SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 950/2016

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG **APPELLANT**

and

OSCAR LEONARD CARL PISTORIUS **RESPONDENT**

Neutral citation: *The Director of Public Prosecutions, Gauteng* v *Oscar Leonard Carl Pistorius* (950/2016) [2017] ZASCA 158 (24 November 2017)

Coram: Bosielo and Seriti JJA and Lamont, Meyer and Mokgohloa AJJA

Heard: 03 November 2017

Delivered: 24 November 2017

Summary: Criminal law and procedure – murder – appeal against sentence arising from conviction of murder dolus eventualis – sentence of six years' imprisonment inappropriate – Increased to 13 years and 5 months' imprisonment on appeal.

ORDER

On appeal from: Gauteng Division, Pretoria (Masipa J sitting as court of first instance):

1 The application for leave to appeal is granted.

2 The appeal against sentence is upheld.

3 The sentence imposed by the court a quo in respect of murder is set aside and substituted with the following:

'The respondent is sentenced to imprisonment for a period of 13 years and five months.'

JUDGMENT

Seriti JA (Bosielo JA and Lamont, Meyer and Mokgohloa AJJA concurring):

[1] The respondent appeared on 3 March 2014 in the Gauteng Division of the High Court, Pretoria on four counts, ie murder and three counts of contravening the Firearms Control Act 60 of 2000. On 12 September 2014 the court a quo made the following order:

'Count 1: Murder, read with Section 51(1) of the Criminal Law Amendment Act, 105 of 1997, the accused is found not guilty and is discharged. Instead, he is found guilty of culpable homicide.

Count 2: Contravention of Section 120(7) of the Firearms Control Act 60 of 2000 and the alternative count, that is contravention of section 120(3)(b) of the same act, the accused is found not guilty and discharged.

Count 3: Contravention of Section 120(7), alternatively section 120(3)(a) and further alternatively section 120(3)(b) of the Firearms Control Act 60 of 2000, the accused is found guilty of the second alternative that is the contravention of Section 120(3)(b).
Count 4: Contravention of Section 90 of the Firearms Control Act 60 of 2000 the accused is found not guilty and discharged.'

[2] On 21 October 2014, the respondent was sentenced as follows:

'1. Count 1 – Culpable homicide: The sentence imposed is a maximum imprisonment of 5 years imposed in terms of section 276(1)(*i*) of the Criminal Procedure Act, number 51 of 1977.
2. On Count 3 – The contravention of section 120 (3)(*b*) of the Firearms Control Act, number 60 of 2000: The sentence imposed is 3 years' imprisonment, wholly suspended for 5 years on condition that within the period of suspension the accused is not found guilty of a crime where there is negligence involving the use of a firearm.
3. The sentence in count 1 and the sentence on count 3 shall run concurrently.'

On 9 December 2014 the appellant applied for leave to appeal against the sentence imposed on the culpable homicide count. The application was dismissed by the court a quo.

[3] The appellant also applied for reservations of three questions of law in terms of s 319 of the CPA relating to the conviction of culpable homicide. The said application was granted by the court a quo on 10 December 2014.

[4] The three questions of law reserved were as follows:

'1. Whether the principles of dolus eventualis were correctly applied to the accepted facts and the conduct of the accused, including error in objecto.
2. Whether the court correctly conceived and applied the legal principles pertaining to circumstantial evidence and/or pertaining to multiple defences by an accused.
3. Whether the court was correct in its construction and reliance on an alternative version of the accused and that this alternative version was reasonably possibly true.'

[5] This court heard the appeal on the reservation of the questions of law on 3 November 2015 and delivered its judgment on 3 December 2015. The first two reserved questions of law were answered in favour of the appellant, which resulted in the conviction and sentence on the culpable homicide count being set aside and replaced with a conviction of murder on the basis of dolus eventualis. The court referred the case back to the court a quo to consider afresh an appropriate sentence in the light of the comments in this court's judgment and taking into account the sentence the respondent had already served in respect of the conviction of culpable homicide – see *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (1) SACR 431 (SCA) paras 56 and 58.

[6] Having heard evidence on the appropriate sentence as ordered by this court, the court a quo sentenced the respondent on 6 July 2016 to six years' imprisonment for murder on the basis of dolus eventualis. Aggrieved by this sentence the appellant filed a notice of application for leave to appeal against the sentence imposed on the murder conviction in terms of s 316B(1) of the CPA. The respondent filed a written opposition to the State's application for leave to appeal against the sentence imposed by the court a quo. On 26 August 2016 the court a quo dismissed the application for leave to appeal.

