

SOUTH AFRICA / JUDGMENT

Mokgale and Another v S (A739/2016)

[2017] ZAGPPHC 476 (11 August 2017)

[2017] ZAGPPHC 476**COURT**

North Gauteng High Court, Pretoria

BEFORE

Fabricius, Hughes, Makhubele

CASE / FILE NUMBER

A739/2016

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case****Number: A739/2016****Reportable:**

No

Of

interest to other Judges: No

Date:

11/08/2017

In

the matter between:

SOLOMON

MOKGALE

1ST

APPELLANT

MIKE

KHUNOU

MONOUA 2ND

APPELLANT

and

THE

STATE RESPONDENT

Coram:

FABRICIUS, HUGHES JJ & MAKHUBELE AJ

JUDGMENT**HUGHES J**

[1] The first and second appellants Solomon Mokgale and Mike Khunou Monoua were arraigned in this court for the following charges:

- (a) Count 1: Housebreaking with intent to steal and theft;
- (b) Count 2: Murder;
- (c) Count 3: Housebreaking with the intent to commit robbery and robbery with aggravating circumstances;
- (d) Count 4: Possession of illegal firearm;
- (e) Count 5: Possession of ammunition;
- (f) Count 6: Attempted theft;
- (g) Count 7: Attempted murder; and
- (h) Count 8: Theft

[2] The appellants were legally represented and pleaded not guilty to the charges preferred. On 9 July 2013 a pronouncement of guilty was made, the first appellant, was convicted of all eight counts, whilst the second appellant was convicted of counts 1 to 3 and 6 to 8. He was acquitted of counts 4 and 5.

[3] The appellants sought leave to appeal both their conviction and sentence. They were granted leave by this court in respect of sentence only.

[4] I need to make mention that the record as regards the sentencing proceedings is incomplete. Attempts were made to reconstruct the record but they were unsuccessful in doing so. The representatives for both the appellants and the state are in agreement that the record as it stands is sufficient to deal with the aspect of sentencing on appeal.

[5] From the application for leave to appeal it is gleaned that the presiding Judge imposed the following sentences for each of the counts on 11 May 1999. I have already stated that the second appellant as acquitted in respect of counts 4 and 5. The sentences

per count are set out below:

Count 1: Housebreaking with intent to steal and theft sentenced to 8 years imprisonment;

Count 2: Murder sentenced to 30 years imprisonment;

Count 3: Housebreaking with the intent to commit robbery and robbery with aggravating circumstances sentenced to 15 years imprisonment to run concurrent with count 2;

Count 4: Possession of illegal firearm sentenced to 2 years imprisonment; Count 5: Possession of ammunition sentenced to 2 years imprisonment; Count 6: Attempted theft sentenced to 8 years imprisonment;

Count 7: Attempted murder sentenced to 10 years imprisonment; and Count 8: Theft sentenced to 8 years imprisonment.

- [6] From the record it appears that the sentence cumulatively imposed by the presiding Judge was 68 years and 64 years respectively. It must be mentioned that the presiding Judge and the state prosecutor during the course of the application for leave to appeal conceded that the sentences imposed were inappropriate.
- [7] Even so, I must hasten to add that the aforesaid is not sufficient to warrant an appeal court interfering with the sentence imposed. If I am of the view that the trial court did not misdirect itself during the process of sentencing then the only conclusion would be that the prescribed sentence imposed is the appropriate one. See *S v Vilakazi* 2009 (1) SACR 552 (SCA)
- [8] During the month of August 1997, specifically the 5th and 15th, the appellants were involved in a series of crimes for which they were indicted. On 5 August 1997 the appellants broke into the shed of Adam Bezuidenhout in the district of Schweizer Reneke and stole the items listed in the indictment, which list is too long to mention.
- [9] On 15 August 1997, still in the district of Schweizer Reneke, the appellants broke into the farmhouse of the deceased, Mr H.E.P Kotzee, with the intent to rob. They assaulted him by stabbing him several times and tied him up with a rope. They robbed him of his motor vehicle, his firearms, and other goods. The deceased managed to escape and proceeded to his neighbour, however, on his way he succumbed to his injuries.
- [10] Further, on 15 August 1997 in the district of Klerksdorp the appellants attempted to steal a Volkswagen motor vehicle from Mr Zubher Master. During the commission of this crime the appellants shot at Mr Master attempting to kill him.
- [11] Eventually on the same date and in the same district the appellants stole an Isuzu motor vehicle belonging to Mr Mohamed Gorra.
- [12] Lastly, the first appellant was apprehended by the police and a firearm and ammunition was found in his possession which belonged to the deceased Mr H.E.P Kotzee.
- [13] On a perusal of the judgment dealing with sentencing, which is incomplete I might add, it is noted that the presiding Judge took into account the following the personal circumstances of the appellants, the crimes, the deceased's family and society. It is also noted that the only count which he gives a view upon is that of count 2 where he states that he cannot impose anything less than 30 years. The presiding Judge states the following at volume 3 page 217 lines 18 24:

