SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 772/2015

In the matter between:

JUDA JOSEPH PLEKENPOL **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Plekenpol v The State* (772/15) [2016] ZASCA 171 (24 November 2016).

Coram: Bosielo, Pillay, and Petse JJA

Heard: 11 November 2016

Delivered: 24 November 2016

Summary: Sentence: fatal assault with knobkierie: subsequent robbery: plea of guilty to murder read with Criminal Law Amendment Act 105 of 1997 and robbery: appeal against sentence of 24 years' imprisonment for murder only: failure to consider the Criminal Law Amendment Act 105 of 1997 misdirection: 24 years' imprisonment found to be too harsh, inappropriate and amounts to misdirection interference on appeal warranted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Maumela J sitting as court of first instance):

1 The appeal is upheld.
2 The sentence of 24 years' imprisonment imposed by the court below in respect of murder and the order antedating the operation of the sentences to 28 July 2014 are set aside. The order of the court below is substituted with the following:
'On count 1, the accused is sentenced to undergo 18 years' imprisonment. On count 2, the accused is sentenced to undergo 4 years' imprisonment which is ordered to run concurrently with the sentence imposed on count 1.'
3 The effective sentence of 18 years' imprisonment is antedated to 4 June 2015.

JUDGMENT

Pillay JA (Bosielo and Petse JJA concurring)

[1] The appellant, a 31 year old man, was arraigned before the Gauteng Division, Pretoria on charges of murder (count 1) and robbery with aggravating circumstances (count 2) - as defined in s 1 of the Criminal Procedure Act 51 of 1977 (the CPA). Both charges were subject to the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). He stood accused of murdering one Louis Cornelius Eksteen (the deceased) by repeatedly assaulting him and thereafter robbing him of a number of items, including his motor vehicle, cash and credit cards.

[2] He pleaded guilty to murder and robbery as envisaged in s 51(2) of the Act. His legal representative tendered a rather lengthy written statement in substantiation of his plea in terms of s 112 of the CPA wherein the events during which these offences were committed were fully described. The appellant signed this statement and indeed confirmed it in court. The prosecution accepted the plea as tendered. A number of documents such as the medico-legal examination (of the deceased), formal admissions, a photograph album and a sketch, a report in terms of ss 77, 78 and 79 of the CPA were

handed into evidence by agreement. He was then convicted of the offences he pleaded guilty to and on the 4 June 2016. The court found that the Act was not applicable in this case and proceeded to impose on the appellant a sentence of 24 years' imprisonment on count 1 and 4 years' imprisonment on count 2. The sentences were backdated to 24 July 2014, this being the date of conviction and were ordered to run concurrently.

[3] The appellant was granted leave to appeal against the sentence to this court. Similarly the respondent (the State) was granted leave to appeal against the sentence. I will refer to the parties as such hereunder in order to avoid any confusion.

[4] It is perhaps necessary at this stage to refer to important factors contained in the appellant's written plea explanation and relevant to the question of sentence. According to this statement the appellant became friends with the deceased shortly prior to the latter's death. It seems that a group, including the deceased and the appellant, were involved in homosexual activities though the deceased and appellant had not had a sexual relationship by the time the former died.

[5] On or about 11 April 2013 the appellant visited the deceased at his abode, as he had done twice before. They ate, consumed liquor and indulged in a drug referred to as CAT, as they had done before. At some time during that evening, the deceased suggested to the appellant that they engage in homosexual sex. The appellant ignored the suggestion and carried on drinking. He had already had a dose of CAT. Later the deceased grabbed hold of his arm. The appellant interpreted that as the deceased wanting to lead him to the bedroom in order to fulfill his earlier suggestion. The appellant felt offended and pulled loose from the grip but in doing so, tripped and fell to the floor. As he tried to get up, he saw the deceased coming towards him. He lost his temper, felt humiliated, provoked and lost his self-control. He got hold of what is commonly referred to as a knobkierie[1] and struck the deceased with it many times, randomly over his upper body and head. This assault caused the deceased to fall to the floor. Though he realised that the deceased was seriously injured the appellant kicked the deceased when he tried to stand up.

[6] Notwithstanding the realisation that the injuries were severe and that the

[1] A knobkierie is indeed depicted on the floor in a photograph taken during the immediate investigation at the scene of the murder - part of Exhibit F of the record.

deceased might possibly die as a result, he nonetheless continued to assault the deceased. Impulsively he decided to rob the deceased of some of his property in order to sell these to buy drugs. He then tied the deceased's hands behind his back so that the latter would not stop the robbery. He also demanded the pin number of the deceased's bank card which was provided to him. He thereafter put a cloth around the deceased's mouth so as to prevent him from screaming. After incapacitating the deceased he loaded a number of items into the deceased's motor vehicle. He thereafter locked the house and left with the vehicle. He sold some of the items and managed to withdraw R700 from the deceased's bank account. He was arrested on 17 April 2013.

