

SOUTH AFRICA / JUDGMENT

Lesetedi v S (CA 24/2023) [2024]

ZANWHC 240 (18 September 2024)

[2024] ZANWHC 240

COURT

North West High Court, Mafikeng

BEFORE

A B Scarrott, N Laubscher

CASE / FILE NUMBER

CA 24/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH-WEST

DIVISION, MAHIKENG)

CASE

NO.: CA 24/2023

REGIONAL

COURT CASE NO.: RC31/2018

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

IN

THE CRIMINAL APPEAL
OF:

LESETEDI

LEBOGANG JOEL

APPELLANT

and

THE

STATE

RESPONDENT

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 am on 18 September 2024.

JUDGMENT

CORAM: SCARROTT AJ and LAUBSCHER AJ

BACKGROUND

RELEVANT TO THIS APPEAL:

[1] This is an appeal by the Appellant against his sentence by the Regional Division of the North West held in Taung on a charge of murder.

[2] The record filed in this matter reflects that the Appellant was charged as follows:

“That the accused is/are guilty of the crime of murder (read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997). In that upon or about the 19 day of June 2016 and at or near Kgomotso Village, in the Regional Division of North West, the accused

did unlawfully and intentionally kill Lebogang Liggert Gabodise a male person by stabbing him with a sharp object / a knife”

[3] The Appellant, who had legal representation at all relevant times, confirmed that he understood the charge.

[4] The Appellant pleaded not guilty to the charge. A statement in terms of Section 115 of the Criminal Procedure Act, Act 51 of 1977 (hereafter “the Criminal Procedure Act”) was made by the Appellant and read into the record by his legal representative.

[5] After a trial being conducted in this matter, the Appellant was found guilty “of murder read with the provisions of Section 51 Subsection 2 of the Criminal Law Amendment (sic) Act 105 of 1997”. As will be noted below, the subject matter of this appeal is the sentence and not the conviction of the Appellant.

[6] No previous convictions were proven by the State.

[7] The Appellant made submissions to the trial court, through his legal representative, in mitigation of sentence, as to his personal circumstances. The submissions were that:

- (a) He is 34 years of age, unmarried, with three children aged 2, 7 and 12 years old. The children are born from 2 different women. The older two children stay with the Appellant's mother as their birth mother is deceased. The youngest child stays with his birth mother. All children are supported by Government grants and the Appellant pays a contribution of R500 a month towards the maintenance of his children;
- (b) He has been employed for 5 years, as a forklift driver, earning R2500 per month;
- (c) He attended school until “Standard 8”;
- (d) No previous convictions were proven;

- (e) The incident was not planned or premeditated and the deceased was stabbed only once and not multiple times;
 - (f) The Appellant and the deceased had been drinking together on the day in question;
 - (g) He was upset at the death of the deceased who had grown up with and was a friend of the Appellant;
 - (h) The foregoing constitutes substantial and compelling reasons for the trial court to deviate from the prescribed minimum sentence.
- [8] The State made submissions to the trial court in response to the Appellant's submissions and in aggravation of sentence. The submissions were that:
- (a) The offence is a serious offence and subject to the minimum sentencing legislation;
 - (b) The reasons advanced by the Appellant are not substantial and compelling reasons to deviate from the minimum sentence prescribed;
 - (c) The children are largely supported by grants and will not be left destitute;
 - (d) The seriousness of the offence requires that the punishment be a deterrent to others, sends a message that such behaviour is not to be tolerated and protects society;
 - (e) The fact that the deceased was the Appellant's friend is aggravatory as was stabbing the deceased in the neck;
 - (f) The personal circumstances of the Appellant should not be over-emphasised.
- [9] After these submissions the trial court considered, inter alia, the purposes of sentencing, the fact that the Appellant did not seek medical assistance for the deceased, the fact that the Appellant

showed no remorse and the principles applicable to deviating from prescribed minimum sentences. The trial court looked at the circumstances advanced by the Appellant, found that there “are no substantial and compelling circumstances present in this case warranting a deviation from minimum sentence”, and sentenced the Appellant to 15 years imprisonment in line with the minimum sentence prescribed in Section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997.

- [10] The trial court also made consequential orders declaring the Appellant unfit to possess a firearm under section 103(1) of the Firearm Control Act, Act 60 of 2000; that there be a search and seizure under section 103(4) of the Firearm Control Act, of firearms, ammunition and of documents issued in terms of the Firearm Control Act; and that the knife be forfeited to the State in terms of section 35(1) of the Criminal Procedure Act.