[7] On 14 September 2016 the appellant lodged an application for leave to appeal in this court in terms of s 316(B) of the CPA, against the sentence of six years' imprisonment imposed on the respondent by the court a quo. On 2 November 2016, this court issued an order which read partly as follows;

'1. The application for leave to appeal is referred for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013.
2. The parties must be prepared, if called upon to do so, to address the court on the merits.'

[8] After the matter was called before us this court directed that the application for leave to appeal and the merits should be argued together as they were both so closely intertwined, that it would be convenient to hear both at the same time.

[9] The offence that the respondent is convicted of falls within the purview of s 51(2)(*a*) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). This section provides that when an accused, who is a first offender, is convicted of murder that is not planned or premeditated, he or she shall be sentenced to imprisonment for a period of not less than 15 years, unless there exist substantial and compelling circumstances as contemplated by s 51(3) of the CLAA justifying the imposition of a sentence lesser than the prescribed minimum sentence.

[10] The background facts of this case are eloquently set out by this court in *Director of Public Prosecutions, Gauteng v Pistorius* supra. I will not repeat the entire factual background save for those parts which are relevant to this judgment.

[11] It is common cause that the respondent was born with a congenital abnormality affecting his legs which he, before his first birthday, had to have surgically amputated. As a result of the amputation he had to rely on prosthetics. It is further common cause that the respondent shot and killed his girlfriend, Miss Reeva Steenkamp (the deceased) in the early hours of

14 February 2013. The facts giving rise to the tragic incident are as follows. On 13 February 2013 the respondent spent the night at his home with the deceased. In the early hours of the fateful morning he heard the sound of a window opening in the bathroom which is situated not too far from the bedroom. Upon hearing the sound of a window opening he thought that there was an intruder who had entered the house through the bathroom window. He went back to his bedroom and retrieved his 9 mm pistol from where he kept it under the bed. Armed with his pistol and without his prosthetic legs he went towards the bathroom. He peeped in the bathroom and noticed that there was no one in the bathroom itself but that the toilet door was closed. The toilet cubicle is very small. He heard a noise emanating from inside the toilet and he immediately fired four shots at the door. After realising that his girlfriend was not in the bedroom, he broke open the toilet door and found the deceased slumped with her weight on the toilet bowl. The evidence shows that after fatally shooting the deceased the respondent took certain steps to try and save the life of the deceased.

[12] According to the evidence of Captain Mangena, a police ballistics expert, the firearm in question was specifically designed for the purpose of self-defence. The ammunition thereof would penetrate through a wooden door without disintegrating but would mushroom on striking a soft, moist target such as human flesh, causing devastating wounds to any person who might be struck by it. Captain Mangena further testified that the deceased must have been standing behind the door when she was first shot and then collapsed down towards the toilet bowl.

[13] The admitted evidence revealed various contradictions in the respondent's evidence as to why he shot at the toilet door that evening. It

suffices to state that these contradictions were so serious that this court in *Director of Public Prosecutions v Pistorius* supra stated that '[i]n the light of these contradictions, one really does not know what his explanation is for having fired the fatal shots'. Furthermore this court said that '[h]e paused at the entrance to the bathroom and when he became aware that there was a person in the toilet cubicle, he fired four shots through the door and he never offered an acceptable explanation for having done so'. This court also found that the evidence of the respondent was 'so contradictory that one does just not know his true explanation for firing the weapon'.

[14] It is common cause that the respondent did not fire a warning shot and his explanation is that he elected not to fire a warning shot as he thought that if the bullet ricocheted it might harm him. The respondent was well trained in the use of firearms. Captain Mangena explained that the firearm the respondent used that morning was a heavy-calibre firearm, which was loaded with ammunition.

[15] I interpose to state that after the case was referred back to the court a quo by this court for sentencing afresh, the State called witnesses to testify in aggravation of sentence. However, although certain witnesses testified for the defence, the respondent elected not to give evidence. This is not withstanding the fact that this court had said 'one really does not know what his explanation is for having fired the fatal shots', and the fact that he had been warned that for the court to deviate from the minimum sentence of 15 years' imprisonment there had to be substantial and compelling circumstances justifying the imposition of a lesser sentence.

[16] The court a quo when considering sentence on the murder conviction, noted that the accused was 29 years old at the time, single with no children and he had no previous convictions. After Grade 12 the respondent enrolled at the University of Pretoria for a Bachelor of Commerce Degree in Business Economics but had to leave his studies due to the demands of his career as an athlete. He is currently enrolled for a Bachelor of Science degree with the University of London.

