THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 544/13

In the matter between Not Reportable

LUTENDO LIFE MULAUDZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mulaudzi v The State* (544/13) [2014] ZASCA 25 (27 March 2014)

Coram: Mhlantla, Wallis and Saldulker JJA

Heard: **5 MARCH 2014**

Delivered: **27 MARCH 2014**

Summary: Appeal – Sentence – Applicable minimum sentence.

ORDER

On appeal from: Thohoyandou High Court (Hetisani J sitting as court of first instance):

1 The appeal against the sentences on counts 1 and 2 is upheld.

2 The sentences imposed by the court below are set aside and replaced with the following sentences:

(i) On Count 1 – Murder – The accused is sentenced to 15 years' imprisonment.

(ii) On Count 2 – Assault – The accused is sentenced to 2 years' imprisonment.'

3 The sentence on count 2 is to run concurrently with the sentence on count 1. To the extent necessary, the sentences are antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 28 August 2007, being the date upon which the sentences were imposed.

JUDGMENT

SALDULKER JA (MHLANTLA and WALLIS JJA concurring):

[1] This appeal is directed against sentence only. It is before us with the leave of the court below. On 28 August 2007, the appellant, Mr Lutendo Life Mulaudzi was convicted in the Thohoyandou High Court, by Hetisani J on one count of murder and on one count of assault. He was sentenced to 24 years' imprisonment on the count of murder and 4 years' imprisonment on the count of assault respectively. The sentences were ordered to run concurrently.

[2] According to the indictment, the appellant was charged with murder, in accordance with section 51(1)(*a*) of the Criminal Law Amendment Act 105 of 1997 (Act) read with Part I of Schedule 2. Both counsel for the State and the

appellant submitted that no such section exists and counsel for the State and the appellant both submitted that there was an error in the charge sheet, which should have read s 51(1) of the Act, read with Part I of Schedule 2.

[3] Before us, both counsel limited their argument in regard to the propriety of the sentences imposed on the appellant. Counsel for the state, argued that the sentence of 24 years' imposed on the appellant for the murder of the deceased was not unduly harsh, having regard to the brutality of the attack on the deceased and the previous convictions of the appellant. Counsel for the appellant rightly submitted that there was no evidence that the murder of the deceased had been planned or pre-meditated and the murder therefore fell within the parameters of s 51(2)(*a*) of the Act, read with Part II of Schedule 2.

[4] Before turning to consider whether the sentences imposed on the appellant were appropriate, a brief consideration of the background facts is necessary. The complainant, on the assault charge and the deceased, on the murder charge were in an intimate relationship. On Christmas Eve, 24 December 2001, the appellant, the former lover of the complainant killed the deceased, and threatened to assault the complainant. Prior to her transferring her affections to the deceased, the complainant had been in an intimate relationship with the appellant for two years. Thereafter the complainant fell in love with the deceased and was his lover until his demise at the hands of the appellant. During the period the complainant was in a relationship with the deceased, she took out a protection order against the appellant to prohibit him from threatening and abusing her. On the fateful night, and whilst she was on her way to meet the deceased, the complainant was accosted by the appellant, wielding a knife. He was only partially dressed at the time. The appellant grabbed at her, dragged her along the road and threatened to kill her. She managed to break loose from his clutches and escape. The appellant then attacked the deceased, who was in the same vicinity, stabbing and stoning him and assaulting him with sticks. He then undressed the deceased, stabbing him several times in the genital area leaving him for dead, naked and bleeding. Later, after a crowd had gathered, he returned, broke through the crowd and tried to resume his assault, before running away again.

[5] In passing sentence on the murder count, Hetisani J paid no regard to the minimum sentence legislation.[1] He took into account the personal circumstances of the appellant these being that he was a relatively young man with two children, but overemphasised the appellant's previous convictions, two of which were for assault and two for malicious damage to property, wrongly concluding that such previous misdemeanours indicated that the appellant had a propensity for violence. The court a quo did not have any regard to the fact that this was a crime of passion, the appellant being the spurned lover, nor the fact that the complainant had taken out a domestic violence interdict to prevent the appellant from abusing her.

[6] It is clear from the evidence that the appellant's attacks on the deceased and his ex-lover were clearly committed without rational thought and with barely controllable emotion. This is evident from the manner in which he attacked the deceased, thereafter undressing him, exposing and stabbing his genital area and leaving him for dead. The appellant was clearly in a highly emotional and disturbed state when he attacked the deceased and the complainant. There was no pre-planning or pre-meditation. Against that background the aggravating factors are as follows: The deceased was seriously assaulted, stabbed and killed. The deceased died from serious fractures of the head, severe abrasions and deep lacerations. The court a quo misdirected itself in imposing the sentences that it did. The misdirection is material, entitling this court to interfere.

[7] Having considered all of the aforegoing, I am satisfied that the murder falls within s 51(2)(*a*) of the Act read with Part II of Schedule 2. The relevant section provides:

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[1] *S v Malgas* 2001 (1) SACR 469 (SCA) para 8; 'First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response.'

'(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;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;' (my emphasis)

[8] It is clear from a reading of s 51(2)(*a*) that 'any such offence' is a reference to an offence falling in the list of offences set out in Part II of Schedule 2. Because neither malicious damage to property nor assault are offences mentioned in Part II of Schedule 2, the appellant is considered a 'first offender' for the purposes of sentencing under s 51(2)(*a*) of the Act. The penal provision applicable to the appellant would be s 51(2)(*a*)(i); imprisonment for a minimum period of not less than 15 years, unless there are substantial and compelling factors justifying a lower sentence or reasons to impose a more severe sentence.

[9] However this does not mean that his previous convictions ought to be ignored. The appellant's previous convictions do not redound in his favour and must be taken into account in the assessment of whether substantial and compelling circumstances exist, justifying a sentence less than 15 years on the murder count. In my view there are no substantial and compelling factors justifying such a departure nor are there any circumstances warranting a more severe sentence. Therefore it follows that a sentence of 15 years' imprisonment for the murder is appropriate.

[10] As regards the sentence of assault, we are mindful that the appellant has two previous convictions for assault, however from the sentences imposed, I infer that they were relatively minor assaults there is no indication that the appellant used excessive force to attack the complainant in this case, and she escaped without harm. There was no basis for the court a quo to

impose a sentence of four years imprisonment in the circumstances of this case. A sentence of two years' imprisonment on count two is appropriate in the circumstances.

[11] In the result the following order is made:

1 The appeal against the sentences on counts 1 and 2 is upheld.

2 The sentences imposed by the court below are set aside and replaced with the following sentences:

'(i) On Count 1 – Murder – The accused is sentenced to 15 years' imprisonment.

(ii) On Count 2 – Assault – The accused is sentenced to 2 years' imprisonment.'

3 The sentence on count 2 is to run concurrently with the sentence on count 1. To the extent necessary, the sentences are antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 28 August 2007, being the date upon which the sentences were imposed.

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H Saldulker
Judge of Appeal

APPEARANCES

For Appellant:	Thomu AL Thohoyandou Justice Centre
For Respondent:	Makhera RJ Department of Public Prosecutions Thohoyandou