[7] He admitted that at the time he knew that his actions were unlawful. It is clear from his admissions that he intended to severely injure the deceased even if it led to death. The appellant also admitted that the appropriation of the deceased's property was unlawful and that he had the intention of permanently depriving the deceased thereof. Finally he accepted the severity of the injuries he inflicted on the deceased and expressed sincere remorse for what he had done.

[8] In regard to sentence, the State called Doctor Janette Verster (Dr Verster) who had been appointed as a specialist forensic pathologist at the University of Pretoria on 1 January 2013 to demonstrate the seriousness of the injuries sustained by the deceased. She testified that she had performed the post-mortem examination on the deceased and had recorded her findings in a report which gives a graphic and gruesome description of the injuries sustained by the deceased. She recorded the following:
(a) A large 63 mm x 36 mm laceration across the right eyebrow containing bone fragments with associated bruising, contusion of the eye and a haematoma surrounding that eye; (b) a small 27 mm x 8 mm laceration on the right temple, (c) a v-shaped laceration on the bridge of the nose associated with a comminuted fracture of the nasal bones, the fragments of which could be seen in it; (d) small abrasions on the tip of the nose, on the left cheek and on the right corner of the mouth; (e) a 11 mm x 2 mm laceration perforated the right side of the lower lip; (f) the doctor observed that the head was covered with blood as was the strips of linen found around the neck and; (g) there were a number of lacerations, some superficial, found on the scalp of the deceased. She estimated the number of blows to the head that caused these injuries to be at least 13. She also found a tramline contusion across the superior aspect of the anterior chest wall

as well as a large contusion over the front chest. Further, she also found bruising to the left shoulder, linear contusions on the upper back, bruising of the right elbow and abrasion wounds on the wrists caused by a cord used to tie the deceased's hands. Smaller bruises were also noted on the lower area of the stomach, an irregular abrasion on the anterior aspect of the left knee, superficial abrasions on the left lower leg. All of these were the observations of the external appearance of the body of the deceased.

[9] The internal examination disclosed a comminuted fracture of the left side of the skull. She also noted the comminuted fracture of the nasal bridge as well as one on the right cheek bone together with a fracture of the right jaw. She also found that the neck contained extreme contusions caused by pressure exerted on the neck. Dr Verster was of the opinion that the cause of these fractures were multiple blows of sufficient blunt velocity impact on the head and jaw so as to expel one of the deceased's teeth and shatter the bone structure where impact occurred. She also noted contusions to the brain likely to have been caused by the blows which resulted in the skull fracture(s).

[10] She opined that a combination of the ligature pressure and a blow to the neck could conceivably have lead to heart failure. She also discovered that the second, third and fifth ribs on the right side of the thoracic cage were fractured, as was the fourth rib on the left side. She also found that the sternum had been fractured. This could also have led to cardiac arrest. As I understand the evidence, the examination of the internal organs disclosed that they were generally pale and this indicates that the deceased lost a large amount of blood.

[11] Dr Verster found that the cause of death of the deceased was 'multiple blunt force injuries to the head and chest, as well as injury to the neck, in the form of pressure to the neck structures'. In evidence she qualified this by testifying that any one of four sets of injuries, were sufficiently severe enough to cause the death on its own. Viz:
(a) the impact to the chest with contusions to the heart;
(b) multiple impacts to the head with brain injury(s);
(c) massive loss of blood arising from all the lacerations; and
(d) the impact to the neck which could have caused the death - not excluding asphyxia as a result of obstruction to the airways.
None of her findings were challenged by the defence.

[12] The State also called Mr Theunis Jacobus Eksteen the brother of the deceased. He testified that his mother was shocked at having discovered her mutilated dead son, aged 45 and losing her son compounded her already fragile emotional state as she had shortly before lost her own mother and her husband. He described his brother as a caring gentleman who would give more to others than to himself. He was a musical artist and generally knowledgeable. He was a father of a 13 year old daughter born of his marriage which subsequently ended in divorce. His daughter lived with her mother but had a good relationship with her father.

[13] He testified that he had an open relationship with his late brother and had his brother had homosexual preferences, he would have been aware of it. In fact he did not come across any signs indicative that he was so inclined when he cleared his brother's belongings from the house. Consequently he found it hard to believe that his brother would indulge in such activities. This view is however insignificant given the plea which the State accepted. He said that his mother had forgiven the appellant for what he has done and they accepted his apology as set out in a letter dated 26 July 2014 which he sent the deceased's family.