[17] In *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para 10, when dealing with the question whether the sentence imposed by the trial court was appropriate, this court said '[t]he test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate'. The Constitutional Court reaffirmed this approach in *S v Boggards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41 when it said '[o]rdinarily sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it'. See also *S v Malgas* 2001 (1) SACR 469 (SCA) para 12 and *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8.

[18] The court a quo enumerated the following as mitigating factors: the accused approached the bathroom in the belief that an intruder had entered his house; at the time he was without his prosthetics and felt vulnerable; behaviour of the accused after the shooting; in that the accused immediately took steps to try and save the deceased's life; he

was distraught and kept on asking God to save the deceased's life and promising to serve him in return. The court further noted that the respondent requested to meet the parents of the deceased to ask for forgiveness and stated that this demonstrated that the respondent was genuinely remorseful.

[19] As against the mitigating factors the court a quo took into consideration the following aggravating factors: the accused used a lethal, high calibre firearm and ammunition; he fired four shots into the toilet door knowing full well that there was someone behind the door; the toilet was a small cubicle and there was no room for escape for the person behind the door; the accused had been trained in the use and handling of firearms; he did not fire a warning shot.

[20] After due consideration of all relevant facts, the triad and the provisions of the CLAA the court a quo stated 'I have taken all the above into consideration and I am of the view that mitigating circumstances outweigh the aggravating factors. I find that there are substantial and compelling circumstances which justify a deviation from the imposition of the prescribed minimum sentence of 15 years'.

[21] I find it difficult on the evidence to accept that the respondent is genuinely remorseful. In *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 47 this court held as follows: 'After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia; what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions'. As stated earlier the respondent has failed to explain why he

fired the fatal shots. The respondent failed to take the court fully into his confidence. To my mind the attempt by the respondent to apologise to the deceased's family does not demonstrate any genuine remorse on his part. He failed to take the court fully in his confidence despite having an opportunity to do so during the second sentencing proceedings. It is clear herefrom that the respondent is unable to appreciate the crime he has committed. The logical consequence is that the respondent displays a lack of remorse, and does not appreciate the gravity of his actions.

[22] Having perused the judgment on sentence by the court a quo I am of the view that the trial court over emphasised the personal circumstances of the respondent. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58 this court said that '[i]n cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background'. See also *S v RO & another* 2010 (2) SACR 248 (SCA) para 20 where this court said '[t]o elevate the appellants' personal circumstances above that of society in general and these two child victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution'. Based on the above-mentioned cases I am of the view that the court a quo misdirected itself in its assessment of an appropriate sentence.

[23] The court a quo also stated that in its view there was an indication that the respondent was a good candidate for rehabilitation and that the other purposes of punishment although important ought not to play a dominant role in the sentencing process. The court a quo seemed to have given rehabilitation undue weight as against the other purposes of punishment being prevention, deterrence and retribution. This court in *S v Swart* 2004 (2) SACR 370 (SCA) para 12 stated the correct legal position

as follows: '[s]erious 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'.

[24] I am of the view that there are no substantial and compelling circumstances which can justify the departure from the prescribed minimum sentence. In the light of the serious offence committed by the respondent and the absence of substantial and compelling circumstances, the court a quo erred in deviating from the prescribed minimum sentence of 15 years' imprisonment for murder in the circumstances. The sentence of six years' imprisonment is shockingly lenient to a point where it has the effect of trivialising this serious offence. The facts of this case demand the imposition of the minimum sentence of 15 years' imprisonment.

[25] By the time the court a quo sentenced the respondent on 6 July 2016, he had however already served a period of imprisonment of 12 months and correctional supervision for a period of seven months pursuant to the initial sentence imposed upon him on 21 October 2014. He should receive credit for those periods of imprisonment and of correctional supervision already served. The terms of our order should therefore be adapted to take account of both s 282 of the CPA and the length of incarceration and of correctional supervision of the respondent. (See *S v RO* 2010 (2) SACR 248 (SCA) para 44.

[26] In the result, the following order is made.

1 The application for leave to appeal is granted.

2 The appeal against sentence is upheld.

3 The sentence imposed by the court a quo in respect of murder is set

aside and substituted with the following:

'The respondent is sentenced to imprisonment for a period of 13 years and five months.'

WL SERITI

JUDGE OF APPEAL

APPEARANCES

For the Applicant:	Advocate A. Johnson
	Advocate D W M Broughton
	Advocate P Voster
	Advocate Moroka
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	Advocate B Roux SC
	Advocate S Jackson
	Advocate R Adams
Instructed by:	Ramsey Webber, Illovo, Johannesburg
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