

SOUTH AFRICA / JUDGMENT

Molefe v S (A293/2017) [2018] ZAGPJHC 107 (11 April 2018) [2018] ZAGPJHC 107

COURT

South Gauteng High Court, Johannesburg

BEFORE

JS Nyathi, LR Adams

CASE / FILE NUMBER

A293/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
CASE

NO: A293/2017
COURT
A QUO CASE NO: 41/2622/2009
DPP
REF NO: 10/2/5/1-(2017/450)

DATE: 11th
April 2018
In

the matter between: MOLEFE,
ITUMELENG Appellant
and
THE
STATE Respondent

JUDGMENT

NYATHI, AJ:

INtroduction

[1]. This is an appeal against a 12 year non-parole term of imprisonment handed down by the learned magistrate Mr P. Venter on 14 January

2014. The appeal is against sentence only.

[2]. The trial commenced on the 11 May 2011, the Appellant faced 3 charges namely: Attempted murder, Unlawful possession of a firearm and the illicit possession of ammunition whilst not being in lawful possession of a firearm in contravention of the applicable legislation.

[3]. On 20 August 2012 the Appellant was convicted on all three charges.

[4]. He was sentenced on 15 January 2014 to 9 years imprisonment on count 1 (attempted murder), 15 years imprisonment on count 2 (possession of a semi-automatic firearm) and 6 months imprisonment on count 3 (of possession ammunition). The magistrate then made an order in terms of section 280 (2) of the Criminal Procedure Act 51 of 1977 ("the Act") that the four years of the term of imprisonment in count 1 as well as the 6 months imprisonment on count 3 shall run concurrently with the term of imprisonment in count 2. The effective period of imprisonment is accordingly 20 years.

[5]. The learned magistrate also applied section 276 (B) of the Act and fixed a non-parole period of 12 years imprisonment on the Appellant.

[6]. The court a quo granted the Appellant's application for leave to appeal against his sentence only insofar as it relates to the order it had made in terms of section 276 (B)

(1) (b) of the Act.

THE LAW

[7]. Sentencing is pre-eminently the domain of the trial court. Even in instances where the discretion of the trial court on sentence is brought under question on appeal, a court of appeal would be loath to interfere with the sentence imposed, unless it is clear that the court a quo has misdirected itself, or did not exercise its discretion judicially and properly, or if the sentence is startlingly inappropriate or that the interests of justice require it.

In *S v De Jager & another* 1965 (2) SA 616 (A) at 628H-629, Holmes JA remarked that:

‘It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot

interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or

misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock; that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.'[1]

[8]. It was contended on behalf of the Appellant that the trial court had erred by making the order contemplated in section 276 (B) (1)

(b) of the Act. Mr Khunou referred inter alia to *S v Botha*

[2004] ZASCA 51 (SCA) where the trial judge had recommended that Appellant in that case should serve at least two thirds of his sentence before he could be considered for parole. Ponnar AJA (as he then was) held that such a recommendation by a trial court was an undesirable judicial incursion into the domain of another arm of the State which was bound to cause tension between the judiciary and the executive. He further said that courts do not have the power to prescribe to the executive branch of government how long a convicted person should be in jail, thereby usurping the function of the executive.

[9]. Ms Muller in her submissions on behalf of the Respondent highlighted the fact that the court a quo in granting leave to the Appellant to appeal its sentence was mindful of the Supreme Court of Appeal's finding in *Ndlovu v S* (9925/2016) [2017] ZASCA 26 (27 March 2017). In the latter case the court held that orders in terms of section 276 (B) should only be made in exceptional circumstances.

CONCLUSION

[10]. There is clear disapproval by the Supreme Court of Appeal on the seemingly wholesale imposition of section 276 (B) orders to buttress sentences by trial court intent on ensuring that lengthier sentences are served by convicted persons.

[11]. Ponnar AJA's remarks in the Botha case (supra), bear this out quite succinctly. He stated: "... Albeit, just a recommendation, its (the section 276 (B) order)[2] persuasive force is not to be underestimated. It, no doubt, was intended to be acted upon. In making the recommendation which he did, the trial judge may have imposed, by a different route, a punishment which in truth and in fact was more severe than originally intended. Such a practice is not only undesirable but also unfair to both an accused person as well as the correctional services authorities".