[14] The appellant himself testified in mitigation of sentence. He said that at the time of his testimony on 30 April 2015, he was in custody for a little more than two years, having been arrested for these offences on 17 April 2013. He had passed standard six as it was then referred to. He was married and has fathered a daughter who was 10 years old at the time. He had an inconsistent primary school career. He was raised primarily by his grandmother, since his father was absent in his life and his mother was working most of the time. It emanates that the appellant worked as a male prostitute since the age of 12, and at times as a security guard. During his adult life, he worked as a prostitute to generate an income. During all this, he resorted to the use of alcohol and drugs.

[15] He referred to a report drafted by a Dr Henk J Swanepoel, a clinical psychologist, which was handed in as an exhibit. Dr Swanepoel confirmed the finding that the appellant is a man with a low self-esteem suffering with a borderline personality disorder. He presents as a depressed person from a dysfunctional family background who had already spent a substantial period in prison. He was found to have developed suicidal ideation. He confirmed that he had also consulted with three psychologists as well as two

psychiatrists. He confirmed that he was diagnosed with a borderline personality disorder. The appellant pointed out that the treatment for the disorder is not forthcoming in prison - motivating a kind of reform therapy punishment. He exclaimed that he was extremely remorseful about the incident and did not think that he would ever forgive himself - hence he sent the family the aforementioned letter of apology.

[16] As stated above, the court below granted leave to appeal against sentence to this court. It is, however, not clear against which sentence(s) such leave was granted. However, the appellant's notice of appeal is clearly directed at the sentence imposed in respect of the murder only. There was no such notice filed by the respondent and hence there is no 'cross-appeal' on its behalf. The appeal is therefore restricted to the question of the appropriateness of the sentence of 24 years' imprisonment in respect of murder in terms of s 51(2) of the Act.

[17] Counsel for the appellant argued that the court below misdirected itself in that it approached the sentence incorrectly as it did not deal with the question of imposing a sentence in terms of s 51(2) of the Act read with sub-section (3) thereof. This was conceded by the respondent. Furthermore, it failed to consider whether a period of 24 years' imprisonment was shockingly inappropriate and consequently amounted to a misdirection. This too was conceded by the respondent.

[18] On the other hand, counsel for the respondent argued that antedating the sentence was not permissible in these circumstances and neither should the sentences have been ordered to run concurrently. Consequently, these also constituted misdirections. The approach by the court below towards the Act, is encapsulated by a single paragraph in its judgment on sentence which reads as follows:

'It is beyond dispute that the offences, of which the accused stands convicted, do not attract minimum sentences in terms of the Criminal Law Amendment Act in the sense that he was convicted of offences that do not entail the implementation of the minimum sentencing legislation.'

This is clearly a material misdirection as the offence falls squarely within the ambit of s 51(2) of the Act. This section prescribes a minimum sentence in respect, inter alia, of murder. Deviation from prescribed sentences is only possible if substantial and compelling circumstances as envisaged by s 51(3) of the Act are found to exist. Consequently this court is at large to interfere and assess the sentence afresh.

[19] In *S v Malgas* 2001 (1) SACR 469 (SCA) para 20 it is stated that:

'… acknowledge that one is obliged to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence which must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling.'

And at para 25D -

'The specified sentences are not to be departed from lightly and for flimsy reasons.'

[20] It was argued on behalf of the appellant that the following would globally constitute substantial and compelling circumstances as envisaged by the Act:

(a) that at the time of the commission of the offence he was under the influence of alcohol and drugs;

(b) that he was angered by the suggestion that he engage in sexual activities with the deceased;

(c) he was a product of a dysfunctional family with an unsavoury background and did not have the benefit of the influences of a mother and father during his upbringing; and

(d) that he was remorseful.

[21] It is clear that the brutality of the assault, evident from the photographs, was both gratuitous and inhumane. Moreover, the deceased was unarmed and helpless soon after the attack commenced. Any prospective sexual advances or attack by the deceased had ceased soon after the initial assault. There was no need to continue therewith. The appellant admitted that he realised that the continued assault could lead to the death of the deceased. Further, he tied the deceased up when he was in such a state in order to incapacitate him while he appropriated the deceased's property. The greed clearly blunted his sense of compassion. These factors constitute, in my view, extreme aggravating circumstances.

[22] In balancing the two sets of factors as set out above, I am, in this case, unpersuaded that there exists any substantial and compelling circumstances which would allow a deviation from the prescribed sentence for this offence.

