

SOUTH AFRICA / JUDGMENT

Makowa v S (CAF 12/2013) [2014] ZANWHC 26 (20 March 2014)

[2014] ZANWHC 26

COURT

North West High Court, Mafikeng

BEFORE

N Gutta, A A Landman, M A Kgoele

CASE / FILE NUMBER

CAF 12/2013

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“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NO. CAF 12/2013

DATE: 20 MARCH 2014

In the matter between:

JOSEPH PAPIE MAKOWA.....APPELLANT

And

THE STATE.....RESPONDENT

LANDMAN J, KGOELE J. AND GUTTA J.

CRIMINAL APPEAL

GUTTA J.

A. INTRODUCTION

[1] The appellant was indicted in the High Court of South Africa, Bophuthatswana Provincial Division, as it was known then, on two counts: murder and possession of an unlicensed firearm.

[2] On 25 February 2004, he was convicted on both counts and sentenced as follows:

2.1 On count 1, life imprisonment;

2.2 On count 2, 3 (three) years imprisonment.

- [3] The appellant applied for condonation for the late prosecution of his appeal. He also applied for leave to appeal the conviction and sentence.
- [4] On 01 April 2011, the Court a quo granted the application for condonation and the application for leave to appeal sentence only.
- [5] Hence, this appeal is against sentence.

B. FACTS

- [6] The facts briefly are that the appellant and the deceased were involved in a love relationship. On 21 July 2001, the appellant arrived at the deceased's home and requested her to accompany him. She refused as she and her sister were preparing to go to church that night. The appellant produced a firearm and threatened the deceased, whereafter she agreed to accompany him half way and then went to church with her sister. The appellant later fetched the deceased from the church. In the evening, the appellant was seen arguing with the deceased at a shopping complex and the appellant produced the firearm and shot her, causing her death.

C. GROUNDS OF APPEAL

- [7] The grounds of appeal are as follows:

7.1 the trial court erred in imposing life imprisonment in terms of Schedule 2 Part 1 of the Criminal Law Amendment Act 105 of 1997 ("the Act") after finding that there were no substantial and compelling circumstances which justify a deviation from the prescribed minimum sentence in circumstances where there was no reference to the provisions of the Act in the indictment or when the charge was put to the appellant;

7.2 life imprisonment is strikingly inappropriate and the trial court erred by not imposing a shorter term of imprisonment;

7.3 The trial court erred in overemphasising the following:

7.3.1 The seriousness of the offence;

7.3.2 The interests of society;

7.3.3 The prevalence of the offence;

7.3.4 The deterrent effect of sentencing;

7.3.5 The retributive element of sentencing.

D. SECTION 51(1) and (2) OF THE ACT

- [8] Counsel for the respondent, Mr Jacobs, correctly conceded that the indictment and record of proceedings in the Court a quo are silent regarding the provisions of section 51(1) and (2) of the Act, and that the appellant was neither warned nor informed that after conviction, the sentence referred to in the Act would be invoked.
- [9] A further concession was that the Court a quo misdirected itself by referring to the prescribed minimum sentence in the judgment on sentence.
- [10] Mr Jacobs however submitted that the normal penal jurisdiction of the High Court was not in any manner affected by the implementation of the Act and submitted that this Court invoke the normal inherent penal jurisdiction and consider the sentence afresh. See *Kganye v The State* (CAF 9/2010) [2013] SANWHC 25 (7 March 2013) at [9].
- [11] In *S v Ndlovu* 2003 (1) SACR 331 (SCA), it was held that where the State intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial. If this is not done in the charge sheet, then it must be done in some other form, so that the accused is placed in a position to appreciate properly and in good time the charge that she or he faces as well as the possible consequence. See *S v Jacobs* 2011 (1) SACR 505 (ECG) at 509, paragraphs [10]–[13].
- [12] The requirement that the accused is legally represented does not relieve the State of its duty to inform the Court to warn the accused of the implications of the minimum sentence provisions. See *S v Ndlovu* 2003 (1) SACR 331 (SCA) AT 337a–c and 337g–h; *S v Steyn* 2011 (1) SACR 364 (WCC) at paragraph [7].
- [13] In the circumstances, it is necessary to set aside the sentence and consider it de novo.

