

SOUTH AFRICA / JUDGMENT

Mogashoa v S (CAF 01/2021) [2023] ZANWHC 25 (10 March 2023)

[2023] ZANWHC 25**COURT**

North West High Court, Mafikeng

BEFORE

J T Djaje, F M M Snyman, S S Maakane

CASE / FILE NUMBER

CAF 01/2021

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE****NO: CAF 01/2021****Reportable: YES / NO****Circulate to Judges: YES****/ NO****Circulate to Magistrates:**

YES / NO

Circulate to Regional

Magistrates: YES / NO

In

the matter between:

NTSHELE

DAVID MOGASHOA

APPELLANT

AND

THE

STATE

RESPONDENT

CRIMINAL

APPEAL

DJAJE

DJP; SNYMAN J & MAAKANE AJ

ORDER

I make the following

order:

1.
The
appeal against sentence in count 1 is upheld.
2.
The

sentence in count 1 is replaced with the following:

- “The
appellant is sentenced to fifteen (15) years imprisonment”
3.
The
sentence in count 2 and 3 is ordered to run concurrently with the
sentence in count 1.
4.
The
sentence is antedated to 5
March 2009.

JUDGMENT

DJAJE DJP

- [1] The appellant was convicted and sentenced on charges of murder, unlawful possession of a firearm and unlawful possession of ammunition by the High Court sitting on circuit in Temba. He was sentenced to life imprisonment on the charge of murder, five (5) and two (2) years imprisonment for the two charges of unlawful possession of firearm and ammunition. This appeal is against the sentence in the charge of murder with leave by the court a quo.
- [2] The facts of this matter are that the deceased was shot by the appellant whilst in his house standing next to the open door. The deceased was with two other people who were standing outside the house about one metre from the door when he was shot. The appellant approached the door from behind one of the people outside and stood at arm's length from the door. He then uttered the words “I told you that I will kill you”. He then shot at the deceased once with a firearm. The deceased fell down immediately. It was during the day and the appellant was easily identified by the people who were with the deceased.
- [3] The witness for the appellant testified that earlier that day she was with the appellant going to town and they passed by the deceased's house. The deceased called and asked her to speak to the appellant to give him his money, ten (10) rand. Upon enquiring from the appellant about the money, he confirmed owing the deceased. The witness took

out ten rand and gave it to the deceased. At that time the deceased told the appellant that he was useless as he failed to give him the money. The appellant was not happy about that statement from the deceased especially in the presence of the witness. The deceased threatened to assault the appellant. The witness left and on her return the deceased was lying on the ground and the appellant was not there.

[4] In the main the appellant's ground of appeal is that the charges put to the appellant in count 1 of murder referred to section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("CLA") which carries a minimum sentence of fifteen years imprisonment if found guilty. It was submitted that the court did not warn the appellant of the implications of the Criminal Law Amendment Act to enable the appellant to prepare properly for his defence. According to the appellant, failure to warn him resulted in the imposition of a shocking sentence of life imprisonment. The respondent conceded that indeed the appellant was not properly warned of the implications of the Act to enable him to properly prepare for his defence. It was argued that as a result of that omission, the appellant did not get a fair trial and that the sentence on count 1 should be set aside.

[5] In the indictment on the count of murder the following was stated:

"Murder (read with section 51(2) of Act 105 of 1997)

In that upon or about the 4th day of November 2004 and at or near Mabopane in the district of Odi, the accused did unlawfully and intentionally kill Thabo Phineaus Letsoalo, an adult male person by shooting him with a firearm".

[6] In convicting the appellant the court a quo found as follows:

"The Court is satisfied beyond reasonable doubt that the identity of the person who shot the deceased is this accused before Court. He is accordingly FOUND GUILTY as charged on all three counts."

[7] During sentence the court a quo in determining whether there were compelling and substantial circumstances stated that:

"In S v Malgas citation the Supreme Court of Appeal laid down the steps which a Trial Judge should take in order to inquire whether or not there are substantial and compelling reasons not to impose imprisonment for life, or not to impose the prescribed minimum sentence."

The Court should take into account the cumulative effect of the mitigating factors which are in favour of the accused, and the Court should take into account the cumulative effect of the aggravating features in the case.

Thereafter the Court should measure the cumulative effect of the mitigatory factors against the cumulate effect of the aggravating features. And the Court should ask itself whether in the light of these circumstances of this case, imprisonment for life would be unjust? If the answer is yes, imprisonment for life should not be imposed, but if the answer is no, imprisonment for life must be imposed."

