

SOUTH AFRICA / JUDGMENT

Mokgahle v S (A234/2015) [2017] ZAGPPHC 1075 (17 August 2017) [2017] ZAGPPHC 1075

COURT

North Gauteng High Court, Pretoria

BEFORE

T.A Maumela, S.B Mngadi

CASE / FILE NUMBER

A234/2015

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case

No: A234/2015

17/8/2017

In

the matter of:

Kabelo
Mokgahle
Appellant
And
The
State
Respondent

JUDGMENT

Maumela J.

1. This is an appeal against sentence only. Before the Regional Court

Sebokeng, (court a quo), appellant who was legally represented throughout the trial was charged with Murder read with the provisions

of section 51 (2) of the Criminal Law Amendment Act 1997: (Act No 105 of 1997). The allegations against appellant were that upon or about the 22nd of August 2011, and at or near Sebokeng in the Regional Division of Gauteng appellant did unlawfully and intentionally kill Bongani Xolisi, an adult male.

2. Appellant opted for trial to proceed against him without assessors. He understood the charge put. He was favoured with and he understood an explanation on competent verdicts relevant to the charge put. He pleaded not guilty to the charge. Explaining his plea, he cited private-defence.
3. The state led evidence; so did appellant. The court a quo accepted the version of the state and rejected that of the defence. He was convicted of murder. He was sentenced to undergo 12 years

imprisonment. He applied for leave to appeal against both conviction and sentence.

4. The court a quo denied appellant leave to appeal against conviction but granted him leave to appeal against sentence. Appellant unsuccessfully petitioned the High Court for leave to appeal against conviction. The appeal herein is against sentence only.

EVIDENCE.

5. An eye witness, Solomon Tsepesi who had ties with neither the deceased nor the appellant was called by the state. He told the court a quo that on the day of the incident, en route from work; he alighted the train and walked home. Along the street he saw the deceased approaching running from the opposite direction; followed by the appellant. Appellant asked him to tell the deceased to stop, which he did not. A ZCC, (Zion Christian Church), affiliate who was walking ahead of him grabbed the deceased.
6. A boy joined in who held the deceased on the one side while the ZCC affiliate held the deceased on the other. He said that appellant was wielding a panga. The boy that had been fleeing screamed. At that time he advised appellant to call the police. Instead appellant approached and hit the deceased with the panga on the waist and on his side. Appellant also chopped the deceased with the panga on the chest and on the neck. On seeing this he asked some people to call

the ambulance. He stated that the ZCC affiliate left the scene. The boy that had joined into the scuffle disappeared from the scene.

According to this witness the deceased died at the scene.

7. Appellant left before the arrival of the ambulance, taking the deceased's watch with him. Some teachers from a nearby school came and stood by. He used the deceased's T-Shirt to stop excessive bleeding on the leg. When the police arrived he showed them the direction to which appellant had gone. By then the deceased had died. He saw it when the police arrested appellant. This witness stated that appellant was complaining that the deceased broke into his dwelling.
8. In defence, appellant told the court a quo under oath that on the day of the incident the deceased broke and entered his house. He said that he caught the deceased in the act. According to him the deceased wielded a knife against him. He pushed the deceased away from him. The deceased fell down. He rose and attacked him again. He delivered two blows against the deceased, one on the rib cage and another on the neck. The deceased fell down. He rose again and continued to attack him.
9. He stated that when the deceased heard voices of people outside, he fled through the window. He too exited the room through the window to pursue the deceased. Once outside he saw two young men one of whom wielded an iron rod while the other wielded a broomstick. The two boys attacked him, hitting him all over the body. He fought the two boys in order to prevent them from leaving the premises.
10. Appellant contended that on the day of the incident he acted in private defence. He stated that he chopped the deceased with a panga when the latter charged at him wielding a knife. He submitted that he was justified to act as he did. He denied having chased the deceased into the street. The court a quo found that the version of the appellant is incongruent to what is depicted in the photo album related to this case. It found his version to be improbable. The court a quo found that appellant overstepped the limits of private defence. It convicted him on murder and sentenced him to 12 years imprisonment.
11. In line with the leave granted, this appeal shall be about sentence only. It is submitted on behalf of appellant that the 12 years imprisonment imposed upon him as a sentence is shockingly harsh and inappropriate; so much so that no reasonable court would have imposed a similar sentence. It is also submitted that in this case direct imprisonment was not warranted.
12. In *S v Zinn*[1], the court stated that in imposing the sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community."
13. Our courts have held the view that those who commit violent crime should be brought to book accordingly before the law. In *S v Makwanyane & another*[2], the court stated: "The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act

unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution.

The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law. . . . "

14. It has been argued on behalf of appellant that the court is entitled to interfere with the sentence imposed upon the accused by the court a quo. It was submitted that at the 12 years imprisonment imposed upon appellant is unnecessarily harsh. The court has to determine whether or not to interfere with the sentence imposed upon the appellant by the court a quo. It is to determine whether or not the court a quo exercised its discretion correctly in sentencing appellant.

APPELLATE POWERS.

15. Our courts have persistently held the view that sentencing is fundamentally a matter for the discretion of the trial court. They

have held that appeal courts are bound to exercise caution so as not to erode the sentencing discretion of the trial court by interfering

with sentences imposed. To that end, in the case of *S v Rabie*[3], the court stated as follows: "The decision as to what an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode that discretion and would be justified to intervene only if the trial court's discretion was not 'Judicially and properly exercised' which would be the case if the sentence that was imposed is 'vitiating by irregularity or misdirection or is disturbingly inappropriate'".

16. It is trite therefore that courts of appeal do not possess powers on a carte blanche basis to interfere with either verdicts or sentences done by trial courts. There are requirements to be met in order to justify interference by appeal court with the decisions of trial courts where sentencing is concerned. In the case of *S v Pieters*[4] the Honourable Botha JA stated at page 734 D-F that: "The decisive question facing a Court of Appeal on sentence was whether it was convinced that the court which had imposed the sentence being adjudicated upon had exercised its discretion to do so unreasonably. If so, the Court of appeal was entitled to

interfere and, if not, then it cannot."

17. The question is whether or not there is cause in this case for the court to interfere with the sentence passed by the court a quo. The murder of which appellant stands convicted is read with the provisions of section 51 (2) (a) of the Criminal Law Amendment Act

1997: (Act No 105 of 1997).

18. This section provides as follows: S 51:

"(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in (a). Part II of Schedule 2, in the case of

(i). a first offender, to imprisonment for a period not less than 15 years;

19. The murder of which appellant was convicted falls under Part 11 of Schedule 2 of the Criminal Law Amendment Act. The prescribed minimum sentence in respect of such offence is 15 years imprisonment. The learned magistrate took into consideration that appellant is a first offender and that he is capable of rehabilitation. On the basis thereof the court a quo found substantial and compelling circumstances to be attendant to the person of appellant. Hence it consciously imposed upon appellant a sentence of 12 years imprisonment which is less than the prescribed minimum.
20. Appellant is adamant that owing to the fact that he is a first offender and that he acted in private defence the court a quo was supposed to impose upon him a sentence lesser than the minimum prescribed. He goes further to argue that the personal circumstances and the nature of the crime of which he stands convicted are cause enough to justify a non- custodial sentence being imposed upon him.
21. The sentencing legislation applicable in this case makes no provision for the passing of a sentence lesser than the prescribed minimum in instances where the accused is a first offender or where the offending act was perpetrated in the execution of private defence. Besides, findings made by the trial court do not sustain the contention that appellant acted in private defence on the day of the incident. There is nothing in the record of this case which justifies

a further reduction of the sentence passed upon appellant by the court a quo. There is no indication at all that the court a quo misdirected itself in imposing the sentence it did upon appellant.

