

SOUTH AFRICA / JUDGMENT

Nhlapo v S (A426/2016) [2017] ZAGPPHC 1035 (6 December 2017) [2017] ZAGPPHC 1035

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlane, NP Mngqibisa-Thusi

CASE / FILE NUMBER

A426/2016

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
CASE NO: A426/2016
6/12/2017
(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) NOT REVISED

In the appeal between: BANELE BAFO NHLAPO
 APPELLANT
 and
 THE
 STATE
 RESPONDENT

JUDGMENT

PHAHLANE, AJ

[1] On the 2nd day of June 2011 the appellant, Mr Banele Bafo Nhlapo who was legally represented during

the proceeding in the court a quo, was charged on the counts of Robbery with aggravating circumstances and Attempted Murder. He was convicted and sentenced to seventeen (17) years imprisonment for the count of robbery and five (5) years imprisonment for the count of attempted murder, on the 8th June 2011. The trial court ordered that 2 years of the 15 -year term should run concurrent with the sentence of 17 years. The effective term of imprisonment was therefore 20 years.

[2] On 6 September 2013, his application for leave to appeal was refused by the trial court. The appellant

subsequently lodged a petition to the High Court (North Gauteng, Pretoria) and was granted leave to appeal against sentence only.

[3] As this is an appeal against sentence only, the factual findings of the trial court must be accepted.

[4] The offence for which the appellant was convicted and sentenced for, occurred on the 3rd of October 2010, at Etwatwa in the regional division of Gauteng, where the appellant and his friends, one of which was accused 1 in the court a quo, robbed Mr Ntulli (the complainant) of his cell-phone and R250.00 in cash. The complainant was assaulted and repeatedly stabbed with a knife. It appears that the appellant and the complainant had known each other very well.

[5] This court has to determine, as a court of appeal, whether the sentence imposed on the appellant was

justified. It is trite that sentencing remains pre-eminently within the discretion of the sentencing court.

[6] In *S v Kgosimore* 1999 (2) SACR 238 (SCA) the court said:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startling inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and sentence the Court of appeal would impose. All these formulations, however, are aimed at determining the same thing, viz whether there was a proper reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis, this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

[7] In *Mokela v The State* 2012 (1) SACR 431 (SCA) para [9], BOSHIELO JA stated the following:

"This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and; set out in many judgments of this Court".

[8] See *S v Pieters* 1987

(3) SA 717 (A) at 727 F-H; *S v Malgas* 2001 (1) SACR 469 (SCA); *Director of Public Prosecutions v Mngoma* 2010

(1) SACR 427 (SCA) at para 11; *S v Le Roux and Others* 2010

(2) SACR 1 (SCA) at 26 b-d; and *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G.

[9] It was submitted on behalf of the appellant that the trial court, in imposing a term of 17 years imprisonment for the count of robbery, did not give reasons and was not justified in imposing such a sentence.

[10] It was further submitted that the court should have taken into consideration, time spent by the appellant in custody awaiting finalization of his trial.

[11] It is clear from the record of the trial proceedings that the appellant was not warned of the possibility of having a sentence in excess of the prescribed minimum sentence being imposed.

[12] The accused person should be informed that the minimum sentence is applicable to his or her case owes its genesis to *S v Legoa* 2003 (1) SACR 13 (SCA) where CAMERON JA stated that:

"under the common law it was 'desirable' that the charge-sheet should set out the facts the State intended to prove to bring the accused within an enhanced sentencing jurisdiction. Cameron JA continued (para 20 and 21):

" But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet ".

[13] The respondent submitted that in terms of the proviso that falls under section 51 (2) of the Criminal Law Amendment Act 51 of 1997 (Minimum sentencing Act) there was no obligation on the trial court to record the aggravating circumstances

that justify a sentence being imposed in excess of the prescribed minimum sentence.

[14] Section 51 reads as follows:

"(2) Notwithstanding any other law but subject to subsection (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;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;"

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

[15] The respondent relied on *S v Mthembu* 2011 d SACR 272 KZP at para 19.5 where the court said:

"there can be no need for the presiding officer to identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and to just such a departure, other than reasons to be advanced to show the sentence imposed is just and appropriate in all of the circumstances".

[16] This finding was affirmed on appeal in the Supreme Court of Appeal by a Full-Bench where the court was of the view that "Failure to apprise the defence that court contemplating sentence higher than prescribed minimum does not constitute a defect in the proceedings".

See *S v Mthembu* 2012 (1) SACR 517 (SCA) I

[17] I am of the view that; the submission made on behalf of the appellant that the trial court was not justified in imposing a sentence of 17 years cannot stand. In answering the question whether the sentence imposed on the appellant is disturbingly

disproportionate, it is crucial to reflect on the circumstances of the case.

