

SOUTH AFRICA / JUDGMENT

# Makoa v S (A 504/2014) [2014] ZAGPPHC 1015 (28 November 2014)

[2014] ZAGPPHC 1015

## COURT

North Gauteng High Court, Pretoria

## BEFORE

D.S. Molefe, K.L.A.M. Manamela

## CASE / FILE NUMBER

A 504/2014

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

## Source record

## SAFLII

## Note: Certain

personal/private details of parties or witnesses have been  
redacted from this document in compliance with the law  
and SAFLII

## Policy

## REPUBLIC

## OF SOUTH AFRICA

## IN

## THE HIGH COURT OF SOUTH AFRICA

## (GAUTENG

## DIVISION, PRETORIA)

## Case Number: A

## 504/2014

## Date: 28 November

## 2014

## Not reportable

## Not of interest to

## other judges

## In the matter

## between:

MOTSAMAI

MAKOA.....APPELLANT

and

THE

STATE.....RESPON

DENT

---

**JUDGMENT**

MOLEFE J:

[1] This is an appeal against sentence only, leave to appeal having been granted by the Oberholzer regional court. The appellant was convicted on the following charges:

Count 1 : rape;

Count 2 : murder.

[2] The minimum sentence provisions pertaining to life imprisonment in terms of section 51 (1) of the Criminal Law Amendment Act, No 105 of 1977 ("the Act") were applicable. The appellant was sentenced to 10 years imprisonment in respect of the rape count and life imprisonment in respect of the murder count. The court a quo found that there were no compelling and substantial circumstances warranting a deviation from the minimum sentence.

[3] As the appeal is against the sentence only, those facts which are germane to the determination of an appropriate sentence for the appellant deserve to be briefly recounted. The appellant was convicted of raping and murdering Ms J[...] M[...] ("the deceased") during the night of 5 October 2012. The appellant met with the deceased at a tavern and the next day her body was discovered in the veld, buried and/or covered with stones. The appellant admitted having consensual sex with the deceased, whom he alleged to be his girlfriend and admitted the DNA results confirming that the appellant had sexual intercourse with the deceased. The post mortem report indicated that there was forceful sexual intercourse and lacerations were found on the deceased's private parts. The deceased's face was crushed beyond recognition, with her head flattened from side to side.

[4] Counsel for the appellant<sup>1</sup> submitted that the trial court misdirected itself in finding no substantial and compelling circumstances to justify the imposition of a lesser sentence than life imprisonment. It was counsel's argument that the appellant's legal representative only addressed the trial court on the traditional factors which are usually placed before a sentencing court and that the learned magistrate did not elicit any further factors from the appellant to assist him in coming to a just sentence. Appellant's counsel relied on *S v Magano* 2014 (2) SACR 423 GP wherein the court held that where a sentence of life imprisonment is prescribed, it is required that sufficient information is presented

to enable the court to produce an informed and balanced sentence. Failure to request a pre-sentencing report or to give counsel

sufficient opportunity to address a court on mitigation of sentence constitute a misdirection.

In my opinion, the decision in Magano supra is distinguishable from this matter. The court in Magano had to re-look at the failure of the trial court to request a pre-sentence report where there was severe parsimony of information on the appellant and the complainant.<sup>2</sup>

- [5] Appellant's counsel further submitted that the trial court failed to take into consideration or attached insufficient weight to the appellant's personal circumstances, such as his age (the appellant was 27 at the time of the imposition of sentence); being married with a child aged 8 years; that he was a first offender; that he passed standard 7 in school and that he earned his income by doing odd jobs. In addition the fact that the appellant was from a drinking place and was probably intoxicated was not highlighted during mitigation.
- [6] Furthermore, counsel for the appellant submitted that the appellant had spent 11 months in custody while awaiting trial and that the period should have been taken into consideration by the trial court. In this regard, appellant's counsel relied on Director of Public Prosecutions. North Gauteng: Pretoria v Gcwala and Others<sup>3</sup> wherein the court held that a sentencing court should consider in all cases whether the period of imprisonment proposed was proportionate to the crime committed, taking into account the period spent in custody awaiting trial. It is on the above-mentioned submission that the appellant's counsel argues that the appeal be upheld in respect of sentence and the matter be referred back to the trial court to obtain sufficient information from the appellant and to properly consider the absence or presence of substantial and compelling circumstances.
- [7] Respondent's counsel opposed<sup>4</sup> the appellant's submissions and contended that the court a quo was not vitiated by any misdirection or irregularity in imposing the minimum prescribed sentence. Counsel for the respondent argued that the rape and murder charges in casu are very serious and reprehensible. Counsel relied on S v Roslee
- [2006] ZASCA 14; 2006 (1) SACR 537 (SCA) wherein the Supreme Court expressed the following principle at 545 e on the issue of the raising of substantial and compelling circumstances by the defence:

*"Although there is no onus on an accused to prove the presence of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration".*

#### (A) Pre-Sentence Report

- [8] The role of pre-sentence reports must not be confused with the obligation of the trial court to impose an appropriate sentence in the first place. In the case of a juvenile, it is important to obtain a pre-sentence report even if the offender was over the age of 18 years at the time of the commission of the offence. (See S v van Rooyen 2002 (1) SACR 608 (C) at 611) . Case law has over the years emphasised the necessity for the sentencing court to obtain pre-sentence reports in respect of young offenders.