22. Appellant's contention that he caught the deceased in the act where the latter entered into his dwelling with intent to steal has not been challenged. It is therefore proper to take into consideration that

appellant did not go out of his way to target the deceased with no cause. To an extent appellant was provoked into acting as he did. However that consideration seems to have already been made in that the court a quo imposed upon appellant a lesser sentence compared to the minimum prescribed. Looking at the crime committed, there is an appearance that the court a quo applied the sentencing triad.

23. In the case of *S v Rabie*[5] at page 857 D-E Holmes JA stated the following: "In every appeal against sentence, whether imposed by a magistrate or judge, the court hearing the appeal-
- (a) should be guided by the principle that punishment is pre- eminently a matter for the discretion of the trial court", and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'Judicially and properly exercised.'

THE CRIME.

24. The crime of which the accused stands convicted is very serious. Invariably, murder gets committed amidst violent cruelty and viciousness. In this case it was perpetrated against a defenseless young man who was held by others while appellant freely delivered fatal blows against him. A panga; a dangerous weapon was used. Even after conviction appellant continued being untruthful before court. He attempted to create the impression that he was under attack at the time he delivered fatal blows against the deceased.
25. Serious violence was applied in the perpetration of the murder. In *S v Mnguni*[6]; the court held that "a cruel and inhuman attack on a helpless unarmed victim is considered to be an aggravating factor."
26. Through the unlawful act of the appellant a human life was lost. A mother lost a son. A beloved relative perished. Murder is rife in South Africa and the world over. However in consideration of the fact that murder is rife, the court has to avoid visiting public aversion against this crime against the accused. It has to avoid an approach which presupposes that the accused is responsible for the other numerous crimes committed by other perpetrators. In *S v Qamata*[7], the court stated as follows: "The accused alone should not have to pay for the price of the increased numbers of robberies on farms and small holdings throughout South Africa".

THE INTERESTS OF THE APPELLANT.

27. The appellant was 51 years of age at the time he was charged. He is a first offender. He perpetrated the offence charged after he caught the deceased in the act after the latter broke into his premises with intent to commit a crime. However because he had overcome the deceased his property was no longer under threat at the time he delivered a fatal blows against the deceased.

THE INTERESTS OF THE COMMUNITY.

28. It is in the interests of community that those convicted of perpetrating violent crimes against others be dealt with by the law. In the case of R versus Karg[8],The Court stated: "In assessing an appropriate sentence, the Court must have regard for the feelings of the community and must bear in mind that if sentencing for serious crimes are too lenient, the administration of justice may fall into disrepute and in that persons may inclined to take the law into their hands."

DEFENCE CASE.

29. The appellant testified in defence. He told court under oath that on the day of the incident the deceased unlawfully broke into his house entering through a broken window. He caught the deceased in the act

and confronted him. The deceased was wielding a knife with which he launched an attack against appellant.

30. The court a quo found that the appellant exceeded the bounds of private defence and convicted him of murder. The court a quo upheld version of the state and rejected that of the defence. This court is to determine whether or not the sentence imposed against the appellant was of such magnitude that it induces a sense of shock.
31. The court has found no indication that the presiding magistrate in the court a quo erred on misdirected itself in imposing upon appellant the sentence he did. On that basis, the appeal against sentence stands to be dismissed and the following order is made:

ORDER.

1. The appeal against conviction and sentence is dismissed.

I agree.

S.B. Mngadi.

Acting Judge of the High Court of South Africa.

T.A Maumela.

Judge of the High Court of South Africa.

[1] 1969 (2) SA 537 (A).

[2]

[1995] ZACC 3; 1995 (2) SACR 1 (CC), at paragraph 117.

[3] 1975 (4) SA 855 (A).

[4] 1987 (3) SA 717 (A).

[5] 1975 (4) SA 855 (A).

[6] 1994 (1) SA CR 579 (A), at page 583 e.

[7] 1997 (1) SACR 479 (E), at page 482 E.

[8] 1961(1) SA 231 (A), at page 236 A- B

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