"Ek kom nou by die moordklagte. Hier is daar absoluut geen versagtende omstandighede nie. Nie alleen het julle ingrebreek in die huis, julle het gewag tot die oorledene terug gekom het.

Beskuldigde 1 het homself tussen twee yster versteek, terwyl beskuldigde 2 net om die draai was om hom te help om die oorledene te oorweldig en dood te maak. Die feit dat julle hom eenvoudig vas gebind het en gelos het om te sterf, is vir my 'n baie verswarende omstadigheid".

[14] In the case of counts 1 and 6 the presiding Judge took the view that they were charges that he dealt with from time to time and he would impose the usual sentences which he imposes in these circumstances. He then took the sentence imposed in count 3 to run concurrent with count 2 as they were committed at the same time and place. The reason he advanced for the imposition of the sentence imposed for counts 4 and 5 was to the effect that the entire reason for being in possession of the unlicensed firearm and ammunition was for furtherance of criminal activity.

[15] That is all that I can discern from the incomplete record. It is evident to me that the presiding Judge misdirected himself when he imposed the sentence which he did. The manner in which they were imposed, in my view, seems to be such, so as to deprive the appellants from being released on parole.

[16] The right to a fair trial, section 35 (3) of the Constitution of the Republic of South Africa 108 of 1996, is a fundamental right entrenched in our Constitution. It is trite that the right to a fair trial is also applicable in sentencing proceedings. See *S v Dzukuda and Others*; *S v Tshilo* 200_0

(2) SACR 443 at para [9]. The duties and responsibilities of the presiding Judge in sentencing proceedings are mammoth. Whatever sentence the presiding Judge imposes has a profound effect on an accused's life. In embarking on the sentencing procedure a presiding Judge has to adhere to the prescripts of the Constitution and the oath of office taken as a judicial officer. See *Dzukuda supra* at para [43]

[17] With the aforesaid in mind I venture to consider the cases referred to below which in my view, are instructive in casu:

S v Mahlatsi 2013 (2) SACR 625 (GNP) at para (31):

"[31] It is also instructive to note that, while the provisions referred to above, besides perhaps section 276B(1)(c) of the Criminal Procedure Act alluded to above, do not refer to 'effective' terms of imprisonment, meaning that the cumulative effect of sentences have to be taken into account. It is quite clear from the intention of the legislature, the Constitutional Court in *Makwanyane* and the Supreme Court of Appeal in *Nkosi and Others* alluded to above, that no sentence of imprisonment should perceivably be higher than what life imprisonment effectively entails. Life imprisonment should remain the ultimate sentence that a South African court can impose today. Furthermore, in our view, the Supreme Court of Appeal has also already expressed itself in *Mhlakaza*, in *Maseola* and in *Johaar* that, normally effective sentences on cumulative counts of between forty (40) and fifty (50) years would exceed 'acceptable limits' of imprisonment other

than life imprisonment; and, therefore effective sentences of thirty (30) years in Maseola; thirty eight (38) years in Mhlakaza; and thirty (30) years in Johaar were held to be within the 'norm' that should be imposed (either a quo or on appeal) where life imprisonment is not imposed.”

