

SOUTH AFRICA / JUDGMENT

Aden v S (A68-2023) [2024]

ZAGPJHC 1 (22 February 2024)

[2024] ZAGPJHC 1

COURT

South Gauteng High Court, Johannesburg

BEFORE

D Dosio, M.H.E Ismail, T.P Mudau

CASE / FILE NUMBER

A68/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: A68/2023

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED

22

February 2024

In

the matter between:

SPEKKA

TOLK

ADEN

Appellant

and

THE

STATE

Respondent

JUDGMENT

DOSIO J:

Introduction

- [1] This is a full court criminal appeal whereby the appellant seeks to set aside the sentence of life imprisonment in respect to count one.
- [2] On 25 August 2016 the appellant was sentenced as follows:
- (a) Count one – murder in terms of s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997') to life imprisonment.
 - (b) Count two - attempted murder to five years imprisonment.
 - (c) Count three – possession of unlicensed firearm to five years imprisonment.
 - (d) Count four – possession of ammunition without a license to two years imprisonment.

In terms of s280 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') it was ordered that the sentences imposed on counts two, three and four, should run concurrently with the sentence of life imprisonment imposed on count one.

- [3] The appellant was legally represented and he was granted leave to appeal against the sentence in respect of count 1 on 24 November 2017.

Ad sentence

- [4] The appellant's counsel contended that the sentence on count one is startlingly inappropriate and disproportional to the offence and that the following factors, namely, the young age of the appellant, the fact that he is a first offender and that he was in custody for seven months awaiting the finalisation of his trial, constitutes substantial and compelling circumstances, justifying a departure from the sentence of life imprisonment. It was also argued that the Court a quo did not consider the aspect that the appellant can be rehabilitated.
- [5] It is trite that in an appeal against sentence, the Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.[1]
- [6] A sentence imposed by a lower court should only be altered if;
- i. An irregularity took place during the trial or sentencing stage.
 - ii. The trial court misdirected itself in respect to the imposition of the sentence.

iii. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.

[7] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[8] In the matter of *S v Malgas*,^[2] the Supreme Court of Appeal stated that:

‘A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.’

[9] The Supreme Court of Appeal in the matter of *Malgas*^[3] further stated that:

‘if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.’^[4]

[10] In the matter of *S v Dodo*,^[5] the Constitutional Court held that:

‘To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity.’^[6]

[11] In the case of *S v Pillay*^[7] the Appellate Division, (as it then was), held that:

‘..the essential inquiry in an appeal against sentence, ...is...whether the court in imposing it, exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.’^[8]

[12] In *S v Salzwedel and other*,^[9] the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate^[10]

[13] The appellant’s counsel referred this Court to the decision of *S v Mabuza and Others*,^[11] where the Supreme Court of Appeal stated that:

‘...Youthfulness almost always affects the moral culpability of juvenile accused. This is because young people often do not possess the maturity of adults and are therefore not in the same position to assess the consequences of their actions. They are also susceptible to peer pressure and adult influence and are vulnerable when proper adult guidance is lacking. There are, however, degrees of maturity, the younger the juvenile the less mature he or she is likely to be...

The degree of maturity must always be carefully investigated in assessing a juvenile's moral culpability for the purposes of sentencing.’[12]

[14] This may be so, but as stated in the matter of *S v Matyityi*, [13] the Supreme Court of Appeal held that:

‘at the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor’[14]

[15] The following aggravating factors are present, namely:

- (a) The appellant never pleaded guilty. He maintained his innocent, called an alibi and showed no signs of remorse.
- (b) The deceased was young when he was shot with a 9mm Norinco pistol on vital parts of his body.
- (c) It appears that the appellant was relentless in shooting the deceased as he shot the deceased several times whilst he was running away and whilst he fell on the ground. The appellant was part of a gang and this murder was premeditated.
- (d) The post-mortem reveals that the deceased was shot in his chest, left forearm and behind the neck. This is not the actions of an immature and sensitive youth who accidentally killed someone. It is the actions of a determined assassin. It is furthermore worrying that a man at the age of 22 years old already possessed an unlicensed firearm and ammunition.
- (e) The appellant acted with callous and cruel indifference towards an unarmed victim, showing no mercy or sympathy for the deceased.
- (f) At the time of his arrest he was found in possession of a firearm loaded with eight live rounds.

[16] The personal circumstances of the appellant are the following;

- (a) He was 22 years old when the crimes were committed and 23 years old when he was sentenced. He is a first offender.
- (b) He is single and the father of one child aged one year and three months old at the time of sentencing. His father and grandmother are assisting him to maintain his child.
- (c) He passed standard seven in 2010 and he was unemployed at the time of his arrest. He was staying with his grandmother.
- (d) He was in prison seven months prior to being sentenced.

[17] All these factors must be taken into consideration in determining whether a sentence of life imprisonment is appropriate. So too must the factors that aggravate the crime be considered. The fact that the Court a quo did not mention the prospects of rehabilitation in the judgment, does not per se mean that it was not considered by the Court a quo. Taking into consideration the lack of remorse and the violent manner in which the murder occurred, the prospects of success seem extremely unlikely.

[18] The appellant was charged with murder in terms of s51(1) of Act 105 of 1997. Accordingly, a sentence of life imprisonment is mandatory.

[19] In the matter of *S v Radebe*, [15] the Supreme Court of Appeal held that:

‘...that the period in detention B pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention..., the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: D whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.’ [16]

[20] Murder is the most serious of crimes. Not only does it end the life of a loved family member but it leaves much hardship and pain for the remaining family members. In the premises, it cannot be said that the sentence imposed is disturbingly inappropriate. The Court a quo correctly found that there were no compelling or substantial circumstances to depart from the minimum prescribed sentence of life

imprisonment on count one.

[21] This Court finds no misdirection on the part of the Court a quo. The sentence imposed does not induce a sense of shock and neither is it out of proportion to the gravity of the offence. The Court a quo was correct in finding that notwithstanding that the appellant was young, that the factors surrounding the killing of the deceased

justified a term of life imprisonment.

[22] In the result, having considered all the relevant factors and the purpose of punishment we consider a term of life imprisonment to be an appropriate sentence.

[23] In the premises we make the following order;

The appeal is dismissed in respect to the sentence of life imprisonment imposed on count one.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

M.H.E ISMAIL

JUDGE OF THE HIGH COURT

I agree

T.P MUDAU

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 22 February 2024.

Date Heard:

19 February 2024

Judgment handed down: 22

February 2024

Appearances:

For the Applicant:

Adv A. Roestorf

Instructed by:

Legal Aid SA

For the State:

Adv V. Mushwana

Instructed by:

Office of the DPP, Johannesburg

[1] see S v Hewitt 2017 (1) SACR 309 (SCA) at para 8 and S v Lungisa 2021 (1) SACR 510 (GNP).

[2] S v Malgas 2001 (1) SACR 496 SCA.

[3] Ibid.

[4] Ibid para i.

[5] S v Dodo 2001 (1) SACR 594 (CC).

[6] Ibid para 38.

[7] S v Pillay 1977 (4) SA 531 (A).

[8] Ibid page 535 E-G.

[9] S v Salzwedel and other 1999 (2) SACR 586 (SCA).

- [10] Ibid page 588 a-b.
- [11] S v Mabuza and Others 2009 (2) SACR 435 (SCA).
- [12] Ibid para 22.
- [13] S v Matyityi 2011 (1) SACR 40 SCA.
- [14] Ibid para 14.
- [15] S v Radebe 2013 (2) SACR 165 (SCA).
- [16] Ibid para 14.
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