[23] The appellant was convicted of murder as envisaged in Part II of Schedule 2 of the Act. Being a first offender to murder, the minimum sentence prescribed by s 51(2)*(a)*(i) of the Act is imprisonment for a period not less than 15 years. Using this as a benchmark, it

is necessary also to examine whether this punishment is sufficiently appropriate in light of the gravity of the crimes.

[24] It is worth mentioning that the record did not include a detailed list of the appellant's previous convictions. While there was an attempt to read this into the record, it became blurred, because of the interruptions and unclear explanations that it cannot serve any useful purpose. However, the appellant himself testified about one of them - viz an assault with intent to do grievous bodily harm for which he was sentenced to seven years' imprisonment. In that incident, because the victim irritated him in some way, the appellant clubbed him with a wooden lamp stand. As a result he broke the victim's arm and inflicted other serious injuries in the assault. This must certainly be taken into account.

[25] All that could be said in favour of the appellant has been said and his personal circumstances set out above do not lend themselves to an overly sympathetic consideration of what sentence should be imposed on him. Violent crimes have become endemic and prevalent in our country. These crimes pose a serious threat to the wellbeing of society. The public seeks the courts to send out a stern message which reflects the abhorrence of the public towards the scourge of crime. This public call is legitimate. Chaskalson P appropriately stated in *S v Makwanyane & another* 1995 (2) SACR 1 (CC) para 117 that:

'The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his *amicus* brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and

equally clearly those who engage in violent crime should be met with the full rigour of the law.'

[26] In *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 519c-e, the following was said:

'Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be more on retribution and deterrence….'

[27] In *S v Swart* 2004 (2) SACR 370 (SCA) at 378 para 12, it was said that:

'Each of the elements [to be considered] of punishment is not required to be accorded equal weight … and serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.'

[28] As stated above, the appellant has been in trouble with the law before. The last time he spent a long time in prison for an assault, the nature of which is not too dissimilar to the assault which lead to the death of the deceased. What is more, he committed this murder relatively soon after his release. It is evident that he has not benefitted nor learnt from that punishment. It furthermore seems that he has a propensity to break the law and certainly does not have the will power to resist resorting to violence when angered or irritated. Thus, he is clearly a threat to society. There is no evidence that there is much hope of him being rehabilitated any time soon. Consequently, a prison sentence of a substantial period is what is called for.

[29] In my view, this murder is of such a nature that it requires more than the prescribed minimum sentence. I have, however, taken into account that the appellant was in custody for two years awaiting trial prior to his being sentenced. However, the indignation which the general community would feel about a person like the appellant with his history of quickly resorting to extreme violence must be reflected in an appropriate sentence.

[30] In balancing all of the favourable factors as against the aggravating factors pertaining to this murder, I have come to the conclusion that 24 years' imprisonment is indeed shockingly inappropriate. In my view, a sentence of 18 years' imprisonment would strike a delicate balance between the nature and gravity of the offences, the interests of society and the personal circumstances of the appellant. I would regard such a sentence

as appropriate.

[31] While the respondent made much of the order to allow the sentence on count 2 to run concurrently with that on count 1, there is no appeal in regard thereto. Neither is it declared impermissible in the Act. To interfere therewith, absent an appeal directed at it, would be unfair on the appellant. In brief, all that has been appealed against is the inappropriateness of a 24 year period of imprisonment. Consequently the sentence on count 2 must remain intact as also the condition of concurrency attached thereto. The trial court's order antedating the sentences is however incompetent and thus cannot be allowed to stand. That power is in terms of sections 304 and 309 of the CPA reserved for reviewing and appellate courts respectively. However, I think it would be wise to set out in this order the full sentence so as to avoid any misunderstanding that could otherwise occur.

[32] In the result, the following order is made:

1 The appeal is upheld.

2 The sentence of 24 years' imprisonment imposed by the court below in respect of murder and the order antedating the operation of the sentences to 28 July 2014 are set aside. The order of the court below is substituted with the following:

'On count 1, the accused is sentenced to undergo 18 years' imprisonment. On count 2, the accused is sentenced to undergo 4 years' imprisonment which is ordered to run concurrently with the sentence imposed on count 1.'

3 The effective sentence of 18 years' imprisonment is antedated to 4 June 2015.

R Pillay

Judge of Appeal

Appearances:

For Appellant:	M G Ndalane (with J Mojuto) Instructed by: Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein
For Respondent:	P Vorster Instructed by: Director of Public Prosecution, Pretoria Director of Public Prosecution, Bloemfontein