wrongful actions. He chose not to testify and his bold statement that he is sorry and regrets his actions could not be tested. In *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 13, Ponnan JA remarked:

'Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined.'

[17] The statement made by the appellant in his s 112(2) statement to the effect that he is sorry and deeply regrets his wrongful actions cannot

be tested and therefore cannot be of any assistance to the appellant.

[18] The appellant's counsel further submitted before this court that at the time of the commission of these offences, the appellant was highly intoxicated and under the influence of drugs. This submission is misplaced. The statement of the appellant in terms of s 112 only states that the appellant, his co-accused and the deceased were consuming alcohol. There is no evidence which indicates that the appellant was intoxicated, nor how long they had consumed the alcohol nor to what extent the appellant was affected by the alcohol. There is also no evidence that the appellant was under the influence of drugs. In my view, in the circumstances of this case, the fact that the deceased consumed alcohol cannot be regarded as a mitigating factor.

[19] The appellant's counsel submitted that in imposing the prescribed minimum sentences the trial court erred in not finding that the factors advanced in mitigation of sentence constituted substantial and compelling circumstances which justify a deviation from the prescribed minimum sentences. This submission is without merits.

[20] In *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 58, Nugent JA observed that:

'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background.'

The appellant was convicted of serious crimes and his personal circumstances must recede into the background. The personal circumstances of the appellant pale into insignificance when the offences committed by him are considered. That being the position, there are no other factors which can justify the imposition of sentences lesser than the

prescribed minimum sentences.

[21] In its judgment, the trial court took into account all the factors relevant for sentencing, inter alia: the seriousness of the offences; the interest of the society; and the accused's personal circumstances as well as the mitigating and aggravating factors. It then came to the conclusion that when viewed cumulatively, the mitigating facts and the personal circumstances of the accused do not justify a departure from the prescribed minimum sentences. In my view, the approach adopted by the trial court is correct and its conclusion cannot be faulted. The sentences imposed by the trial court are appropriate and fit the offender and the crimes committed and they are in the best interest of the society.

[22] Therefore the following order is made:
The appeal is dismissed.

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W L SERITI
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	N L Skibi
Instructed by:	Legal Aid South Africa Mahikeng Justice Centre, Mahikeng
	Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	N G Munyai
Instructed by:	The Director of Public Prosecutions North West, Mahikeng
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