E. SENTENCE

- [14] It is trite that the imposition of a sentence is a matter for the discretion of the Court tasked with imposing same. A court of appeal will generally only interfere with the sentence imposed by a lower court in circumstances where the reasoning of the trial court is vitiated by misdirection or where the sentence imposed is startlingly inappropriate and induces a sense of shock or where there is a striking disparity between the sentence imposed and that which a Court of appeal would impose. See *S v Kgosimore* 1999 (2) SACR 238 (SCA) at 241G–H, where the Court held that the true enquiry is:

“ . . . Whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. . . . 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.”

See also *S v Coetzee* 2010 (1) SACR 176 (SCA); *S v Matlala* 2003 (1) SACR 80 (SCA).

- [15] The appellant’s personal circumstances and mitigating factors are the following:

15.1 The appellant was 23 years old when he was sentenced on 25 February 2004. He was 20 years old when the offence was committed on 25 July 2001;

15.2 He was employed and earning an income of R2 000.00 per month;

15.3 He has one dependant, a minor of 7 months, who he was maintaining before he was sentenced;

15.4 He was single;

15.5 He and his family assisted in the funeral arrangements of the deceased;

15.6 He was injured during the commission of the offence, as he attempted to shoot himself.

[16] Factors in aggravation of sentence are the following:

16.1 The appellant had two previous convictions, namely, assault with intent to commit grievous bodily harm and malicious damage to property;

16.2 The deceased was a young woman, aged 18 years;

16.3 The appellant had threatened the deceased with a firearm earlier and later used the same firearm to shoot her.

[17] The youth of an offender has traditionally been a mitigating factor. In *S v Mohlobane* 1969 (1) SA 561 (A) at 565C–E, Rumpff CJ said that:

“Although the extent of the mitigation will depend on the circumstances of each case, in general a court will not punish an immature young person as severely as it would an adult.”

[18] In *Brandt v S*

[2005] 2 All SA 1 (SCA), the sentence of life imprisonment imposed on an offender who was just under 18 years of age when he committed murder and robbery with aggravating circumstances was replaced with a sentence of 18 years. The Court at paragraph 15 held that:

“The child must be dealt with in a manner which takes into account his age, circumstances, maturity as well as intellectual and emotional capacity.”

[19] The appellant committed the offence when he was 20 years old. Although he was not a minor as in the *Brandt v S* case supra, he was a young offender and cannot be treated in the same way as a mature adult with the intellectual and emotional capacity.

[20] Another consideration is the fact that the appellant and the deceased were involved in a love relationship. The conduct of the appellant is one of irresponsibility and immaturity and resembles that of a jealous and controlling boyfriend. The fact that he attempted to shoot himself may also be perceived as a sign of remorse, coupled with the fact that he and his family assisted with the funeral arrangements for the deceased.

- [21] When sentencing a young offender, a court should take the rehabilitation of and eventual reintegration of the offender into account.
- [22] Having said that, one cannot disregard the gravity of the offence. As counsel for the respondent submitted that violence against women and children is rife in South Africa. So much so that Parliament instituted the 'sixteen days of activism against violence against women and children'. It is clear that women and children must be protected against these violent attacks. A young innocent woman was murdered, and it is for this reason that the appellant must serve a lengthy prison sentence.
- [23] After considering the triad as set out in *S v Zinn* 1969 (2) SA 537 (A), namely, the interests of society, the seriousness of the offence as well as the personal circumstances and mitigating factors of the appellant, including the needs and interests of a young offender, and having taken cognisance of the recognised objectives of sentencing, namely, punishment, deterrence, retribution and rehabilitation, I am of the view that a sentence of life imprisonment is inappropriate and induces a sense of shock, and I am of the view that a sentence of 24 years imprisonment is appropriate.

F. ORDER

[24] I accordingly make the following order:

- a) The sentence of life imprisonment is set aside and substituted with 24 years imprisonment.
- b) The sentence is antedated to 25 February 2004.

N. GUTTA

JUDGE OF THE HIGH COURT

I agree

A.A. LANDMAN

M.A. KGOELE

APPEARANCES

DATE OF HEARING : 28 FEBRUARY 2014

DATE OF JUDGMENT : 20 MARCH 2014

COUNSEL FOR APPELLANT : ADV N.L. SKIBI

COUNSEL FOR RESPONDENT : ADV D.G. JACOBS

ATTORNEYS FOR APPELLANT : MAFIKENG JUSTICE CENTRE

ATTORNEYS FOR RESPONDENT: THE DIRECTOR OF PUBLIC PROSECUTIONS

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