Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE: A272/2017

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

[redacted] 31/5/2024

In the matter between:

LUCKY KHUMALO Appellant

and

THE STATE Respondent

JUDGMENT

VAN DER WESTHUIZEN AJ:

INTRODUCTION:

[1] This is an appeal against the convictions and sentences imposed by the Regional Court, Johannesburg.

[2] The Appellant was convicted on the following Counts:

2.1 Count 1 Murder

2.2 Count 2 Rape

2.3 Count 3 Robbery with aggravating circumstances.

2.4 Count 4 Robbery with aggravating circumstances.

2.5 Count 5 Rape

[3] On 22 February 2013 the Appellant was sentenced as follows:

Count 1: Life imprisonment.

Count 2: Life imprisonment.

Count 3: Fifteen (15) years imprisonment.

Count 4: Fifteen (15) years imprisonment.

Count 5: Fifteen (15) years imprisonment.

[4] It was ordered that the sentences in respect of Counts 3, 4 and 5 should run concurrently with the sentence imposed on Count 1. It was also ordered that his name

should be entered in the register of sexual offenders in terms of section 50 (2)(a) of Act 32 of 2007.

THE TRIAL:

[5] The Appellant pleaded not guilty on all the counts. The State called a number of witnesses and the Appellant also testified under oath.

[6] The only eyewitness in the case was the Complainant in respect of Counts 2, 3 and 5. According to her, she and her boyfriend Percy, the deceased referred to in Count 1, were asleep in a supermarket (as the prosecutor described it) in Jules Street, Johannesburg on 27 October 2008 at approximately 03h15.

[7] For purposes of Count 3 one can certainly find, and it was not disputed that all the items in the shop were under their control.

[8] Three men entered the shop and one of them was carrying what appeared to her to be a firearm. One of the men then started to assault the deceased. Another of the men with dreadlocks, came to her and demanded money. She pointed at a bag on a table containing money. The assailant with the dreadlocks ordered "Mlung", the third man, to take it, which he did and he left the room.

[9] The Appellant searched the trousers of the deceased and he also asked the complainant about cellphones. On a question by the Prosecutor whether anything was taken from the deceased's trousers, her response was: "I do not know but the only thing that I saw when Percy came in was money that was inside his pocket but I do not know how much was it." On a further question whether she at any stage saw if the money was still there, she replied in the negative.

[10] After that, she saw the assailant with the dreadlocks hit the deceased with a hammer, in the presence of the Appellant. On a question by the Prosecutor whether the

Appellant did anything to stop the assailant with the dreadlocks hitting the deceased with the hammer, her response was: "No, he did not stop him because he said to the guy with the dreadlocks they must stab me and kill me as well." The one with the dreadlocks then ordered the Appellant to go and fetch, to use her words, "the cosmetics". To us it seems that it was not real cosmetics but balms, other types of items used as remedies, and lotions.

[11] The assailant with the dreadlocks then ordered the Complainant to take of her panties, which she did and he then started to rape her. Whilst still busy raping her, he stopped, walked to the deceased and hit him once again with a hammer on the side of his face. She shouted at him and asked him whether he wanted to kill the deceased in front of her and his response was "yes". He then returned to her and continued to rape her until he ejaculated.

[12] The assailant with the dreadlocks got dressed and said to the Appellant that he is going to leave, which he duly did. The Appellant asked the complainant to give him cartons of cigarettes, which she did. He placed everything into a plastic bag.

[13] The Appellant then approached her, took out his penis and put it in her mouth and he ordered her to suck it. She did not adhere to his request and he started to make movements like having sex in her mouth. He took his penis out of her mouth and started to penetrate her vagina whilst she was on her back. He stopped before he ejaculated. He tied her hands with a stocking behind her back and stuffed her panty inside her mouth.

[14] The Appellant then left the shop with only one bag containing a cellphone and different kinds of soap. He also took two pool cues. He forgot to take the other plastic bag with the other items in it.

[15] During cross-examination by the Defence, the following arose which is very important for purposes of the judgment. The question posed was what was the position

of the appellant when he was searching Percy. The response by the complainant was: "He was standing by the trousers hanging on the chair".

[16] She also testified during cross-examination that the one with the dreadlocks took the plastic bag containing the cigarettes when he left.

[17] The Complainant was a very important witness in this matter as will become evident later on in this judgment. The learned Magistrate was correct in his finding that the Complainant was an honest and reliable witness. He further correctly rejected the Appellant's version as false beyond reasonable doubt.

[18] I do not deem it necessary to deal with the rest of the evidence that was led during the trial. I am of the view that the learned Magistrate dealt with the matter correctly. However, I am not satisfied with his reasoning and resultant finding of the Appellant guilty on all the counts. Accordingly, this court must interfere therewith.

