

SOUTH AFRICA / JUDGMENT

Mokoena v S (A859/2013) [2020] ZAGPPHC 504 (25 June 2020)

[2020] ZAGPPHC 504

COURT

North Gauteng High Court, Pretoria

BEFORE

K Mogale, AJ Bam

CASE / FILE NUMBER

A859/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

CASE

NO: A859/2013

25/6/2020

In

the matter between:

THABANG

JOSEPH

MOKOENA

APPELLANT

And

THE

STATE

RESPONDENT

JUDGMENT

MOGALE, AJ

INTRODUCTION

- [1] On 19th June 2008 the Appellant was convicted in the Klerksdorp Regional Court on the following charges: Count 1 Murder, count 2 Robbery, and Count 3 Assault with intent to cause grievous bodily harm. The appellant was subsequently sentenced to twenty (20) years imprisonment on count 1, five (5) years imprisonment for count 2, and three (3) years imprisonment on count 3.
- [2] The appellant was legally represented during the trial. Leave to appeal was granted only in respect of sentence

THE ISSUE

- [3] The issue revolves around whether the sentence is inappropriately severe which. According to the submissions of Mr Botha, for the appellant, the sentence is to be interfered with on several grounds. Firstly that the minimum sentence regime was not applicable due to the fact that the appellant was not yet 18 years of age when the crimes were committed, and, secondly, that the trial court erred in not ordering that the sentences on counts 2 and 3 should be served concurrently with the sentence on count 1. Ms Scheepers, for the respondent, holds a contrary view that the issue of the appellants' age was never brought to the attention of the trial court, further that this is a new ground that was supposed to be formulated in writing and furnished to the clerk of the court within the prescribed time frame. She further argued that the sentence imposed is a justified and appropriate sentence.

PRINCIPLES GUIDING APPEAL COURTS DEALING WITH APPEAL AGAINST SENTENCE

- [4] For purposes of sentence, this court is guided by the principles that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion. These guidelines were discussed in the cases stated below.
- [5] In *S v Rabie* 1915 (4) SA 855-857 (A) Holmes, JA, as he then was, said:
- "In every appeal against sentence, whether imposed by a magistrate or a 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 "

[6] In S v Salzwedel and Others 2000

(1) SA 786 (SCA) at 790 D_F Mahomed CJ said:

"An appeal court is entitled to interfere with a sentence imposed by the trial court in a case where the sentence is; 'disturbingly

inappropriate " or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection's of a nature which shows that the trial court did not exercise its discretion reasonably. It has also been held that

" the over-emphasis of the effect of the appellant's crimes and the underestimation of the person of the appellant, constitute... a misdirection and in the result, the sentence should be set aside".

This must be equally true when there is an over-emphasis of the personal circumstances of the accused an under-estimation of the gravity of the offence"

[7] In S v Anderson 1964 (3) SA 494 (A.DJ at 495 G-H, Rumpff, JA as he then was, said....

"...The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence."

[8] The Constitutional Court in S v Dodo 2001(1) SACR 594 (CC) at 602-603, per Ackerman J. approved the step-by-step procedure to be followed in applying the test to the actual sentencing situation set out in S v Malgas 2001 (1) SACR 469 (SCA). This approval is also evident in a number of other cases.

In S v Malgas (supra) at 482 e Marais JA said:

"...If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the crime, and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

FAILURE BY THE APPELLANT NOT TO SPECIFY THE GROUND ON WHICH HE PURPORTS TO BASE HIS APPEAL

[9] The respondent argument is that because the appellant failed to specify the issue of the appellants' age in court during the proceedings and to specify the ground on the appeal constitutes an irregularity.

[10] When there is an irregularity, this court has inherent review jurisdiction to deal with matter. See *S v Sivhidzor* (A304/2014J (2018) ZAGPJHC 655 (4 December 2018). The fact that the appellant was not yet 18 years old during the commission of the offence and whether the Minimum Sentencing Act was applicable which is in issue, but does not seem to be cannot be an irregularity. The question whether the issue was not specifically addressed by the magistrate, does not take the matter any further

Both counsel referred to the judgement of *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (CCT98/08){2009} ZACC 18. 2009 (2) SACR 477 (CC), 2009 (6) SA 632 (CC). 2009 (11) BCLR

1105 (CC) (15 July 2009), where it was held that, before the Amendment Act came into force, the minimum sentence regime had limited application to children who were under 18 at the time of the offence.

The SCA ruled that a distinctive regime for this group existed and exempted

those under 16 altogether. In *S v B* 2006 (1) SACR 311 (SCA), the Court held that under the legislative scheme the fact that an offender was under 18, though over 16 at the time of the offence, automatically conferred a discretion on the sentencing court, leaving it free without more to depart from the prescribed minimum sentence; that offenders in this group do not have to establish substantial and compelling circumstances to avoid the minimum sentences; but that the prescribed sentences, as the sentences Parliament has ordinarily ordained for the offences in question, nevertheless operate as a “weighting factor” conducing to generally heavier sentences.

On 31 December 2007, the Amendment Act came into force. Its effect (and, according to the answering affidavit of the Minister, its express objective) was to address the ruling of the Supreme Court of Appeal in *S v B* supra and to make the minimum sentencing regime to children who were 16 or 17 at the time of the offence applicable..

