

SOUTH AFRICA / JUDGMENT

# Ngakatau v S (CAF 02/2010) [2010] ZANWHC 29 (11 November 2010)

[2010] ZANWHC 29

## COURT

North West High Court, Mafikeng

## BEFORE

Hendricks, Gura, Kgoele

## CASE / FILE NUMBER

CAF 02/2010

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**Source record****IN THE NORTH****WEST HIGH COURT, MAFIKENG****CASE NO: CAF 02/2010**

## In the matter between:

JOSEPH NGAKATAU

.....Appellant

and

THE STATE

.....Respondent

FULL BENCH APPEAL

HENDRICKS J; GURA J; KGOELE J

DATE OF HEARING : 05 NOVEMBER

2010

DATE OF JUDGMENT : 11 NOVEMBER

2010

COUNSEL FOR THE APPELLANT : ADV

SKIBI

COUNSEL FOR THE  
RESPONDENT :

ADV NDI MANDE

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**JUDGMENT****HENDRICKS J****[A] Introduction:-**

- [1] The Appellant was convicted on the 10th March 1999 of murder and housebreaking with the intent to rob and robbery. He was sentenced to fifty (50) years imprisonment on the murder charge and fifteen (15) years imprisonment on the count of housebreaking with the intent to rob and robbery. The sentences on these two counts were ordered to run consecutively and not concurrently by Friedman JP (as he then was).
- [2] After the passage of eleven (11) years, the Appellant applied for leave to appeal against the conviction as well as the sentence imposed upon him.
- [3] Mpshe AJ, on 27 July 2010, granted condonation for the late filing of the Application for Leave to Appeal and leave to appeal to the Full Bench of this division against the sentence. Leave to appeal the conviction was refused. Hence, the present appeal to this Court is only against the sentence of sixty-five (65) years imposed upon the Appellant.

**[B] The Sentence:-**

- [4] It is trite law that sentence is within the discretion of the trial court and a court of appeal will not lightly interfere with the exercise of its discretion by the trial court. A court of appeal will only interfere if the trial court failed to exercise its discretion judiciously, properly or reasonably and thereby committed an irregularity by imposing a sentence that is either shockingly severe or disproportionate to the offence committed.

See:- S v Kgosi 1999 (2) SACR 238 (SCA);

S v Matlala 2003 (1) SACR 80 (SCA).

- [5] The following personal circumstances were placed on record at the time of sentencing in the court a quo:-

the Appellant was thirty six (36) years old;

he was cohabiting with a woman;

he is the father of two minor children aged two years and one month respectively;

he was a hawker selling vegetables and earned an income of approximately R300-00 per month;

though he had previous convictions, they were more than ten (10) years old.

- [6] The trial court found that there was nothing extraordinary about these personal circumstances. In my view, this finding prompted the trial court to impose the severe sentence that it had imposed.

- [7] However, the aggravating circumstances of this case cannot be overlooked. The deceased was an elderly lady of eighty six (86) years of age, who tried to make a living by running a tuck shop. The Appellant and his friend embarked on a planned housebreaking and robbery exercise of the deceased around midnight on the evening in question.
- [8] They broke the window and gained entry into the house of the deceased. They assaulted her and gagged her mouth with a piece of cloth (“doek”) and killed her in the process. The deceased was robbed of R20-00 plus some coins. This was indeed murder of an extremely vulnerable elderly lady for a mere R20-00. She was in the safety and comfort of her home when accosted by the Appellant and his friend.
- [9] The trial court was pre-occupied with the fact that the friend of the Appellant was sentenced to sixty-five (65) years imprisonment. This friend to the Appellant, Mr Setouto was not only asked about the sentence imposed upon him when he testified, but it was also repeated in the judgment on the merits by the trial court.
- [10] Furthermore, in imposing sentence, the trial court (per Friedman JP) stated:-

*“In the circumstances of this case I cannot impose a lesser sentence on you than your co-accused previously obtained.”*

Though it may be ideal to impose the same type of sentence for a co-perpetrator in the same offence(s), this principle must not erode the sentencing discretion of a trial court.

- [11] The element of rehabilitation is of paramount importance in imposing a suitable sentence upon an offender. No mention whatever was made by the trial court about the possibility of rehabilitation. The court’s pre-occupation with the fact that a similar sentence must be imposed as was imposed on the former co-accused, overshadowed the other elements and factors relevant to the impositioning of a balanced, and more importantly, an appropriate sentence.

See:- S v Kwenamore 2004 (1) SACR 385 (SCA).

- [12] Exceptionally long terms of imprisonment that even exceed life expectancy should not be imposed upon an accused person even though there may be a need to remove him permanently from society.
- [13] I reiterate that the possibility of rehabilitation should not be ignored when sentence is imposed. Similarly, mercy is also a factor to be considered in imposing a suitable sentence.

See:- S v Siluale en Andere 1999 (2) SACR 102 (SCA);

S v Bull and Another; S v Chavulla and Others 2001 (2) SACR 681 (SCA);

S v Monyane and Others 2008 (1) SACR 543 (SCA);

S v Mokwena 2009 (2) SACR 308 (SCA).

[C] Conclusion:-

- [14] Having regard to all the factors relevant for the impositioning of a just and appropriate sentence on the counts of which the Appellant was convicted, I am of the view that a sentence of twenty five (25) years imprisonment for the murder (count 1) and ten (10) years imprisonment for the housebreaking with intent to rob and robbery will be appropriate under the circumstances of this case.
- [15] There is also no plausible reason why these two sentences should not be ordered to run concurrently seeing that the two offences were committed simultaneously. In actual fact, the murder was committed in the execution of the housebreaking and in particular the robbery.
- [16] As already indicated, eleven (11) years had passed since the impositioning of sentence by the trial court. Under the circumstances, it will be just and fair that the substituted sentence be antedated to 10th March 1999, the date of sentence by the trial court.

[D] Order:-

[19] Consequently, the following order is made:-

[i] The appeal against sentence is upheld.

[ii] The sentence imposed by the trial court is set aside and it is substituted by the following sentence:-

Count 1 – (Murder):- the accused is sentenced to twenty five (25) years imprisonment.

Count 2 – (Housebreaking with intent to rob and robbery):- the accused is sentenced to ten (10) years imprisonment.

It is ordered that the sentence on count 2 should run concurrently with the sentence on count 1.

[iii] The sentence is antedated to 10th March 1999.

R D HENDRICKS

JUDGE OF THE HIGH COURT

I agree.

SAMKELO GURA

A M KGOELE

ATTORNEYS FOR THE APPELLANT: MAFIKENG JUSTICE CENTRE

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