

SOUTH AFRICA / JUDGMENT

Makena v S (A723/08) [2011] ZAGPPHC 207; 2011 (2) SACR 294 (GNP) (4 February 2011) [2011] ZAGPPHC 207

COURT

North Gauteng High Court, Pretoria

BEFORE

Webster, Ranchod, Pakati

CASE / FILE NUMBER

A723/08

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REPORTABLE

IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE.NO.:A723/08

DATE:04/02/2011

In

the matter between:

KOBANE

CAIPHUS

MAKENA.....APPELLANT

And

THE

STATE.....RESPONDENT

JUDGMENT

WEBSTER J

[1] The appellant is before a full bench of this court on appeal against a sentence of a single judge, sitting with assessors, leave to do so having been granted by the Supreme Court of Appeal.

[2] The appellant, having pleaded guilty, was convicted of the following crimes, viz:

- I.) Murder;
- II.) Robbery; and
- III.) Housebreaking with intent to steal and theft.

[3] He was sentenced on those corresponding counts as follows: I.) Forty (40) years' imprisonment; II.) Fifteen (15) years' imprisonment; and III.) Ten (10) years' imprisonment.

It was ordered that the sentences on the counts of murder and robbery run concurrently. The cumulative effective sentence is ~ therefore

fifty (50) years' imprisonment. The trial court further recommended that the appellant be only considered for parole after serving thirty years of the term of imprisonment.

[4] It is now trite that the imposition of sentence is pre-eminently a matter for the trial court. A court of appeal will not interfere with a sentence unless it is satisfied that the trial court failed to exercise the discretion bestowed upon it in a "proper and reasonable" manner. As Scott JA held in *S v Kgosimore* 1999 (2) SACR 238 at page 241 para [10]:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Compare *S v Pieters* 1987 (3) SA 717 (A) at 727 G-I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so. I can, accordingly, see no juridical basis for the stricter test suggested by counsel; nor is there anything in s 316B of the Act, or for that matter s 310A, to suggest otherwise. (See also *S v Anderson* 1964 (3) SA 494 (A).)"

[5] It is important to highlight that the offences giving rise to the trial against the appellant occurred in 1996 i.e. prior to the enactment of the General Law Amendment Act No. 105 of 1997.

[6] A brief synopsis of the facts of the crimes the appellant was convicted of-is as follows:

6.1 The appellant and his former co-accused broke into the premises of the complainant in the count of housebreaking and theft with the intention to steal. Having done so they removed a large quantity of household goods, clothing, and jewellery and hid them. In the evening while they were loading the stolen goods under the cover of darkness into the appellant's vehicle the deceased came upon them at the scene. In his plea explanation the appellant described how the

deceased pointed a firearm at him and his accomplice. A struggle ensued between the appellant and the deceased. The appellant and his accomplice overpowered the deceased and removed the firearm (a Z88 pistol) from the deceased. The appellant then shot the deceased on the chest and right rear hip. The deceased died as a result of such injuries.

6.2 The deceased had been in private clothes and had been travelling in an unmarked private vehicle.

6.3 The appellant admitted in his statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 that he had removed the deceased's R5 rifle, ammunition and cellular telephone with the necessary intention of permanently depriving him of such property.

6.4 In sentencing the appellant the learned trial judge dealt with crimes the appellant was convicted of, the personal circumstances of the appellant and the interests of society. He pointed out that murder was undoubtedly the most serious of crimes. The deceased had been shot after he had

been disarmed. He noted that even if the appellant had not known that the deceased had been a police officer the —objective in shooting the deceased was to evade arrest-and-avoid being traced as one of the persons who had committed the burglary. The robbery, he remarked, was likewise viewed as a serious crime as well.