[8] Section 51 of the Criminal Law Amendment Act 105 of 1997 ("CLA") provides that:

"Minimum sentences for certain serious offences"

51. (1) Notwithstanding any other law but subject to subsections (3) and (6)

a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

- (2) Notwithstanding any other law but subject to subsections (3) and (6) a regional court or a High Court shall—
- (a) if it has convicted a person of an offence referred to in Part II of Schedule 2 sentence the person in the case of—
- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) if it has convicted a person of an offence referred to in Part 111 of Schedule 2, sentence the person in the case of-
- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years and;
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) if it has convicted a person of an offence referred to in Part IV of Schedule 2 sentence the person.in the case of-
- (i) a first offender, to imprisonment for a period not less than 5 years;
- (ii) a second offender of any such offence to imprisonment for a period not less than 7 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

- (b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older but under the age of 18 years, at the time of the commission of that act which constituted the offence in question it shall enter the reasons for its decision on the record of the proceedings.
- (4) Any sentence contemplated in this section shall be calculated from the date of sentence.
- (5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act 1977 (Act No. 51 of 1977).
- (6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.
- (7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.
- (8) For the purposes of this section and Schedule 2 "law enforcement officer" includes—
 - (a) a member of the National Intelligence Agency or the South African Secret Service established under the Intelligence Services Act, 1994 (Act No. 38 of 1994); and
 - (b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1959 (Act No. 8 of 1959)."
- [9] In *S v MT* 2018 (2) SACR 592 (CC) at paragraph [38] to [40] the following was said in relation to the drafting of a charge and the applicability of the Minimum Sentences Act:

"[38] The cases before us come after a number of Supreme Court of Appeal judgments with differing approaches to the necessity of citing the Minimum Sentence Act's provisions in the charge sheet. The starting point is Legoa, where the Supreme Court of Appeal held that it was not desirable to lay down a general rule as to what is required in a charge sheet and that whether an accused's right to a fair trial, including their ability to answer the charge, has been impaired will depend on "a vigilant examination of the relevant circumstances". Since then, the Supreme Court of Appeal has primarily dealt with cases where charge sheets cite the incorrect section of the Minimum Sentences Act. In Ndlovu, this Court held decisively that, where an accused is convicted in a Magistrate's Court of an offence under an incorrect section of the Minimum Sentences Act, that Court will only have jurisdiction to sentence under that section,

- [39] This precedent has not created a hard-and-fast rule that each case where an accused has not been explicitly informed of the applicability of the Minimum Sentences Act will automatically render a trial unfair. However, a practice has developed to include the relevant section of the Minimum Sentences Act in the charge sheet because of this precedent.

- [40] It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed."
- [10] There are a number of decisions from this Court on this issue of incorrect section referred to in the charge sheet. See: *MS v The State* case no CA 40/2017 per Djaje J and Petersen AJ (as they were then); *Josias Mokobane v S* CA 26/2017 per Hendricks DJP (as he then was) and Petersen AJ (as they were then). In all these matters this court found that it is important for the court to make a finding on the applicable section as failure to do so results in a serious misdirection. All these decisions are in line with the decision of the Constitutional Court in *S v MT* referred to above.
- [11] In this matter the indictment clearly referred to a sentence in terms of section 51(2) of the Criminal Amendment Act which prescribes a minimum sentence of fifteen years imprisonment for conviction on murder of a first offender. The appellant was a first offender as no previous convictions were proven against him. The appellant was convicted "as charged" which meant it was in terms of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act. The court a quo erred in delivering sentence by saying that:
- "In count 1 of murder, Act 105 of 1997 prescribes imprisonment for life for a person who kills under these circumstances. In fact, the indictment also reads that this is a murder which is punishable in terms of the Minimum Sentence Act."*
- [12] In sentencing the appellant the court a quo found that there were no substantial and compelling circumstances. The appellant although provoked by the deceased, he did not walk away but instead went to get a firearm and went to the deceased who was in the safety of his house. The source of the conflict between the appellant and the deceased was ten rand.
- [13] The personal circumstances of the appellant are outweighed by the aggravating circumstances and there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence of fifteen (15) years imprisonment. The other two counts of unlawful possession of firearm and ammunition relate to the count of murder and there is no reason why they should not run concurrently with the sentence of count 1 of murder.

[14] Looking at the facts of this case, the personal circumstances of the appellant, the mitigating and aggravating features, as well as the submissions by both counsel, the sentence imposed by the court a quo should be set aside and replaced by the minimum sentence as prescribed in section 51(2) of the Criminal Law Amendment Act>.

Order

[15] Consequently, the following order is made:

1. The appeal against sentence in count 1 is upheld.
2. The sentence in count 1 is replaced with the following:
“The appellant is sentenced to fifteen(15) years imprisonment”
3. The sentence in count 2 and 3 is ordered to run concurrently with the sentence in count 1.
4. The sentence is antedated to 5 March 2009.

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION; MAHIKENG

I agree

F M M SNYMAN

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

S S MAAKANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 03 FEBRUARY 2023

JUDGMENT

RESERVED

: 03 FEBRUARY 2023

DATE OF JUDGMENT

: 10 MARCH 2023

COUNSEL FOR THE PLAINTIFF

: ADV MAPHUTHA

COUNSEL FOR THE DEFENDANT : ADV B CHULU

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