THE APPEAL

- [11] The Appellant appeals only the sentence imposed by the trial court, seeking a reduction of the sentence from 15 years imprisonment to 10 years imprisonment. In this appeal the Appellant was represented by Adv Seleka, and the Respondent was represented by Adv Molefe.
- [12] In this appeal the Appellant contends that the sentence imposed by the trial court is excessive and, in essence, that the trial court erred in over-emphasising the interests of society and the seriousness of the offence and under-emphasising the personal circumstances of the Appellant. The Appellant submits that the trial court should have found substantial and compelling circumstances existed requiring deviation from the minimum sentence. In support of this, the Appellant repeats his personal circumstances set out in paragraph 7 above and contends that he is a good candidate for rehabilitation.
- [13] The Respondent on the other hand contends that this Court should not interfere with the sentence. The State argues that the personal circumstances of the Appellant were correctly found not to constitute substantial and compelling reasons to deviate from the minimum sentence and that in imposing the sentence of 15 years imprisonment the trial court considered the nature and seriousness of the offence, the prevalence of the offence, the interests of justice and the personal circumstances of the Appellant.
- [14] This appeal is heard, as requested by the parties, without hearing oral argument, in terms of section 19(a) of the Superior Courts Act 10 of 2013.

MURDER AND THE MINIMUM SENTENCING LEGISLATION

- [15] Murder is the “unlawful and intentional causing of the death of another human being”.
- [16] Section 51 of the Criminal Law Amendment Act, Act 105 of 1997 (hereafter “the Criminal Law Amendment Act”) introduced the so-called “minimum sentencing legislation”. It became effective and applicable to offences committed from 1 May 1998[1].
- [17] The Appellant was convicted of murder in circumstances where Part I of Schedule 2, to the Criminal Law Amendment Act does not apply. Section 51(2) of the Criminal Law Amendment Act provides that, subject to subsections (3) and (6), the sentencing Court was required to sentence the Appellant, as a first offender, to imprisonment for a period of not less than 15 years[2].
- [18] However, the provisions of section 51(3)(a) of the Criminal Law Amendment Act states that:
- “If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence...” (this Court’s emphasis).*
- [19] As the Appellant was older than 18 years of age at the time of the commission of the offence, section 51(6) of the Criminal Law Amendment Act was not applicable.

[20] In the seminal judgment on minimum sentences, *S v Malgas*,^[3] the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences brought about thereby:

“...The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative

hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders...

Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.”^[4] (this Court’s emphasis)

[21] In *S v Vilakazi*^[5] the above referred to judgment in *Malgas* and that of the Constitutional Court in *S v Dodo*^[6] (on the same subject) 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’.^[7] It is enough for the sentence to be departed from that it would be unjust to impose it.” (footnotes retained)

[22] Accordingly then, where imposing the prescribed minimum sentence would be unjust, the Court is then required to impose a lesser sentence^[8].

[23] As to the reasons advanced by the Appellant in support of his request for a lesser sentence, the further statement by Nugent JA in *S v Vilakazi*^[9] is of guidance and apposite:

“In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or

three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment".

- [24] It is trite that murder is a serious offence and one of the major contributors to the fact that crime and lawlessness in South Africa are out of control. Accordingly, murder has been identified as one of the crimes that is subject to the minimum sentencing legislation and a lengthy term of imprisonment (15 years).

GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON SENTENCE:

- [25] The powers of a court of appeal regarding sentencing, are regulated by the principles laid out in the body of established judicial

precedent[10]. These include the following principles that are applicable in casu:

- (a) An appeal Court is generally loath to interfere with the sentence of a trial court. As with the assessment of facts, the trial court has the advantages of having been present when the matter was heard. As far back as 1920, the Appellate Division (as it then was) in the case of *R v Maphumulo and Others*[11] stated that:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

- (b) In *S v Barnard*[12] the Supreme Court of Appeal stated: "A court sitting on appeal on sentence should always guard against eroding the trial court's discretion ... and should

interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably."

- (c) In *S v Hewitt*, [13] Maya DP held that: "It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence

and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised."

- (d) In *S v Bogaards*[14], Khampepe J in the Constitutional Court stated as follows regarding the power of an appeal Court to interfere with a sentence imposed by the trial court:

"It can only do so where there has been an irregularity that results in the 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."

- [26] This principle was also echoed by and phrased by Du Toit[15] as follows: "The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it." [16]

- [27] The trial court "...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same." [17] In *S v Singh*[18] Tshiqi JA held that: "The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate."

- [28] In the matter of *Chitumbura and Another v S*[19] the Court quoted the above referred to phrase from du Toit with approval, referred to the Supreme Court of Appeal matter of *S v Kgosimore*[20] and stated the following: "Regard may be had also to the judgment of Scott, JA in *S v Kgosimore*, 1999

- (2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial

hierarchy protects the prerogative below, and it is difficult to add to it."

- [29] In *Bailey v The State*[21] the Supreme Court of Appeal in a unanimous judgment stated that:

"[20] What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not."

[21] The most difficult question to answer is always: what are substantial and compelling circumstances? The term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part the sentencing court. I have, however, found the following definition in *S v Malgas* (above) para 22 to be both illuminating and helpful:

‘The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.’

[30] The above quoted authorities clearly set out the legal position in this regard and requires no further discussion.