6.5 He took note of the appellant's personal circumstances viz, his age (34 years), his clean record, that even though he was unmarried he was the father of two minors whom he maintained. The appellant has a standard eight level of education and had been employed as an operator earning R400 per week. In the appellant's favour he took note of the appellant's contrition in pleading guilty and undertaking to testify against his co-accused who had pleaded not guilty. The trial judge further dealt with the interests of society highlighting, inter alia, the well-known excerpt from *R v Karg* 1961 (1) SA 231 (A.D.) at 236 A -B where Schreiner J.A. noted:

"While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

[7] What stands out in the judgment of the Court a quo was the evidence of superintendent Vreugdenberg of the murder and robbery division of the South African Police, namely, that the deceased had been a sergeant in the detective branch of the police. He was married with a three year old daughter. He was 25 years of age. He provided the court with the statistics of the number of police officers who had been murdered between 1994 and 1998. This information must have been intended to serve as emphasis of the seriousness of the crime

the appellant was guilty of and as an aggravating factor. Nothing further was mentioned in the judgment on the sentence regarding the death of police officers whilst on duty.

- [8] It was submitted by Ms. Koos-Manyakane, for the appellant, that the appellant was wrongly convicted. Even though this related to the conviction and leave to appeal on the merits had not been granted this court allowed her the opportunity to motivate this. She then pointed out that after pleading guilty the appellant had added that he had not intended to kill the deceased. When she was referred to the written statement in terms of section 112(2) of the Criminal Procedure Act at page 21 (lines 5 to 10) of the record she conceded the lack of merit in her argument. The excerpt referred to reads as follows:

n Ek het toe die ongewapende ooriende wederregtelik en opsetlik twee maal daarmee geskiet Ek erken dat ek voorsien het dat ek deur die ooriene op 7? kort afstand met 'n vuurwapen geskiet het ek horn kon gedood het Ek het my daarmee versoen."

- [9] With regard to the sentence Ms Koos-Manyakane submitted that I.) The sentence was too harsh;

II.) The trial court should have found that exceptional circumstances existed in that the crimes committed were so closely related that a lesser sentence should have been imposed:

(III.) The trial court should have ordered that the sentences imposed run concurrently.

- [10] Ms. Scheepers for the State, submitted that the trial court had duly considered all the relevant factors and -urged-this court -not-to. interfere.. She emphasized the interests of society given the alarming increase in violent crime and the need for sentences to reflect the obligation to ensure that serious crime is not met with light sentences such that society would take the law into its own hands. She referred the court to *S v Swart* 2004 (2) SACR 370 (SCA) at 378 and urged the court to ensure that prevention and retribution were clearly manifested in the sentence, if the court were to interfere with the sentence.

- [11] On debating the sentence with Ms. Scheepers on count one, i.e. the murder count, she conceded, reluctantly, that the sentence of forty years did appear to run counter to the judicial trend to strive after rehabilitation and reformation as opposed to retribution and prevention. She conceded further that life imprisonment is deemed to be the ultimate form of punishment. She further and again reluctantly conceded that the general perception is that an offender sentenced to life imprisonment could be released or considered for release on parole after 25 years imprisonment. The court's considered view is that these concessions are correct and can be deduced from the jurisprudence of the Supreme Court of Appeal and the Constitutional Court respectively. Two issues arise from this viz, the recommendation of the trial court regarding the period that must elapse before the appellant can be considered for release on parole and whether the effective sentence on the counts of murder and housebreaking with the intent to steal and theft, namely, 40 years and 10 years' imprisonment respectively, can be regarded as being in accordance with the ethos of fairness and justice in a society which, despite the envied values enshrined in our

Constitution, is still so sharply riven by historic, educational and economic factors.

[12] Given the doctrine of separation of powers, under the present Constitution, I am of the view that it is best left to the Department

of Correctional Services, which forms part of the Executive arm of government, to determine when the accused should be released on parole without any suggestion or recommendation in this regard from the Court. The Correctional "Services Department, which

functions under the executive branch of government may not influence, nor seek to do so, the courts in their pursuit of administration of justice. Likewise, the courts may not influence Correctional Services in their own duties and functions. It is indeed so and perhaps only human that a court may view the facts in a case so seriously that it may be of the considered view that its abhorrence and desire to protect society from the accused's conduct should be conveyed to Correctional Services. Whilst that may find favour with the intellect it overlooks the fundamental independence of the latter which, to my mind, does not operate from the premise that those convicted by the courts and channelled to it are incorrigible and beyond redemption from a life of crime and are beyond rehabilitation. It is my considered view that a recommendation along the lines in the sentence on count one should be avoided and left uninfluenced in the hands of the appropriate department.