- [9] Section 71 of the Child Justice Act 75 of 2008 sets out circumstances where a child justice court must request a pre-sentence report. A failure to do so is an irregularity. In casu, the appellant was at the time of the imposition of sentence, 27 years old and an adult. The pre-sentence report was therefore not mandatory and the present matter did not warrant a pre-sentence report. In *State v van de Venter* 2011 (1) SACR 238 (SCA) it was held:

*“That despite the fact that the Appellant was legally represented there had nonetheless been a duty on the court a quo to call for such evidence as was necessary to enable it to exercise a proper judicial sentence discretion. The community’s natural indignation warranted recognition in sentence.”*

- [10] The appellant in casu was duly represented by a legal representative, who clearly from the trial court record was given sufficient time to present sufficient

information to the trial court to enable the court to produce a balanced, and informed sentence and to exercise a proper judicial

sentence discretion. I do not find any misdirection or irregularity on the court a quo in imposing the minimum prescribed life sentence without a pre-sentence report.

#### (B) Time Spent in Custody While Awaiting Trial

- [11] The correct approach on the subject of an accused spending time in custody while awaiting trial was set out in the recent case of *Radebe v S* (726/12) r2013l SA SCA 31 (27 March 2013), a judgment of Lewis JA with Leach JA and Erasmus AJA concurring. It was held that when determining an appropriate sentence of imprisonment,

the period spent by an accused in detention while awaiting trial, sentence should not be assessed mechanically in reducing the period of imprisonment to be imposed. Having regard to the facts in this matter, the brutality and gruesome murder and rape of a defenceless woman, I am of the opinion that there was no room for considering a reduction of sentence by the court a quo as a result of the time spent in custody by the appellant while awaiting trial.

#### (C) Appellant as a First Offender

- [12] I agree that the fact that an accused is a first offender should count in his or her favour. However, it cannot on its own, amount to substantial and compelling circumstances especially in a case such as the present where the nature and seriousness of the offence and the interest of society far outweigh the fact that the appellant is a first offender. The appellant’s status therefore as a first offender, correctly did not play a prominent role in sentencing. The appellant’s clean record pales into insignificance when compared to the brutality of the complainant’s murder and rape.

#### (D) Consideration of Appellant’s Personal Circumstances

[13] Counsel for the appellant correctly submitted that depending on the facts of each case, certain personal circumstance are neutral and can never amount to substantial and compelling circumstances even cumulatively as envisaged in the Act. In the present case, the age of the appellant, level of education, marital status and work experience can play no dominant role in sentencing.

[14] In a well written judgment, the learned magistrate upon sentencing confirmed that the appellant's personal circumstances deserved deliberations and was also mindful of the fact that to reach a fair and appropriate sentence, the court had to do a balancing exercise of all the relevant factors.

[15] It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle

implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been imposed by a sentencing

court. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been set out in many SCA judgments. (See *S v Malaas 2001 (1) SACR 469 (SCA)*).

[16] This Court cannot fault the decision of the sentencing court nor can it be said that the sentence imposed was shocking or unjust. There were also no substantial or compelling circumstances warranting a deviation from the minimum prescribed

sentence. To decide otherwise would be to use "flimsy reason"<sup>5</sup> to avoid a prescribed minimum sentence when it is clearly warranted.

[17] In the result, I would grant the following order:

The appeal against sentence is dismissed.

D.S. MOLEFE

Judge of the High Court

K.L.A.M. MANAMELA

Acting Judge of the High Court

I agree

APPEARANCES:

Counsel on behalf of Appellant : Adv. L A van Wyk

Instructed by: Legal-aid South Africa

Counsel on behalf of Respondent: Adv. M J Nethononda

Instructed by : State Attorneys

Date Heard: 21 November 2014

Date Delivered: 28 November 2014

1Advocate L A van Wyk

2See Magano at paragraph [12] - [14] on pages 426-7

32014

(2) SACR 337 (SCA)

4Advocate M J Nethononda

5See Malgas supra

---

## 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/ZAGPPHC/2014/1015.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/makoa-v-s-unknown-topic-agpphc-2014--6a3ea51a3b1caa9129810b6d>

Prepared on 14 October 2026 · Esheria