DISCUSSION:

[19] It is clear that the three assailants that entered the room where the Complainant and deceased were asleep, had the common intent to commit certain unlawful acts. However, not all of the counts that the Appellant was convicted of, were committed with one common intention.

[20] Firstly, the count of murder. When the three assailants entered the room, one of them had something in his possession that looked like a firearm. That was the last word in the record that we hear about a firearm. The evidence of the Complainant was that the deceased was bludgeoned with a hammer. This was never disputed by the defence. It was not canvassed with the Complainant where the hammer could have come from. The question arises whether or not that is not the weapon that she saw when they entered the room, which she perceived to be a firearm.

[21] The fact remains that when they entered the room, they started to assault the deceased with a hammer. None of the assailants distanced themselves from this assault and the evidence is clear that he died as a result thereof. When the Complainant shouted at the assailant with the dreadlocks to stop the assault, the Appellant was the one that proposed that they should also stab her to death. He was clearly content that the two of them should be killed. "Active association with the acts of the person or persons which caused the death of the deceased can also justify a finding of his own mens rea and his guilt". See: S v Memani 1990 (2) SACR 4 (TKA).

[22] The Magistrate was correct in finding the Appellant guilty on Count 1 as charged.

[23] Count 2 which the Appellant was convicted of is one of rape. It is clear that the Complainant was raped by the assailant with the dreadlocks. Whilst he was doing that, the Appellant was busy in the shop collecting items to steal. There is no indication that there was a common purpose between these two men to rape the Complainant. There is the evidence that the Appellant also raped the Complainant in her vagina, but on the evidence before us, we cannot find that this charge refers or relates to that rape. We are of the view that this charge refers to the rape by the assailant with the dreadlocks.

[24] The fact that the Appellant was present when this rape took place, does not mean that he had the common intent with the assailant with the dreadlocks, to rape the Complainant. The assailant with the dreadlocks committed the rape out of his own volition. For that reason, the conviction on this count cannot stand.

[25] Count 3 is the robbery with aggravating circumstances in that a hammer was used. From the charge sheet it appears that only cigarettes, lighters, sim cards and pool cues were taken. From the Complainant's evidence it appears that many more items were taken including lotions, soap, money and other items. The fact remains that the Appellant was there to take as much as possible.

[26] It is clear that the Complainant was robbed of certain items but whether aggravating circumstances were present is questionable. Although there was a hammer present in the room which was used to kill the deceased, there is no evidence that the Complainant was ever threatened with the hammer to give up possession of any of the items that were taken. For obvious reasons we accept that she was scared and a hammer had been used to kill her boyfriend. However, she was never assaulted with the hammer or even threatened with it. The Appellant acted on a frolick of his own by taking the items that he and the assailant with the dreadlocks wanted

[27] Robbery of the items was proved, but not with aggravating circumstances. Accordingly, we must intervene in the conviction in that regard.

[28] Count 4 relates to the robbery with aggravating circumstances of the deceased of an unknown amount of money and the aggravating circumstances is, once again, the use of a hammer.

[29] On this charge, the evidence of the Complainant is very important. According to her, when the deceased entered their room, he had money in his pocket. We do not know how long before the incident it was. We do not know whether he went out again or what he did with the money whilst inside the room. We do not even know the amount of money that he allegedly had.

[30] The other concern is that the deceased's trousers were hanging over a chair. In other words, he was not wearing his trousers so the money was not taken from him by force. The hammer was not used in any way to obtain the money from the deceased.

[31] In light of the fact that we have little knowledge about the money, that the trousers were hanging over a chair, and that the hammer was not used to dispossess the deceased of the monies, the conviction on this count can also not stand.

[32] Count 5 is the charge of rape where it is alleged that the Appellant had oral sex with the Complainant, although her evidence is that he also penetrated her vaginally.

[33] The Appellant ought to have been charged with two counts of rape. Here I would like to refer to what was said in Ndlovu v S 2017 (2) SACR 305 (CC) by Kampepe J at par [58]: "When even the most heinous of crimes are committed against persons, the people cannot resort to self-help; they generally cannot prosecute the perpetrators of these crimes on their own behalf. This power is reserved for the NPA. It is therefore incumbent upon Prosecutors to discharge this duty diligently and competently. When this is not done, society suffers. In this case the Prosecutor failed to ensure that the correct charge was preferred against Mr Ndlovu. The Prosecutor was from the outset in possession of the J88 form in which the injuries sustained by the Complainant were fully described. It boggles the mind as to why the proper charge of rape read with the provisions of Section 51 (1) of the Minimum Sentencing Act was not preferred. This can only be explained as remisness on the part of the Prosecutor that, further, should have been corrected by the Court. This error is acutely unfortunate – victims of crime rely on Prosecutors performing their functions properly. The failings of the Prosecutor are directly to blame for the outcome in this matter".

