**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Non-Reportable**

Case no: 552/2018

In the matter between:

**MOHAMMED SANI ALIKO** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** *Aliko v The State* (552/2018) [2019] ZASCA 31 (28 March 2019)

**Coram:** Leach, Dambuza and Van der Merwe JJA and Carelse and Eksteen AJJA

**Heard:** 11 March 2019

**Delivered:** 28 March 2019

**Summary:** Criminal law – sentencing – appellant convicted of murder – premeditation is not an essential requirement for sentence of life imprisonment – court exercises inherent discretion in determining suitable sentence – life imprisonment justified for brutal murder of a defenceless disabled victim.

---

**ORDER**

---

**On appeal from**: Eastern Cape Division, Grahamstown (Tshiki, Roberson and Bloem JJ sitting as court of appeal):

The appeal is dismissed.

---

**JUDGMENT**

---

**Dambuza JA (Leach, and Van der Merwe JJA and Carelse and Eksteen AJJA concurring):**

**Introduction**

[1] During the mid-morning of 8 August 2013, a 44 year old disabled man, Mohammed Laher (the deceased), was found murdered at the South End Mosque in Port Elizabeth. The appellant, Mohammed Sani Aliko, was charged and convicted of this murder by the Eastern Cape Local Division of the High Court, Port Elizabeth (trial court, Revelas J). He was then sentenced to life imprisonment. On appeal to a Full Court of the Eastern Cape Division, Grahamstown (court a quo) the conviction and sentence were confirmed. This appeal against the sentence of life imprisonment, is with the special leave of this court.

[2] Before considering the issue in this appeal, it is necessary to deal with one unfortunate aspect. The State is on record as opposing this appeal. Its Heads of Argument were duly filed. However on the day of the hearing of the appeal there was no appearance on its behalf. Nevertheless, despite non-appearance by the State, the appeal hearing had to proceed as the appellant's counsel was in attendance and the appeal was properly before us.

**Background**

[3] The day of the incident, 8 August 2013, was the penultimate day of the sacred month of Ramadaan in the Islamic year. In the mosque were Ms Muna Mohammed Osman (Ms Osman), her husband Mr Moulid Osman Siyad (Mr Siyad), the couple's four young children, and the deceased. The couple looked after the mosque as caretakers during the month of Ramadaan. Ms Osman was with the children in the women's section of the mosque whilst her husband was asleep on the first floor.

[4] The deceased suffered from multiple sclerosis which, over the preceding 15 years, had rendered him disabled. He walked with difficulty with the assistance of crutches and also used a wheel chair. In the mosque he would crawl on the carpeted floor. Ms Osman had known him for approximately five years. He had spent the preceding three months in the mosque, fasting and praying.[1] During the last ten days of Ramadan he submitted himself to Itikaaf and thus devoted those days in the mosque, praying and reading scriptures. His favourite spot in the mosque was towards the front of the prayer area. There he would sit at a small book table on which he would place his Quran and other books. All indications were that this is where he was when he met his death.

[5] According to Ms Osman the appellant (to whom she referred as Hamza) arrived at the mosque at about 10h45 on the morning of the incident. Ms Osman knew him and recognised him on a CCTV monitor inside the mosque. She opened the locked main door for him.

[6] After the appellant had entered the mosque, Ms Osman went about her own affairs. A while later she heard a 'thumping' sound which she described as 'someone playing with a ball' inside the prayer area of the mosque. She instructed her five year old daughter to investigate. When the daughter told her that it was the appellant she (Ms Osman) peeped through a hole in the door to the prayer area. She saw the appellant 'making swinging movements with [a] cable' that he had in his hand. Ms Osman left the building together with her children and locked herself in her car which was parked in the yard of the mosque. At

[1] The Rajab, Shab'aan and, at the time of the incident, the Ramadaan.

some stage she alighted from the car in order to go back and look inside the mosque, but returned to the car on hearing the appellant closing windows inside the mosque. She again left the car, but returned once more on hearing the appellant closing a door in the women's bathroom. Through all of this her husband was still asleep in the mosque. Eventually the appellant came out of the mosque carrying the electrical cable, which he threw in a concrete rubbish bin outside the building, and then left the mosque.

[7] After the appellant had left, Ms Osman returned to the mosque. That is when she discovered the deceased lying dead on the floor. He had sustained extensive bruising on the head, neck and chest. He had died of strangulation, having sustained fractured tracheal rings and a severely bruised larynx. A pencil had been plunged into his left ear with such violent force that it penetrated his inner ear and tore into his temporal muscles. As a result thereof, he had bled severely into his chest cavity and lungs.

[8] On discovering the deceased lying on the floor Ms Osman called out to her husband, telling him that the appellant had killed the deceased. Thereafter she went outside and flagged down a passing police vehicle.

[9] At the trial, the appellant's version was that he went to the mosque to find out what the time was as he had an appointment with a benefactor who was financing his University studies. He also wanted to ascertain prayer times on the mosque roster. He admitted having seen Ms Osman's five year old daughter but denied having seen Ms Osman and the deceased, both of whom he knew well. Because he saw no adults at the mosque he decided to leave through the female entrance which was unlocked. He denied that he had a cable in his hands when he exited the mosque.

[10] It is against this background that the appellant was convicted. The trial court rejected his denial that he had killed the deceased together with his version on why he visited the mosque and what happened when he was there. Although the court a quo confirmed the sentence of life imprisonment, it found that there was no evidence of premeditation. It then set aside the conviction of 'premeditated murder' and replaced it with one of 'murder'.

