

SOUTH AFRICA / JUDGMENT

King and Another v S (Appeal) (CA50/2023) [2025] ZANWHC 83 (13 May 2025) [2025] ZANWHC 83

COURT

North West High Court, Mafikeng

BEFORE

A Reddy, J T Maodi

CASE / FILE NUMBER

CA50/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

CA:50/2023

Regional

Magistrates Case No RC 38/2021

Circulate

to Regional Magistrates: YES

/ NO

Reportable: YES / NO

Circulate to Judges: YES /

NO

Circulate to

Magistrates: YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between: TUELO JOHANNES
KING
FIRST APPELLANT
KAMOGELO
MOKGOTHU
SECOND APPELLANT
AND
THE
STATE
RESPONDENT
Judgment is handed
down electronically by distribution to the parties' legal
representatives by e-mail. The date that the
judgment is deemed to be
handed down is 13 May 2025 at 14h00.
ORDER
The
appeal against sentence is dismissed.
APPEAL

JUDGMENT

REDDY ADJP

Introduction

[1] The appeal that serves before this Court is confined to the issue of sentence. The appellants cited as accused 1 and 2 were arraigned before Lichtenburg Regional Court (the court a quo) on a count of murder read with the provisions of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA). Section 51(1) of the CLAA read with Part 1 of Schedule 2 provides for the imposition of a mandatory sentence of life imprisonment on a conviction of murder when, inter alia, it was planned or premeditated, unless there are substantial and compelling circumstances which justify the imposition of a lesser

sentence.

[2] The court a quo constituted the Acting Regional Magistrate Mr Maphango, and two assessors as provided for in section 93ter of the Magistrates Court Act 32 of 1944. The appellants were legally represented by Mr Appie who appeared for the first appellant and Adv Mathebesi for the second appellant.

Proceedings in the court a quo

- [3] On 12 December 2022, the appellants pleaded not guilty and elected to invoke the right to remain silent as envisaged in section 35(3)(h) of the Constitution, Act 108 of 1996. Moreover, the appellants made certain admissions as provided in section 220 of the Criminal Procedure Act 51 of 1977 (the CPA) relating to the formal evidence.
- [4] On 2 February 2023 the appellants upon being convicted were each sentenced to life imprisonment. A consequential order in terms of section 103(1) of Firearms Control Order 60 of 2000 declared each accused ex lege unfit to possess a firearm.
- [5] The appeal, before this Court in terms of section 309(1)(a) of the CPA, grants an accused sentenced to life imprisonment by a regional court, an automatic right of appeal to the High Court. The parties assented to the consideration of this appeal on the papers as provided in section 19(a) of the Superior Courts Act 10 of 2013.

Condonation

- [6] The appeal is accompanied by an application for condonation for the late prosecution of the appeal. The application is not opposed. In *City of Ekurhuleni Metropolitan Municipality In re: Unlawful Occupiers 1 Argyl Street and Others v Rohlandt Holdings CC and Others*, [2024] ZACC 10 at paragraphs 25 and 26 the apex court posited the following in respect of condonation:
- [25] The factors that a court will consider in deciding whether the grant of condonation is in the interests of justice include—
- “the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.”*
- [26] A party seeking condonation must make out a proper case for the court’s indulgence with reference to these criteria. The explanation for the delay must be full and “reasonable enough to excuse the default”. (footnotes omitted)
- [7] It is undisputable that a party seeking condonation must make out a proper case for the court’s indulgence against the aforesaid fundamental standards. The proffered explanation for the delay must be full and reasonable enough to excuse the default. Applying these criteria, the late filing of the appellants’ appeal has been adequately and transparently explained. The late prosecution of the appeal is accordingly condoned.

Grounds of appeal

- [8] The appellants assail the sentence on two scores. First, they assert that the court a quo misdirected itself by failing to consider the cumulative personal circumstances of the appellants as substantial and compelling to justify a departure from the prescribed sentence of life imprisonment. Second, they assert that the sentence is shocking and inappropriately severe, when considering the appellants cumulative facts in mitigation.

