

SOUTH AFRICA / JUDGMENT

Mehlape v S (AA08/2019) [2020] ZALMPPHC 59 (17 June 2020)

[2020] ZALMPPHC 59**COURT**

Limpopo High Court, Polokwane

BEFORE

M.V Semenya, E.M Makgoba, M.G Phatudi

CASE / FILE NUMBER

AA08/2019

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(LIMPOPO****PROVINCIAL DIVISION, POLOKWANE)****CASE NO:**

AA08/2019

In

the matter between:

LEVY

MEHLAPE

: APPELLANT

And

THE

STATE

: RESPONDENT

JUDGMENT**SEMENYA J:**

- [1] The appellant and his co-accused were convicted on murder, robbery with aggravating circumstances and on unlawful possession of a firearm. The appellant was sentenced in terms of section 286A read with section 286B (1) (a) and (b) of the Criminal Procedure Act 51 of 1977 (the Act). In addition to declaring the appellant a dangerous criminal as envisaged in section 286A, the appellant was sentenced for an indefinite period of imprisonment. The trial court further directed that the appellant is to be brought to court on the 13 October

2034, i.e. after the expiration of a period of 35 years, for the purposes of reconsideration of the said sentence. Ledwaba DJP granted leave to appeal against sentence only. Counsel for the appellant has in any event conceded that the conviction cannot be faulted.

[2] Section 286A and 286B of the Act provides as follows:

“286A Declaration of certain persons as dangerous criminals

- (1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal.
- (2)
- (a) If it appears to a court referred to in subsection (1) or if it is alleged before such court that the accused is a dangerous criminal, the court may after conviction direct that the matter be enquired into and be reported on in accordance with the provisions of subsection (3).

286B Imprisonment for indefinite period

- (1) The court which declares a person a dangerous criminal shall-
 - (a) sentence such person to undergo imprisonment for an indefinite period; and (b) direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.
- (2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1) (b) but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1) (b) be brought before the court which sentenced him in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he had not been absent.”

[3] The correct approach to be adopted by a court faced with an appeal against sentence has been laid down as follows in *S v Malgas* 2013(1) SACR 469 (SCA) at [12]

“...A court exercising appellant 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."

- [4] The procedure followed by the trial court in declaring the appellant a dangerous criminal and the penal jurisdictional competency of that court to impose a sentence in terms of section 286A and B are not challenged. The crux of the argument proffered on behalf of the appellant rests on the well-established principle laid down in *S v Zinn* 1969 (2) SA 537 (A) at 540G (Zinn) and *S v Rabie* 1975 (4) SA 855 (A) at 862G (Rabie). In *Rabie Holmes J* stated the following:

"Punishment should fit the crime as well as the criminal, be fair to society and be blended with a measure of mercy according to the circumstances."

Counsel for the appellant argued that the trial court failed to have regard to the effect that the length of the indefinite period of imprisonment will have on the appellant. It was further contended that the only conclusion one can arrived at is that the trial court allowed anger to cloud its mind and ignored the principle that enjoins courts to blend sentence with a measure of mercy.

- [5] A brief summary of the facts that led to the conviction of the appellant are that on the 22 August 1997, the appellant and his

erstwhile co-accused broke into and entered the house of 80 years old deceased person who was living with his 78 years old wife and his 93 years old blind sister. The two tied and assaulted the occupants of the house. One of the female victims was also raped. They left with certain properties, including a firearm, motor vehicle, TV set, money and watches. The deceased died of the injuries he sustained as a result of the assault. The appellant was, among others, linked to the scene by his finger prints.

- [6] It is common cause that on the 15 May 1992, the appellant was convicted on one count of murder, two of housebreaking with intent to steal, one of robbery, one of arson, two of unlawful possession of a firearm and two of unlawful possession of ammunition. He was sentenced to imprisonment for life in respect of the murder charge and to a total of 38 years in respect of other counts. It is further common cause that he had escaped from lawful custody when the offences in the present case were committed, five years after the commencement of the sentence of life imprisonment. He was in essence a fugitive from justice.

- [7] The argument that the trial court disregarded the principle laid down in Zinn and Rabie is without merit. The court had regard to the personal circumstances of the appellant. On the issue of the ages of the appellant and his co-accused, the court regarded the differences in their ages and that of the victims and regarded that aspect as an aggravating factor. The appellant was 42 years old as at the date of the commission of the offence. His co-accused was 34. In passing sentence, the trial court took judicial notice of the fact that the perpetrators of the offences the appellant was convicted of, are in the most, young people, while the victims are mostly defenceless elderly people who are staying alone on farms, away from other members of the community. It is not the appellant's contention that the court misdirected itself in regarding this fact as a matter of general knowledge on which it can take judicial notice.
- [8] It appears clearly from the record of the proceedings that the court dealt with the need to maintain law and order and to protect the peace loving members of the community from infringement of their rights and make them feel safe where ever they might be. The trial court's finding that the appellant was a dangerous criminal cannot be faulted. The court in so doing, took into consideration, as an aggravating factor, the fact that the appellant was sentenced to life imprisonment plus 38 years' imprisonment. He escaped from prison and shortly thereafter committed exactly the same type of offences he was sentenced for. I am in agreement with the trial court's conclusion that the appellant is a dangerous criminal on this basis alone.
- [9] Counsel for the appellant argued that the court should have ordered the sentence to run concurrently with the sentence of life