S v Nkosi and Others 2003 (1) SACR 91 (SCA) at para [7][9] :

"[7] As was stated in *S v Bull and Another*; *S v Chavulla and Others* 2001(2) SACR 681 (SCA) at 693j694a, this Court has, since the abolition of the death penalty,

‘consistently recognised that life Imprisonment Is the most severe and onerous sentence that can be imposed and that It lathe appropriate sentence to Impose In those cases where the accused must effectively be removed from society’.

In the Bull case it was also pointed out (at 694b) that this Court has repeatedly warned against excessively long sentences being imposed to circumvent the premature release of prisoners by the executive.

[8] A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services: see Bull (supra at 695gh), although as Is pointed out (at 695de) there is no legal impediment preventing the earlier release of parole on a prisoner serving a life sentence. A prisoner serving a determinate sentence, on the other hand, is not considered for parole before having served half of the sentence (unless the date for considering parole is brought forward as a result of credits earned)

- sees 65(4)(a) of the Correctional Services Act 8 of 1959, as amended. When s 73(6)(a) of the new Correctional Services Act 111 of 1998 comes into operation all life prisoners will have to be considered for parole after they have served 25 years of their sentences.

[9] Thus under the law as it presently stands when what one may call a Methuselah sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of the Constitution, Act 108 of 1996: see Bull's case supra at 695c where it is pointed out that it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment”

[18] When sentencing it is trite that one has to take into account the triad principles, that being the crime, the criminal and society. In addition, in the interest of society it is paramount that in sentencing presiding Judge must be mindful of the purpose of

sentencing, that is, deterrence, prevention and retribution blended with a measure of mercy. See *S v Zinn* 1969 (2) SA537 (A) and *S v Rabie* 1975 (4) SA 855 (A).

- [19] In my view the purpose of sentencing is not to "lock the door and throw away the keys" so to speak as is evident in this case. It is true that the appellants must be punished for the crimes that they have committed but in this case the presiding Judge clearly misdirected himself when he imposed the sentence that he did. This clearly resembles a sentence imposed to ensure the appellants are never released and in the circumstances the cumulative sentence stands to be changed as it is inhuman and cruel.
- [20] In addressing the sentences imposed the starting point in my view is count 2 murder. Count 2 falls in the realm of a Schedule 6 offence as it is murder that was as a result of robbery with aggravating circumstances.
- [21] It is evident that the presiding officer misdirected himself as no explanation is advanced for him deviating from the mandatory sentence of life imprisonment that ought to have been imposed. It is trite that one cannot deviate from the prescribed minimum sentence lightly or for flimsy reasons detailed and sound reasons must be provided. In this case, I am not persuaded that detailed reasons or reasons at all have been advanced for the deviation. The prescribed sentence must be imposed unless substantial and compelling reasons are advanced. Thus the sentence imposed falls to be amended.
- [22] Another aspect which can be considered in light of the dicta of Nkosi supra, is if the imposition of a life sentence is considered to be the most severe and onerous sentence, then in these circumstances any other sentences imposed do not trump the imposition of the life sentence. Thus, it follows that the other sentences imposed for the other offences would run concurrently with the life sentence imposed.
- [23] In the result the appeal on sentence succeeds. It is ordered that the sentence imposed on the appellants in respect of count 2 is set aside and replaced in the case of each of the appellant with a sentence of life imprisonment. Further, that the sentences imposed in respect of all the other offences for which they were convicted are to run concurrently with the sentence of life imprisonment imposed in count
2. It is ordered that the sentence imposed in respect of both appellants of life imprisonment is antedated to 11 May 1999.

W. Hughes

Judge of the High Court Gauteng Pretoria

It is so ordered

Fabricsius J

I concur

Makhubele AJ

Acting Judge of the High Court Gauteng Pretoria

Appearances:

For the Appellant : Adv F. Van As

Instructed by : Legal Aid

For the Defendant : Adv M.J Nethononda

Instructed by : The State Attorney

Date heard

: 11 August 2017

Date delivered : 11 August 2017

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