CONSIDERATION OF THE GROUNDS OF APPEAL

[31] It falls to this Court on appeal to consider whether the facts considered by the trial court were substantial and compelling or not and whether the sentence imposed was, in the circumstances, unjust or disproportionate to the crime.

[32] The grounds given by the Appellant in mitigation and as constituting substantial and compelling circumstances, are personal circumstances as envisaged by the court in the Vilakazi matter.

[33] The Appellant contends that he is capable of being rehabilitated. No evidence was led before the trial court in this regard, and this is presented as a statement of [unsubstantiated] fact. There is no evidence as to the impact that alcohol may have had.

[34] In addition to the personal circumstances mentioned in the Vilakazi matter as not being material, the Appellant was not a youth at the time the offence was committed, there was no evidence of reduced mental capacity, and the trial court found no signs of remorse of the Appellant.

[35] The trial court found no substantial and compelling circumstances and was satisfied that in the circumstances of the matter the prescribed minimum sentence was appropriate. The sentence was arrived at after a consideration of the circumstances of the matter and the representations on behalf of the Appellant as to his personal circumstances.

- [36] This Court noting the authorities cited above, is not persuaded that any of the personal circumstances as presented by the Appellant, when considered as a whole and when considered in light of the seriousness of the crime and the circumstances of this matter, constitute substantial and compelling reasons that required the trial court to consider a lesser sentence.
- [37] It is the view of this Court that no injustice arises from the application of the prescribed minimum sentence in the circumstances of this matter.
- [38] In this matter, this Court is satisfied that the imposition of the prescribed minimum sentence would not constitute an injustice, nor would it be disproportionate to the crime, the criminal or the legitimate needs of society.
- [39] The prescribed minimum sentence is appropriate, does not induce a sense of shock in the circumstances of this matter. There was no misdirection by the trial court in imposing the sentence.
- [40] There is no basis for this Court to interfere with the sentence imposed by the trial court.

CONCLUSION

AND JUDGMENT:

[41] In the premise the following order is hereby made:

The appeal against sentence is dismissed and the sentence of 15 years imprisonment imposed by the trial court, as well as the following consequential orders made by the trial court and stated below are also confirmed:

- (a) The declaration in terms of section 103(1) of the Firearm Control Act, Act 60 of 2000 that the Appellant is unfit to possess a firearm;
- (b) The order in terms of section 103(4) of the Firearm Control Act, Act 60 of 2000 for the search and seizure of all competency certificates, licences, authorisations and permits issued to the Appellant in terms of the aforesaid Act as well as all firearms and all ammunition in the Appellants possession;
- (c) The declaration in terms of section 35 of the Criminal Procedure Act that the knife used in the commission of the murder be forfeited to the State.

A B SCARROTT

ACTING JUDGE OF THE HIGH COURT, NORTH-WEST DIVISION, MAHIKENG

I AGREE.

N LAUBSCHER

For the Appellant: Adv Seleka

For the Respondent: Adv Molefe

Date of Hearing: Adjudicated on the record and heads of argument

Date of Judgment: 18 September 2024

- [1] A Guide to Sentencing in South Africa SS Terblanche Third Edition page 50.
- [2] Section 51(2)(a) of the Criminal Law Amendment Act read with Part II of Schedule 2.
- [3] 2001 (1) SACR 469 (SCA).
- [4] At paras [7] to [9] and [25].
- [5] Vilakazi v The State (576/07) [2008] ZASCA 87 at para 20.
- [6] 2001 (3) SA 382 (CC).
- [7] S v Malgas para 23.
- [8] Vilakazi v The State supra at paras 14 – 15.
- [9] Vilakazi v The State supra at para 58.
- [10] Criminal Procedure Handbook J J Joubert 12 Edition page 457.
- [11] 1920 AD 56 at 57.
- [12] 2004
- (1) SACR 191 (SCA) at para [9].
- [13] 2017 (1) SACR 309 (SCA).
- [14] 2013 (1) SACR 1 (CC) at para [41].
- [15] Commentary on the Criminal Procedure Act (Jutastat, 31 January 2021) at 30-41.
- [16] Also see S v Fhetani 2007 (2) SACR 590 (SCA), Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA), S v Anderson 1964 (3) SA 494 (A); Nevilimadi v S (545/13) [2014] ZASCA 41 (31 March 2014) and S v Asmal (20465/14) [2015] ZASCA 122 (17 September 2015).
- [17] Gqika v S (CA&R 112/2021) [2022] ZAECGHC 15 (1 March 2022) at para [20].
- [18] 2016
- (2) SACR 443 at para [23].
- [19] (A190/201) [2017] ZAGPJHC 274 (14 September 2017) at para [9] and [10].
- [20] 1999 (2) SACR 238 (SCA).
- [21] (454/11) [2012] ZASCA 154 at paras [20] and [21].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2024/240.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/lesetedi-v-s-unknown-topic-anwhc-2024>

Prepared on 9 October 2026 · Esheria