Background facts

- [9] On the morning of 13 November 2020 at about 03h45am Nolothando Naymetole (Naymetole) was returning from a morning prayer. On route to her domicile, her attention was drawn to the sound of the cries of a female voice emanating from one of the holes which were dug in the area. The said person exclaimed, "What did I do, what did I do?". Assisted by moonlight, Naymetole advanced to a vantage point some nine metres away where she observed the appellants, the deceased and one Kabelo in the hole. She proceeded to use the video function on her cell phone to record what was unfolding before her.
- [10] Naymetole witnessed the appellants and Kabelo take turns at stabbing the deceased each once with a knife. The deceased eventually cried and fell to the ground.
- [11] The second appellant then emerged from the hole. He cautioned Naymetole to remain silent about what she had observed that he knew her and where her father lived, and he would come for her. The relevant video recording on her cell phone encapsulating what had occurred, was deleted. Naymetole was instructed to leave. She acquiesced. Unbeknown to the appellants, the recorded video had been saved on iCloud.
- [12] On the ensuing Monday 16 November 2020, members of the public found the body of the deceased in a stream. Naymetole proceeded to the scene and confirmed for herself that it was the deceased. Naymetole initially did not report what she knew about the death of the deceased, but a few days later, notwithstanding the consequences of making disclosure regarding the death of the deceased, her conscience got the better of her and she was unable to suppress her intimate knowledge of the death of the deceased. Resultantly, she alerted a member of the South African Police Services of the evidence that was in her possession and volunteered to hand same over. An appointment for this purpose was pre-arranged. The scheduled appointment did not reach fruition as Naymetole failed to honour the appointment in respect of the handing over of the video evidence, which had been stored on iCloud because Kabelo followed her on her way to the police station.
- [13] On 17 November 2020, whilst at home alone, Kabelo arrived and deleted the video evidence that was stored in iCloud. A few days later, Naymetole was contacted by the SAPS and requested to depose to an affidavit after failing to honour the appointment as aforesaid.
- [14] On 18 November 2020, Dr Letebele made the following chief findings after the postmortem examination had been conducted on the deceased. The deceased exhibited the following stab wounds. A stab wound (approximately 20mm x 30mm in size) on the right upper back, penetrating the chest puncturing the upper lobe of the right lung and causing death. A stab

wound (approximately 30mm x 20mm in size) on the central mid-back, cutting through the space between thoracic vertebrae 12 and lumbar vertebra 1, cutting through the spinal cord. A stab wound on the right upper abdomen (approximately 20mm x 10mm in size) with intestines protruding through it. These observations resulted in Dr Letebele concluded that the cause of death was a stab wound on the right upper back into the chest, and a stab wound on the central mid-back causing spinal injury.

Sentence

[15] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court and that an appeal court should only alter a sentence if that discretion has not been judicially and properly exercised, namely where the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate. *S v Holder* 1979 (2) SA 70 (A) at 75A.

[16] In *S v Malgas* 2001

(2) SA 1222 (SCA) at paragraph 12, the following approach was postulated:

“The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. 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. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the

former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

[17] The court a quo found that there were no substantial and compelling circumstances to justify a departure from the prescribed sentence of life imprisonment. Notwithstanding the arduous duty that a sentencing court is seized with, the exercising of a sentencing discretion is aimed at the attainment of a balance. The balance is directed at three prominent factors namely, the crime, the offender and the interests of the community. *S v Zinn* 1969

(2) SA 537 (A) at 540G-H.

[18] The first appellant was twenty-four (24) years old and unmarried. Prior to being arrested and detained for this matter, he was residing with his mother and two siblings. Notwithstanding being formally unemployed, the first appellant was an informal trader. He had been in custody since his arrest on 17 December 2020. The first appellant was not a first offender. He has a string of previous convictions. The most notable is a conviction for a contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, for which he was sentenced to life imprisonment. Additionally, he was declared *ex lege* unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

[19] The second appellant was twenty-six (26) years old at the date of sentencing. Whilst in primary school he was orphaned due to the passing of both his parents. Resultantly, his grandmother became his primary care giver. The highest level of education that he attained was Grade 10. The second appellant had to jettison the completion of his education to secure employment to support his child and the mother of his child. He was arrested on 14 January 2021 and had been in custody since his arrest. He is a first offender.