[12]. Keeping the foregoing in mind, the section 276 (B) order at issue in the present appeal cannot be left untouched and stands to be set aside.

[13]. As regards the rest of the sentence which, due to the trial court invoking section 280 (2) of the Act and ordering 4 years of the 9 years imprisonment term imposed on count 1 as well as the 6 months on count 3 to run concurrently with the 15 years imposed on count 2 is an effective 20 years sentence, the following are briefly the salient considerations:

[14]. The attempted murder was perpetrated on a woman who had recently terminated a romantic relationship with the Appellant. The incident took place at the official staff quarters where the victim resided. From submissions by Mr Khunou, it is clear that the Appellant had visited the victim ostensibly to try and patch things up between him and the victim. At the end of the day however, he had been reluctant to leave. As the record of the court a quo indicates, he had feigned departure, only to return and shoot at the victim execution style. She barely escaped with her life. Protests that this had been a crime of passion are not supported by any evidence at all. The victim is yet to make a reasonable physical and emotional recovery if at all. The 9 year sentence is in my opinion fair and bordering on the side of leniency.

[15]. As regards the 15 year imprisonment sentence for the illegal possession of firearms, detailed and prolific references were made to relevant applicable case law by Ms Muller in her submissions. The leading case of *S v Thembaletu* 2009 (1) SACR 50 (SCA) at

[6] makes it firmly clear that the minimum sentences provisions in section 51 (2)(a) of Act 105 of 1997 which lays down a minimum sentence of 15 years for the illicit possession of a semi-automatic firearm are peremptory.

[16]. The reason for the singling out of semi-automatic firearms for this special treatment is the result of the frequency with which these firearms have been used in violent crimes. It was thus the unambiguous intention of the legislature to impose a harsher sentence

for this offence. This position has since been confirmed in cases such as *S v Swartz*[3] and *S v Motloun*[4]

[17]. The only permissible departure from the sentencing regime laid down is only if there are proven substantial and compelling circumstances

justifying the imposition of a lesser sentence than the one prescribed. (See *S v Malgas*[5]).

[18]. Courts entrusted with the duty to lay down appropriate sentences are enjoined to do so fairly, compassionately and above all, judicially.

Caution is thus to be applied in determining whether particular facts qualify to be regarded as substantial and compelling circumstances.

The admonishment by the Supreme Court of Appeal in *S v Matyityi*[6] still ring ever so loud that courts are not free to subvert the will of the legislature by resorting to vague and flimsy concepts in deciding what substantial and compelling circumstances are.

[19]. In the current appeal, I am not satisfied or convinced that any circumstances have been presented by the Appellant that meet the test to qualify as substantial and compelling.

[20]. As a result, the sentence imposed by the court a quo is susceptible to alteration only in so far as the imposition of the non-parole period of imprisonment in terms of section 276 (B) of the Act.

ORDER

Accordingly the following order is made:

- 1) The appellant's appeal to have his sentence set aside is dismissed.
- 2) The appeal against the non – parole order issued by the Johannesburg Regional Court on the 15th January 2014 is upheld.
- 3) The non – parole order dated the 15th January 2014 under Johannesburg Regional Court case number: 41/26222/09 be and is hereby set aside.

JS NYATHI

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree,

LR ADAMS

Judge of the High Court of South Africa

HEARD ON: 8th March 2018 DATE OF JUDGMENT: 11th April 2018 FOR THE APPELLANT: ADV M A KHUNOU INSTRUCTED BY: SR Malatji Attorneys 3rd Floor, Marble Towers 208 Jeppe Street JOHANNESBURG REF: Mr S.R. Malatji/App17 FOR THE RESPONDENT: ADV N MULLER INSTRUCTED BY: The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg

[1] Quoted with approval by Saldulker JA in *Broodryk v. State* (unreported (959/2016) ZASCA [2017] 62 of 29 May 2017

[2] My insertion

[3] 2016 (2) SACR 268 (WCC)

[4] [2016] ZASCA 96 (2 June 2016) (SCA)

[5] 2001 (1) SACR 469 (SCA)

[6] 2011 (1) SACR 40 (SCA)

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/ZAGPJHC/2018/107.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/molefe-v-s-unknown-topic-agpjhc-2018>

Prepared on 13 October 2026 · Esheria