[18] The complainant testified that it was approximately between 1:00 and 2:00am when he was leaving the tavern

in the company of his friend Mr Nkosana Dlamini. They were accosted by the appellant and his friends, and the appellant appeared to be the leader of the group. The complainant was stabbed several times with a knife on his head; his neck; his back and on his buttocks. His friend Mr Dlamini who managed to run away when the complainant was stabbed, called out his name. When the appellant and his group tried to look where the voice was coming from, the complainant got a chance to escape. He entered a certain house and screamed for help. The owner of the house Mr Lifi Ndala, came out in order to assist, but the appellant and his friends managed to catch up with the complainant and began to threaten Mr Ndala.

[19] Mr Ndala retreated after the threats and the appellant and his group grabbed the complainant and dragged him out into the street and continued to stab him. He lost consciousness and when he woke up, he was in hospital.

[20] The extent of the injuries sustained by the complainant were recorded in the J88 which was admitted by agreement,

as Exhibit A into the record before any evidence was led. It is clear from the J88 that the injuries inflicted on the complainant were without due consideration of human life. The doctor recorded in his findings that the complainant had difficulty breathing. Amongst the wounds inflicted on the complainant, he had two stab wounds on the chest and another on the back of his neck. The photos of the complainant while in hospital, were also admitted as Exhibit B and they reflect all the injuries sustained by the complainant.

[21] One can therefore accept that the trial court was justified in finding that a long term of imprisonment was

appropriate under the circumstances. Having said this, it should be borne in mind that it is always necessary and important that in the evaluation of what a proper punishment should be, the trial court must have due and proper consideration of all mitigating

circumstances in favour of an accused person. This is particularly important because of the applicability of the minimum sentence in this case.

[22] Ms Masete [from Legal Aid SA] argued on behalf of the appellant that, since the count of attempted murder arose from the same set of facts as the count of robbery, the court should have ordered the two sentences to run concurrently. She submitted that having only a portion of the sentence in the attempted murder count run on its own constitutes prejudice to the appellant.

[23] She further submitted that though the Minimum Sentences Act applies in this matter, the court in effect imposed a sentence greater than the prescribed minimum sentence. This she insisted is also prejudicial. She further submitted that this, the court did without taking into account appellant's mitigating circumstances, to wit:-

1. That the appellant was 20 years old.
2. That the appellant was a first offender.
3. That the appellant spend a period of 7 months in custody awaiting finalization of his trial.
4. That the appellant has prospects of rehabilitation.

[24] The respondent submitted and rightly so, that the general principles governing the imposition of a sentence in terms of the Minimum Sentencing Act as enunciated by the Supreme Court of Appeal in *S v Malgas* supra cannot be ignored. Marais JA said:

"The Legislature has deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored" .

[25] I am in agreement with the submission that the trial court did not misdirect itself in finding that the robbery in casu was worse than the typical or everyday robbery which warranted the imposition of a higher sentence than the minimum prescribe

sentence of 15 years imprisonment.

[26] Having submitted on behalf of the appellant that his personal circumstances should have been considered as constituting substantial and compelling circumstances which warranted a deviation from the prescribed minimum sentence, and that he had prospects of rehabilitation, this court is mindful of the four main objectives or purposes of punishment, which are deterrence, reformation and retribution. The court is also mindful of the so-called "triad" factors pertaining to sentence as enunciated in S v Zinn namely: ' the crime, the offender and the interests of society'. In balancing all these factors, due

consideration has to be taken as regards an appropriate sentence.

[27] The trial court held that no substantial and compelling circumstances existed, justifying a deviation from the prescribed minimum sentence. I agree with the trial court's finding. Having given proper and due consideration to all the circumstances, I am of the view that the aggravating features of this case far outweigh

the mitigating circumstances.

[28] See in this regard S v Sikhapha 2006 (2) SACR 439 (SCA) at para 16 where the court held that: "in deciding whether the particular circumstances of a case called for the imposition of a lesser sentence than the prescribed minimum sentence ordained by the legislature, the traditional mitigating factors would

have to be weighed with the aggravating factors.

[29] See also S v Matyityi (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA)

[30] Having considered both arguments before this court, and taking into consideration all the factors, I propose that the following order be made:

The appeal against sentence is dismissed

P D PHAHLANE

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree - and it is so ordered.

NP MNGQIBISA-THUSI

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 14/11/2017

For the Appellant: Adv

MMP Masete

Instructed by: The

Legal Aid Board

For the Respondent: Adv

DWM Broughton

Instructed by: Deputy

Director of Public Prosecutions

Date of Judgment: 6

December 2017

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