[20] The appellants were convicted of premeditated murder. There is no underscoring society's abhorrence to the senseless murder of women and children. Notwithstanding this, sentence is about the attainment of proportionality. It is about balance in the trilogy of factors that form the sentencing triangle as set out in *Zinn*. It is for this purpose that the punishing of an offender/s should never be relegated to a process that amounts to the exacting of revenge. *S v Kruger* [2011] ZASCA 219; 2012

(1) SACR 369 (SCA) at paragraph 11.

[21] Public opinion may have some relevance to the enquiry, but it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public. Righteous anger should not becloud judgment. Sentence must serve public interest rather than public opinions. *S v Pillay* Case No CCD 48/17 (7 May 2018), *S v Makwanyane & Another* [1995] ZACC 3; 1995

(6) BCLR 665; 1995

(3) SA 391 paragraphs 87-89.

Discussion

[22] For purposes of context it would be apposite to reiterate the grounds on which the appellant is aggrieved by the sentence. First, they assert that the court *a quo* misdirected itself by failing to consider the cumulative personal circumstances of the appellants as substantial and compelling to justify a departure from the prescribed sentence of life imprisonment. Second, they assert that the sentence is shocking and

inappropriately severe, when considering the appellants cumulative facts in mitigation.

[23] The appellants were not remorseful, as predicated in *S v Matyityi* 2011

(1) SACR 40 (SCA). Our courts link the presence of remorse with the prospect of the rehabilitation of the offender. (Terblanche “Sentencing”

2010 Annual Survey of South African Law 1279 1287–1288; *S v Ntuli* 1978

(1) SA 523 (A) 528B–C; *S v PN* 2010

(2) SACR 187 (ECG); *S v De Klerk* 2010

(2) SACR 40 (KZP) paragraph [28]; *S v Langa* 2010

(2) SACR 289 (KZP) par [36]; *S v Onose* 2012 JDR 1074 (ECG) par [9]; *S v Keyser* 2012

(2) SACR 437 (SCA) paragraph [29]) *S v Seegers* 1970

(2) SA 506 (A) 512G–H and *S v Matyityi* 2011

(1) SACR 40 (SCA) paragraph [13]).

[24] In *S v Matyityi* (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) (30 September 2010), the question of remorse was addressed as follows:

[13] There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and

acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. 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. There is no indication that any of this, all of which was peculiarly within the respondent’s knowledge, was explored in this case.” (footnotes omitted)

[25] As espoused in *Matytyi*, there was no gnawing pain of their individual conscience for the plight of the deceased or her next of kin after having callously murdered her. This did not change during the trial. There was no appreciation and acknowledgment of the extent of the error of their ways. This is underscored by the appellants failure to have disclosed the motive for the brutal murder of the deceased. Remorse was certainly not a factor that fell for consideration at the time of sentencing.

[26] Turning to the issue of pre-trial detention. The leading authority on the issue of pretrial detention is *Radebe and Another v S* (726/12) [2013] ZASCA 31; 2013

(2) SACR 165 (SCA) (27 March 2013). The trite principles espoused in *Radebe* were recently re-affirmed in *Loyiso Ludidi and Others v S* (983/2022; 056/2024) [2024] ZASCA 162 (29 November 2024) where Nicholls JA (Hughes, Molefe JJA and Dolamo and Bloem AJJA concurring) stated that:

“[13] It is now trite law that in respect of finite sentences there is no hard and fast rule as to the weight to be afforded to pre-sentencing incarceration. It is but one of the factors to take into consideration when determining the existence of substantial and compelling circumstances. In addition, a sentencing court should take into account the reasons for the prolonged period of detention prior to sentencing.

.....

[15] This Court, in dealing with a sentence of life imprisonment in *Ncgobo v S*, confirmed that the period spent in custody before conviction and sentencing is not, on its own, a substantial and compelling circumstance. It is merely a factor in determining whether the sentence imposed is disproportionate and unjust. It was held that the two years spent in custody would make a minimal impact on a sentence of life imprisonment and did not render the sentence shockingly disproportionate.”

[27] 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 and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one. See *S v Dlamini* 2012

(2) SACR 1 (SCA) paragraph 41.

