

SOUTH AFRICA / JUDGMENT

Modiboa v S (Appeal) (CA30/2024)

[2025] ZANWHC 127 (25 July 2025)

[2025] ZANWHC 127**COURT**

North West High Court, Mafikeng

BEFORE

Hendricks, Mokhare

CASE / FILE NUMBER

CA 30/2024

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****NUMBER: CA 30/2024****REGIONAL COURT CASE****NO: RC 2/94/2020****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

Circulate to Regional

Magistrates: NO

In

the matter between:

GAOPALELWE

FAITH MODIBOA

APPELLANT

And

THE

STATE

RESPONDENT

Coram: HENDRICKS JP ,MOKHARE AJ
Date
judgment reserved: 30 May 2025
The
judgment was handed down electronically by circulation to the
parties' representatives via email. The date and time
for
hand-down is deemed to be 25 July 2025 at 10h00am.
ORDER
1.
Condonation for the late noting and
prosecution of the appeal is granted.
2.
The appeal against sentence is
dismissed.
3.
The sentence of
twenty-five 25 years' imprisonment imposed by the Regional
Court is confirmed.

JUDGMENT

MOKHARE AJ:

Introduction

- [1] This is an appeal against the sentence only, following the appellant's conviction in the Regional Court sitting in Klerksdorp on a charge of murder read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The appellant was sentenced to 25 years' imprisonment on 26 August 2021. His application for leave to appeal was granted on 21 September 2023.
- [2] This appeal was adjudicated on the papers, as agreed by the legal representatives. Comprehensive heads of argument were filed by the appellant and confirmed that the appeal is limited to sentence.
- [3] The appeal was prosecuted late which warranted the condonation application for late prosecution of the appeal.

Condonation

- [4] The appellant failed to prosecute the appeal timeously and filed an application for condonation, which is accompanied by an affidavit of the appellant. The application for condonation is unopposed.

[5] The appellant in the founding affidavit for condonation avers that after sentencing he was transferred from Klerksdorp Correctional Centre to Sinthumule Correctional Centre which, made him to lose contact with his legal representative, Mr Neethling, whose an attorney of Legal Aid South Africa based in Mafikeng. Mr Neethling represented him in the trial and the leave to appeal. He was later contacted in October 2024 by Mr Semino from Legal Aid South Africa. Mr Semino is the legal representative of the appellant in this appeal.

[6] It is trite that this Court has a discretion whether or not to grant condonation for failure to comply with the rules of Court, when good cause has been shown. In determining if good or sufficient cause has been shown such factors as the degree of lateness, the explanation for the lateness and prejudice to the parties, prospects of success,

respondent's interest in the finality of the dispute, the convenience of the court and the avoidance of unnecessary delay in the finality of the dispute need to be considered.

[7] In the Supreme Court of Appeal judgment of *Melane v Santam Insurance Co Ltd*[1], the principle of sufficient cause was articulated as follows: -

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Upon the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would no point in granting condonation."

[8] Ultimately the overriding question which was articulated by the Constitutional Court in determining sufficient cause is whether the granting of condonation would serve the interest of justice.

[9] In *Mulaudzi v Old Mutual Life Assurance Company (SA) Limited* [2]Ponnan JA re-affirmed the factors to be considered in respect of an application for condonation stated in *Melane V Santam Insurance Co. Ltd*[3]:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

[10] In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[4], the Constitutional Court stated the test as follows: -

“...It is appropriate that an application for condonation be considered on the same basis and that such application be granted if that is in the interest of justice and refused if it is not. The interests of justice must be determined by reference to all the factors including the nature of the relief sought, the extent and the cause of the delay, the nature and cause of any other defect, in respect of which condonation is sought, the effect on the administration of justice, prejudice and reasonableness of the applicant’s explanation for the delay or defect.”

- [11] It is clear that at all material times the appellant wanted to prosecute this appeal after the leave to appeal was granted, but due to his transfer he lost contact with the legal representative, Mr Neethling. He was later afforded a new legal representative who is now assisting him in this appeal. The delay is not attributable to the appellant. There are numerous factors which are in play which caused the delay. The appellant should not be punished for such delay. Good cause exists for the granting of the application for condonation. The application for condonation for the late filing of the appeal is accordingly granted.

Factual

Background

- [12] The Appellant has been convicted of murder, which is read together with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The circumstances of the murder as described in the judgement are as follows; that two rival gangs are operating in Jouberton, which have been involved in fights past seven days. On the day of this incident there was an ambush that was setup by the gang of the two accused persons who appeared in the trial court. The appellant was one of the accused. Unbeknown to the deceased and his gang, they walked into a trap.
- [13] By the time they realised, it was too late. The deceased, as he was running away, at one point realised that they were about to caught up with him, because the evidence of one of the witnesses is that he threw away his weapon which he had with him, as he was running away. The running away did not help, because the gang of the two accused persons caught up with him.
- [14] Accused number 1(Qamangile Ponto), hacked him with a panga, and the deceased fell. The group gathered and circled around him, and various stab wounds were inflicted on the deceased.
- [15] The evidence shows that the appellant acted in concert with another person, this was not a spur-of-the-moment decision, but rather a carefully orchestrated plan that relied on teamwork and timing. The method employed indicates a deliberate and premeditated strategy to commit the offence, which aggravates its seriousness.

[16] At the time of sentencing, the appellant was 30 years old. He was not married. He has no children. His formal education took him up until Grade 10. He was working at Overland Fruits and Vegetables and was earning R100.00 a day. Prior to his arrest he was staying with his grandmother, and he joined the BTS gang in the year 2018, a year before this murder was committed. He was the first offender.

[17] Notably, the appellant had spent approximately two (2) years and two (2) months in custody awaiting finalisation of the trial.