Section 51(6) of that Act now makes it clear that only children under the age of 16 at the time of the offence are excluded. Section 53A, a transitional provision, provides that the new provisions are applicable to trials of 16 and 17 year olds pending at the time of its coming into force.

[11] The appellant was above the prescribed age, as a result, the Minimum Sentencing Act is applicable

THE TIME SPEND AWAITING TRIAL

[12] Mr Botha further argued that, the fact that the appellant was incarcerated 14 months pending the finalization of the trial should be considered as substantial and compelling circumstances for the court to deviate from imposing the minimum sentence.

[13] In this regard the following decisions are relevant.

In *S v Radebe* 2013 (2) SACR 165 (SCA) at 169 i-170d (13) to (14) Lewis JA said:

"In my view there should be no rule of thumb in respect of the calculation of weight to be given to the period spent by an accused awaiting trial. (See also *S v Seboko* 2009 (2) SACR 573 (NCK) para 22). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention

prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. (it should be noted that this court has opened the question of how to approach the matter in *S v Dlamini* 2012(2) SACR 1 (SCA) para 41

A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would be taken into account the conditions affecting the accused in detention and the reason for a prolonged period of detention.

COMMON CAUSE FACTS

[14] The following factors are common cause:

14.1. That the appellant was 17 years 11 months during the commission of the offence and 21 years old at the time of sentence

14.2. That the appellant was still a youth during the time of the offence

14.3. That he was unmarried with one minor child to care for

14.4. That he completed grade 11 and was employed earning R1 200, 00 per month.

14.5. That the appellant used a knife in the commission of these offences and further that the deceased was robbed R50.

14.6. That alcohol played part on both the appellant and the victims during the commission of the offence.

14.7. That the deceased was the one using his money to buy alcohol for the appellant.

14.8. That the appellant has two relevant previous convictions. (His third conviction, Robbery, was after the commission of the crimes in question.) offence.

MINIMUM SENTENCING ACT

[15] The legislature promulgated the Criminal Law Amendment Act 105 of 1997 providing for minimum sentences in respect of a variety of instances involving serious and violent crimes.

[16] Section 51 (2)(a) of the Criminal Law Amendment Act 105 of 1997 provides that a regional court shall sentence a person who has been convicted of an offence referred to in Part 11 of Schedule 2 in the following manner:

"In respect of a first offender, 15 years' imprisonment and not less than 20 years' imprisonment in respect of a second offender of any such offence".

[17] Section 51(3) (a) of Act 105 of 1997 compells a court to deviate from imposing the prescribed sentence when substantial and compelling circumstances exist justifying the imposition of a lesser sentence. In this regard, it shall enter those circumstances on the record of the proceedings and thereupon impose such a lesser sentence. For a court to come to that conclusion, it must consider the totality of the evidence before it, together with other relevant factors traditionally taken into account in respect sentencing, together with the principles or purpose of sentencing.

[18] The vexed question which requires proper consideration is whether the circumstances in casu are such that it constitutes the existence of substantial and compelling circumstances to justify deviation from the imposition of the prescribed sentence. Put differently what are the factors, in this case, that can be regarded as constituting substantial and compelling circumstances?

In *S v Malgas* 2001 (1J SACR 469 (SCAJ at 482 c-d Marais JA said:

"All factors (other than .those set out in D above) traditionally taken into account in sentencing (whether or not the diminish moral guilt) thus continue to play a role, none is excluded at the outset from consideration in the sentencing process.

The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained

MITIGATING CIRCUMSTANCES

[19] The evidence accepted by the court a quo demonstrates that the appellant, the deceased, and the two witnesses (Mr Johannes Koboe and Mr Joseph Mnetso) were probably under thhe influence of liquor during the commission of the offences. The trial court also accepted the fact that the appellant was still of the young age when he committed these offences.

(The court a quo did not take into account the period the appellant spend in custody prior to him being sentenced.)

EVALUATION

[20] The court a quo correctly emphasized that murder is the most serious crime. lit is clear that appellant had no respect for human life. Severe sentences have to be imposed by the courts in order to send a message to the prospective criminals that killing of other people cannot be tolerated. The court a quo also emphasised that the appellant showed no remorse.

- [21] However, the fact that the appellant was not yet 18 years of age at the time of the incidents, as well as the fact that the people involved were all intoxicated to some extent, in my view, constitute substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum sentence of 15 years.
- [22] In this regard the trial magistrate misdirected himself. Accordingly this court is entitled to interfere. I would suggest that a sentence of 12 years imprisonment on count would be appropriate.
- [23] There is no reason to interfere with the sentences in respect of counts 2 and 3. However, having regard to all the above mentioned factors it seems that in adding the sentences of respectively 5 years and 3 years imprisonment, the cumulative effect would be too severe..
- [24] Taking into account the purposes of punishment being deterrent. preventive. reformatory and retributive, as well as the fact that the appellant, on the probabilities, can be rehabilitated, I suggest that the appeal against 5 sentence should succeed. and the following order be made:

Order

[23] Count 1: The accused is sentenced to 12 years imprisonment; Count 2:

The sentence of 5 years imprisonment is confirmed;

Count 3: The sentence of 3 years imprisonment is confirmed;

It is ordered that the sentence on count 3 should be served concurrently with the sentence on count 1.

K MOGALE,

Acting Judge Acting judge of the High Court

I agree and it is so ordered

AJ BAM J

Judge of the High Court

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