[11] Despite the finding by the court a quo that, even in the absence of premeditation, the sentence of life imprisonment was the appropriate sentence for this murder. This appeal is still grounded on the imposition of that sentence based on the finding of premeditation. The submission on behalf of the appellant was that the approach of the court a quo remained anchored in the erroneous thinking of the trial court, that life imprisonment was the minimum sentence applicable for the crime committed by the appellant. It was argued that the court a quo had lost sight of the fact that this murder was less reprehensible than a premeditated killing and that the minimum sentence prescribed in respect of a non-premeditated murder is 15 years' imprisonment, which would have been an appropriate sentence.

[12] It was also submitted on behalf of the appellant that the court a quo attached insufficient weight to the appellant's personal circumstances. At 44 years old the appellant was a first offender. He was an unemployed bachelor with a one year old baby who lived with its grandparents. He was studying for an Honours Degree at the Nelson Mandela University in Port Elizabeth. He had recently lost another young child and was under severe emotional stress from this tragedy. He was also experiencing serious financial challenges when he committed the murder.

**Discussion**

[13] It is necessary, firstly, to say something about the offence of which the appellant was convicted. It is trite that murder consists of an unlawful and intentional causing of the death of another human being.[2] Premeditation is not an element of the offence of murder. It is a factor in the assessment of the sentence to be imposed. As this court has previously held:

'. . . .in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature did not create a new type of offence. The 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of

[2] C R Snyman *Criminal Law* 5 ed at 447.

the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present.' [3]

In relation to this case therefore, the legislature did not create an offence of 'premeditated murder'. The expression is merely used in s 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) to communicate the basis for the enhanced sentencing regime in a particular case. The appellant had been convicted of murder. The court a quo however set aside what it called a conviction of premeditated murder and substituted it with a conviction of murder. This was a misdirection as there is no offence of premeditated murder and the trial court had not convicted the appellant of such a crime. Nevertheless, no harm was done as the appellant was clearly guilty of the offence of murder.

[14] There is uncertainty in this case as to whether the trial court did find that the murder had been planned. Although at the start of the sentencing proceedings the court remarked that the appellant had been convicted of premeditated murder, during the application for leave to appeal the learned judge said that she had sentenced him in terms of her 'ordinary sentencing jurisdiction'. It is not necessary for us to concern ourselves with this issue. What is relevant is whether the trial court and the court a quo exercised their discretion properly in determining the sentence.

[15] Recently this court, in *Kekana v S*,[4] considered a sentence of 15 years' imprisonment imposed on an appellant charged with four counts of murder for killing his four children. In a statement tendered in terms of s 112 of the Criminal Procedure Act 51 of 1977 (the CPA), the appellant had pleaded guilty on all the counts 'in terms of s 51(2) of [Act 105 of 1997]'. He did not explain why the provisions of s 51(2) should apply instead of s 51(1) which the state had invoked. This court emphasized the long established principle that courts enjoy inherent discretion when determining sentence. At para 27 Makgoka JA, writing for the court, held:

'. . . .a cryptic, unexplained reference to s 51(2) such as the one in the present case, is certainly not sufficient to mutate the sentencing regime from the purview of s 51(1) to s 51(2). *It must be*

[3] *S v Legoa* 2003 (1) SACR 13 (SCA) para 18.
[4] *Kekana v S* [2018] ZASCA 148; 2019 (1) SACR 1 (SCA); [2019] 1 All SA 67 (SCA).

*emphasized in this regard that even where such facts are stated, the discretion of the court to consider and impose an appropriate sentence remains extant.*' (My emphasis)

[16] At para 28 of *Kekana v S,* Makgoka JA highlighted that the dictates of justice and the need to avoid absurd consequences required consideration of life sentence by the sentencing court even where the state accepted the plea and invocation of a more lenient sentencing regime. The learned judge emphasized that irrespective of the minimum sentences provided for in the CLAA, the court retained its inherent power to consider the sentence of life imprisonment.

[17] In *S v Matyityi*[5] this court stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored.

[18] These remarks are equally applicable in this case. Even in the absence of premeditation, the imposition of a sentence which is disproportionate to the crime committed would be wrong. It remained the duty of the courts to determine and impose a sentence which took into consideration the crime, the criminal and the interests of society. The trial court was alive to this. When sentencing the appellant, the trial judge said that even if there had been no premeditation the sentence of life imprisonment would have been the appropriate sentence. I agree.

[19] This murder was horrific. It was executed with shocking brutality and cruelty against a defenceless, sickly person. The appellant's brazenness went beyond the commission of the crime. On the evening of the incident he returned to the mosque and prepared to participate in the evening prayers. It is at this stage Ms Osman alerted other people leading to his arrest. At no stage did he show remorse. As the trial court highlighted, this senseless murder was committed in a mosque, a place of worship and refuge, during a particularly

[5] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

sacred period of Ramadan. The aggravating factors in the crime committed by the appellant far outweighed his personal circumstances. In these circumstances, retribution and deterrence come to the fore and the appellant's personal circumstances reduce to the background. The sentence of 15 years' imprisonment would be woefully inappropriate in these circumstances. The sentence of life imprisonment is suitable.

[20] The appeal is dismissed.

_____

N Dambuza

Judge of Appeal

APPEARANCES

| | |
|---|---|
| For Appellant: | L Smith |
| . | |
| | Instructed by: |
| | Legal Aid South Africa, Port Elizabeth |
| | Bloemfontein Justice Centre, Bloemfontein |
| For Respondent: | No appearance |
| | Instructed by: |
| | Director of Public Prosecutions, Grahamstown |
| | Director of Public Prosecutions, Bloemfontein |