imprisonment that the appellant was serving in terms of the previous conviction. In terms of section 280(2) of the Act, a person who is sentenced by a court to different sentences, be it in one trial or in separate trials, shall serve such sentences consecutively unless the court orders concurrent running of such sentences. I am alive to the dictum in *S v Mashava* [2013] ZASCA 200; 2014 (1) SACR 541 (SCA) at para 7 wherein the following was stated with regard to section 276B(1)(b)-(fixing of a non-parole period) :

"The provision is clear. Any determinate sentence of incarceration, imposed in addition to life imprisonment, is subsumed by the latter. This is logical and practical. A person has one life and a sentence of life imprisonment is the ultimate penal provision."

One may be tempted, on the basis of *Mashava*, to find that the trial court was supposed to have ordered the sentence in this case to run concurrently with the life imprisonment sentence that the accused was already sentenced to. However, the facts of this case are not that simple. The appellant was supposed to have been in custody serving the imprisonment for life sentence when he committed the offences. The life of the victim in this case could have been spared had he remained in custody until he is released on parole. One is inclined to believe that he escaped from custody solely for the purpose of continuing to commit further serious offences. This is nothing but sheer disdain of the rule of law. The court was correct in ordering that the sentences

should not run concurrently. As in Jimmale

[2016] ZACC 27; 2016 (2) SACR691 (CC); 2016 (11) BCLR 1389 (CC) at para 11, exceptional circumstances which can be established by investigation of salient facts, legal argument and sometimes further evidence may call for a consecutive running of a sentence.

Although Mashava and Jimmale dealt with a different section of the Act, I am of the view that the sentiments expressed therein finds application in this matter.

[10] Counsel for the appellant's contention that the court failed to blend the sentence with a measure of mercy loses the fact that the court in Rabie went further and stated that the extension of mercy on an accused person must depend on the circumstances of the case. Mercy is not there for the taking. It must be earned. The manner in which the offences were committed is one of the factors that will dictate whether a particular person is a suitable candidate for this mercy. The fact that the victims in this case were old, frail and defenceless, more in particular the 93 years old blind victim, and the gruesome manner in which the offences were committed, the fact that the appellant escaped from prison, and the fact that a firearm was stolen, an instrument which the appellant clearly uses to perpetuate his criminal activities, are factors which disqualifies the appellant from the category of people on whom mercy should be extended.

[11] As stated in Malgas above, this court is not supposed to approach sentence as if it is the trial court, unless it finds that the trial court has misdirected itself, as by so doing, it will usurp the discretion of that court. It is evident that the trial court was influenced by circumstances that prevailed as at the date of sentence. In *S v Moswathupa* 2012 (1) SACR 259 (SCA) at [9] and *S v Mgibelo* 2013 (2) SCAR 559 (GSJ) the courts took judicial notice of the prevalence of the offences of housebreaking, murder attempted murder and other offences in the entire country in imposing sentence. The court in this matter was justified in taking the prevalence of the offences into consideration. The offences of murder are still prevalent in 2020, just as they were in 1992, if not worse.

[12] Counsel for the appellant argued that the trial court disregarded the element of rehabilitation. It is convenient to state that the appellant is now of mature age and that the period he has spent in custody has rehabilitated him. However, this is not how the appeal court should approach sentencing, lest it will turn itself into an armchair critic, who is wise after the event, which is discouraged in Malgas. The statement made by the psychiatrist who compiled the pre-sentence report, to which the trial court relied upon, in which the following was stated speaks a volume:

"there is no feature of mental illness which would render him more dangerous than this known record would already predict".

The court, based on this statement, found that the only interpretation one can attach to it is that the appellant is a dangerous criminal. As already stated, the appellant is not appealing against this declaration. I am of the view that a court will be justified, as the trial court has done, in finding that a dangerous criminal deserves to be removed from the society for a long period of

time. I find that there is no need for this court to interfere with the sentence, in particular, with the period he should serve before he could be brought back to court for reconsideration of the sentence. It is on this basis that I make the order:

[13] The appeal is dismissed.

M.V SEMENYA

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

E.M MAKGOBA

JUDGE PRESIDENT OF THE HIGH

COURT LIMPOPO DIVISION

M.G PHATUDI

APPEARANCES

ATTORNEY FOR THE APPELLANT : LEGAL AID SOUTH AFRICA

COUNSEL FOR THE APPELLANT : MR. L MANZINI

ATTORNEY FOR THE STATE

: DPP

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: 08 MAY 2020

JUDGMENT

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: 17 JUNE 2020

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