[34] The finding by the Magistrate that the Appellant had oral sex with the Complainant was correct. There is not reason to interfere therewith.

SUMMARY:

[35.1] The appeal against the convictions in respect of Counts 1 and 5 is dismissed.

[35.2] The appeal in respect of Count 3 is partially successful in that the conviction of robbery with aggravating circumstance is replaced with a conviction of robbery.

[35.3] The appeal against the convictions in respect of Counts 2 and 4 is upheld.

AD SENTENCE:

[36] As already mentioned, the Appellant was sentenced in respect of:

Count 1: Life Imprisonment.

Count 3: Fifteen (15) years imprisonment.

Count 5: Fifteen (15) years imprisonment.

[37] According to the learned Magistrate, the Accused was convicted of murder read with Section 5 (1)(c) of Act 105 of 1997 in that the death was caused whilst committing robbery with aggravating circumstances. This is not how we understand his judgement. Clearly his judgement was based on Section 51(1)(d) where the murder was committed whilst the Appellant acted with a common purpose with at least the assailant with the dreadlocks. This does not impact upon the sentence that was imposed.

[38] On page 003 – 248 of the judgement the Magistrate says that the State did not prove any previous convictions against the Appellant. On page 003 – 253 the Magistrate says that it is not the first time the Appellant collided with the law because he was convicted of robbery on 1 September 2004 and on 15 August 2008 he was convicted of housebreaking.

[39] It was not easy to follow the judgement on sentence but we are satisfied that the Magistrate took everything into account that should be taken into account before deciding on a suitable sentence to impose.

[40] The only aspects that were raised by the defence in their heads of argument, that would amount to substantial and compelling circumstances, are the age of the Appellant and the time spent in custody awaiting trial, to wit four years. It is in actual fact a few months less than four years. The Magistrate did take this into consideration before

passing sentence – see page 003 – 258. He also took into consideration the age of the Appellant – see page 003 – 258 and further.

[41] The Magistrate found that if he takes the crimes and circumstances in which they were committed into consideration, it is difficult to find mitigating features in favour of the Appellant. We have no problem with this approach. It might seem that he was overemphasizing the offences, but we are of the view that he took everything into consideration before he imposed the sentence. As was set out in S v MASWATHUPA 2012 (1) SACR 259 (SCA) at P261: "In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy. In addition to that the court must also consider the main purpose of punishment, which are deterrent, preventive, reformative and retributive. In the exercise of its sentencing discretion, a court must strive to achieve a judicious balance between all relevant factors "in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of others".

[42] S v Malgas 2001 (1) SACR 469 (SCA) the following was said at P478: "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh".

[43] We are of the view that the court a quo did not misdirect itself by the sentences that were imposed. This obviously does not apply to Count 3 where the appeal on conviction is partially upheld in that the conviction on robbery with aggravating circumstances is substituted with a conviction on a count of robbery. On this count, the learned Magistrate imposed the prescribed minimum sentence which must be set aside and substituted with a suitable sentence.

ORDER:

The following order is made:

1. The appeal against the convictions and sentences imposed in respect of Counts 1 and 5 is dismissed and the conviction and sentences on these counts are confirmed.

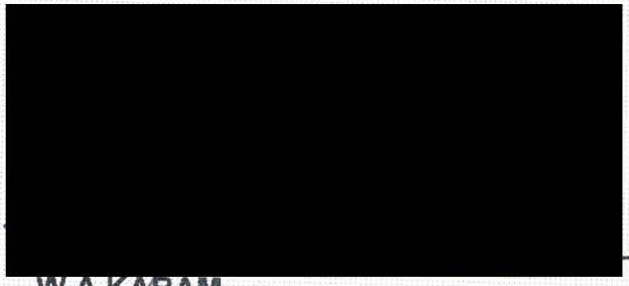
2. The appeal against the convictions and sentences imposed in respect of Counts 2 and 4 is upheld and the convictions and sentences on these counts are set aside.

3. The appeal against the conviction in respect of Count 3 is partially upheld in that the conviction of robbery with aggravating circumstances is set aside and replaced with a conviction of robbery. The sentence of (15) fifteen years imprisonment imposed by the court a quo on this count is set aside and replaced with a sentence of (5) five years imprisonment.

[redacted]

FJ VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree,



W A KARAM

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date:

Of hearing: 18 March 2024

Of judgment: 07 June 2024

Appearances:

For the appellants: Y J Brits

Instructed by Legal Aid South Africa

For the State: Adv. PJ Schutte

Office of the Director of Public Prosecution, Johannesburg