Grounds of Appeal

[18] In essence, the appellant contended that the trial court erred by imposing a sentence that is strikingly inappropriate, in that, it is out of proportion to the totality of the accepted facts in mitigation. The trial Court should have found that imposing a sentence of 25 years' imprisonment was disproportionate to the crime, the criminal and the interest of society. The appellant content that the trial court erred by not imposing a shorter term of imprisonment, more particularly taking into consideration that;

18.1 The Appellant was 28 years old during the commission of the offence.

18.2 The Appellant is a first offender, and

18.3 The Appellant has been in custody for a period of 2 years and two months before the finalisation of the matter.

[19] The appellant further content that, the Court over-emphasized the seriousness of the offence at the expense of the personal circumstances of the appellant.

[20] That, the Court imposed an excessive and severe sentence.

[21] He submits that, there are reasonable prospects that another court may impose a lesser sentence.

[22] The appellant contended that the trial court erred by imposing a sentence that is unjustifiably severe and disproportionate to the offence committed. He further contended that the court a quo failed to consider a lesser sentence, especially in light of his personal circumstances, and the fact that he had already spent a significant period in pre-trial detention.

[23] He further submitted that the trial court should have taken the period spent in prison awaiting trial into account when sentencing the appellant as stipulated in *Vilakazi v the State*[5]. That the trail court should have applied the sentencing principles set out in *S v Scott-Crossley*[6], where the court held that:

"Plainly any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. The sentence imposed does not afford the Appellant the opportunity to rehabilitate taking into consideration that it is a lengthy term of imprisonment."

[24] The appellant contend that the sentence of 25 years' imprisonment is excessively long, and it induces a sense of shock. He further contends that the trial court did not take into account his personal circumstances as submitted in mitigation of sentence.

[25] From the judgment of the Regional Court, it is apparent that the personal circumstances of the appellant were taken into account when sentencing. The trial court relied on the Constitutional Court judgement in *State v M*[7] where the Court stated that:

"The nature of the Crime, the personal circumstances of the criminal, and the interest of the community are relevant factors determinative of appropriate sentence. It is required of the Court to weight and balance those elements and strive to accomplish and arrive at a well counterbalance. Well-judged counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of others."

[26] The appellant's grounds of appeal are unmeritorious, as the record indicates that the appellant's personal circumstances were considered during sentencing.

[27] The respondent did not file any heads of argument in opposition.

Legal Principles: When an Appeal Court May Interfere with Sentence

[28] It is well-established that sentencing is primarily within the trial court's domain. An appellate court will only interfere where the sentence is vitiated by a material misdirection or is shockingly inappropriate.[8]

[29] In *Mathekga and Another v S*[9], the Supreme Court of Appeal endorsed the Constitutional Court's reasoning in *S v Bogaards* 2013 (1) SACR 1 (CC) at paragraph [19] where the following was said:

"...a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, assess the appropriateness of the sentence as if it were the trial court and then alter the sentence arrived at by that court, simply because it disagrees with it."

[30] The limited grounds upon which a court of appeal may interfere with sentence include:

- (i) Where the sentence is disturbingly inappropriate.
- (ii) Where the sentence is so disproportionate to the offence as to induce a sense of shock;
- (iii) Where the sentence differs markedly from that which the appellate court would have imposed;

- (iv) Where there was a material misdirection; or
- (v) Where the sentencing discretion was exercised unreasonably.

[31] In *S v Malgas*[10], the Supreme Court of Appeal stated that:

“A court exercising appellate 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 simply because it prefers it.”

[32] This principle was reaffirmed in *S v Matyityi*[11] where the following was said:

“It is incumbent upon a trial court to consider all relevant factors and to strike a balance between the nature and seriousness of the offence, the interests of society and the interests of the offender.”

Application to the Present Case

[33] The appellant’s personal circumstances were taken into account by the trial court. However, these had to be weighed against the offence convicted of.

[34] While the period of pre-trial incarceration, approximately two year and two months, is a relevant factor, it does not outweigh the gravity of the offence.

[35] The sentencing court applied its discretion judicially. A sentence of 25 years’ imprisonment, while substantial, cannot be said to be so disproportionate as to induce a sense of shock. There is no misdirection warranting interference by this Court.

Order

[36] In the result, the following order is made:

3. The sentence of twenty-five (25) years’ direct imprisonment imposed by the Regional Court is confirmed.

MOKHARE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree

HENDRICKS JP

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

DATE OF HEARING :30 MAY 2025

DATE OF JUDGMENT : 25 JULY 2025

For the Appellant: Mr T.G Gonyane

No 742 Dr James Moroka Drive

South Wing Borekelong House

MMABATHO

Tel: 018-381 4582

For the Respondent: The Director of Public Prosecutions

North West Province

Mega City- East Gallery

Sekame Road

MAHIKENG

[1] 1962

(4) SA 531(A) at 532C-E,

[2] [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA).

[3] See footnote 1 above.

[4] CCT45/99;

[2000] ZACC 3; 2000 (5) BCLR 465 (CC); 2000 (2) SA 837 (CC) para 3.

[5] 2009

(1) SACR 552 (SCA).

[6] 2008

(1) SACR 223 (SCA).

[7] 2008

(3) SA 232(CC).

[8] See *S v Hewitt* 2017 (1) SACR 309 (SCA) and *S v Livanje* 2020 (2) SACR 451 (SCA).

[9] 2020

(2) SACR 559 (SCA).

[10] 2001

(1) SACR 469 (SCA) at paragraph [12].

[11] 2011

(1) SACR 40 (SCA) at paragraph [23].

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/2025/127.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/modiboa-v-s-unknown-topic-anwhc-2025>

Prepared on 9 October 2026 · Esheria