[13] What has been said about rehabilitation and reformation applies to the period of the appellants' rehabilitation viewed from the appropriateness or otherwise of the imprisonment for fifty (50) years. It is my considered view based on the sentences emanating from the Supreme Court of Appeal that effective sentences exceeding 25 years' imprisonment are not confirmed lightly. Again the basis for this may be the emphasis on reformation and rehabilitation, based inter alia on the constitutional precepts that punishment should not be cruel or be deemed to be such. This statement is made with the full knowledge and appreciation of the gravity and devastating effects that the loss of the victim's life has inevitably inflicted on his family, society and the country. The need to have regard for a convicted person's personal circumstances serve precisely to balance the principles that must be considered when sentencing as set out in *S v Rabie* 1975 (4) SA 855 where Holmes JA said:

"To sum up, in general punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

[14] In as much as it may be difficult to find "extenuating circumstances" (*S v Malgas*), the appellant appears to have

expressed sincere remorse: it may be that the evidence against him was overwhelming. But the following facts cannot be overlooked. He was 34 years of age. He had never run foul of the law before. He was in employment and still entertained the hope and desire to return to employment. He made a clean breast of what had occurred on the night of the incident. He not only made an undertaking to assist in his co-accused's prosecution but made an affidavit that was

accepted by the state for the purpose for which it was envisaged. He has relentlessly pursued the hope of a reduction in his sentence.

[15] It is often said that the admissions by a convicted person of his/her complicity in the commission of a crime is the first step to reformation and rehabilitation. Whatever greed may have enticed the appellant to conspire with his former co-accused may have given way to a full realization of the error of his ways. The opposite may be true i.e. having been apprehended all romantic notions gave way to reality and the only hope is the route the appellant has chosen. In the court's view the appellant should be given the benefit of the doubt. After all, the psychologists and other experts that will plot and vet his future are in place within the Department of Correctional Services.

[16] It is my considered view that the trial court was in all probability influenced in imposing the sentence that it did, by the fact that the deceased was a police officer. The statistics on the death of police officers on duty is quite alarming and evinces a response to impose a sentence that little or no mercy will be shown to those who shoot or harm law enforcement officers. Having regard to the facts in this matter, it is my considered view, that 40 years' imprisonment on count 1 is excessive and this court should interfere with that sentence. It is my considered view that 20 years' imprisonment would be an appropriate sentence on the count of murder. I would confirm the sentences on counts 2 and 3.

[17] In the result:

1. The appeal against sentence succeeds,
2. The sentence imposed is set aside.
3. In its place the following sentence is imposed:

(I.) On the charge of murder - twenty (20) years' imprisonment;

(II.) On the charge of robbery-ten (10) years' imprisonment,

(III.) On the charge of housebreaking with intent to steal and theft - ten

(10) years' imprisonment. I would suspend half of this sentence for a period of five (5) years on condition that the appellant is not convicted of the offence of housebreaking and theft committed during the period of suspension;

IV.) It is ordered that the sentence for robbery run concurrently with the sentence for murder. The effective sentence is therefore 25 years' imprisonment.

G. WEBSTER JUDGE IN THE HIGH COURT

I agree.

N RANCHOD

JUDGE IN THE HIGH COURT

B. PAKATI

ACTING JUDGE IN THE HIGH COURT

2.The sentence imposed is set aside.

3. Sn its place the following sentence is imposed:

(I) On the charge of murder - twenty (20) years¹ imprisonment;

(II) On the charge of robbery - ten (10) years' imprisonment;

(III) On the charge of housebreaking with intent to steal and theft - ten ("10) years' imprisonment
J would suspend half of this sentence for a period of five (5) years on condition that the appellant is not convicted of the offence of housebreaking and theft committed during the penod of suspension;

(IV.) It is ordered that the sentence for robbery run concurrently with the sentence for murder.
The effective sentence is therefore 25 years' imprisonment.

G. WEBSTER

I agree-

N. RANCHOD

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