[28] The ages of the appellants at time of sentencing were twenty-four

(24) and twenty-six (26) years respectively. It would be ill-contrived to describe each of them as callow youths. Opaque contentions that the appellants were youthful offenders is unhelpful.

Intrusively, there is no indication that the ages of the appellants fell exclusively or conjunctively within the epithet of substantial

and compelling circumstances. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others, reduces his blameworthiness. See: *S v Van Rooi & Andere* 1976(2) SA 580 (A). To this end, the age of the appellants on its own were neutral factors.

[29] In *S v Vilakazi* (576/07) [2008] ZASCA 87 at paragraph 20, the judgment in *Malgas* and that of the apex court in *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (5 April 2001) were considered. Nugent JA stated in *Vilakazi* that:

"... the essence of the decisions in Malgas and in Dodo is that a court is not compelled to perpetrate injustice by imposing a sentence that is disproportionate to the particular offence. Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case, though bearing in mind what the legislature has ordained and the other strictures referred to in Malgas. It was also pointed out in Malgas that a prescribed sentence need not be 'shockingly unjust' before it is departed from for 'one does not calibrate injustices in a court of law'. It is enough for the sentence to be departed from that it would be unjust to impose it."

[30] The irrefutable fact of this matter is a perfect example where the personal circumstances of the appellants recede into the background when the seriousness of the crime is considered. The crime is deserving of a substantial period of imprisonment. The deceased was murdered in a cowardly and vicious fashion. The injuries as recorded by Dr Letebele is an objective remainder of the callous and cruel nature of the deceased's death. Sadly, after she was murdered the deceased body was discarded only to be discovered by members of the public. It is apparent that the inviolable right to life as enshrined in our Constitution was of no moment to the appellants.

[31] The heinous conduct of the appellants counterpoised what the Supreme Court of Appeal sought to make clear in *S v Chapman* [1997] ZASCA 45; 1997

(3) SA 341 (SCA), that 'women in this country have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives'.

[32] The personal circumstances of the appellants are at best flimsy and should be avoided as expressed in the seminal judgment of *Malgas*. In the premises, the court a quo did not misdirected itself in finding that there were no substantial and compelling circumstances warranting a departure from the mandated sentence of life imprisonment.

[33] Finally, it would be remiss of me not to express my disquiet as it relates to the non-possum stance of the prosecutor, Miss Ntsala when the question of sentence was broached. Her conduct can best be surmised by paraphrasing from *S v Dlamini* 1991

(2) SACR 655 (A) at 666b-f (footnotes omitted), where the following observation was made:

'whereas criminal trials in both England and South Africa are conducted up to the stage of conviction with scrupulous, time-consuming care, the procedure at the sentencing stage is almost perfunctory.' That by and large continues to be the position. This matter was conducted somewhat differently. Notwithstanding the respondent's guilty plea, evidence ostensibly in proof of aggravation was led by the state. Much of it though went to guilt not sentence. We thus know little, if anything, about Mr MF. Was he a breadwinner? Were others dependent on him? If so, how many? What were his

scholastic or other achievements? What type of work did he do? What was the effect of his death on his family, employer and community? I hazard that the value of the sum of his life must have been far greater than the silent crime statistic that he has come to represent

in death. It surely would therefore be safe to infer that in some way or the other his death must have had devastating consequences for others. Although she testified, we know as little about the harm done to Ms KD by the respondent's deeds. All of those questions

regrettably remain unanswered in respect of her as well.

(emphasis added)

[34] Regrettably, Miss Ntsala did not give the deceased a voice which countermands the interest of justice. It is clearly a posture that must be deprecated and is indicative of tardiness. It is the duty of the prosecutor to ensure that sufficient facts are placed before the court for it to impose an appropriate sentence. See *R v Motehen* 1949 (2) SA 547 (A) at

550. *Olivier v S* (318/2009) [2010] ZASCA 48 (31 March 2010) at paragraphs 9-11.

Order

[35] Consequently, the following order is made:

The appeal against sentence is dismissed.

A REDDY

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION MAHIKENG

I agree.

J T MAODI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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Judgment

reserved: 7 February 2025

Judgment

handed down: 13 May 2025

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