

SOUTH AFRICA / JUDGMENT

Radebe v S (A92/2016) [2017] ZAGPPHC 233 (11 May 2017) [2017] ZAGPPHC 233

COURT

North Gauteng High Court, Pretoria

BEFORE

I Ellis, L M Molopa-Sethosa

CASE / FILE NUMBER

A92/2016

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IN THE HIGH
COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
11/05/2017
CASE NO: A92/2016
Reportable: No

Of interest to other
judges: No

In the matter between: KHEHLA PAULOS
RADEBE
Appellant
and
THE
STATE
Respondent

JUDGMENT

ELLIS, AJ:

- (1) This is a criminal appeal, with leave of this Court, against an effective sentence of 18 years' imprisonment, imposed on the appellant in the Regional Court, Heidelberg on 10 June 2015, after being convicted on charges of theft, possession of a semi-automatic fire-arm and possession of ammunition. The appellant's sentence included a non-parole-period of 12 years, to be calculated from the date when the sentence that the appellant is currently serving has expired.
- (2) The appellant was initially charged with five counts of which count 1 (housebreaking with the intent to commit a crime unknown to the state) and count 2 (murder), were withdrawn by the State. On count 3 (robbery with aggravating circumstances) the appellant pleaded not guilty thereto, but entered a plea of guilty to a competent verdict of theft. The appellant also pleaded guilty to count 4 (possession of a semi-automatic fire-arm) and count 5 (possession of ammunition).
- (3) To this end, the appellant submitted two written statements in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("CPA"), which were entered into the record as Exhibit "A" and "B". The prosecutor accepted the appellant's pleas of guilty and on 9 June 2015 the appellant was convicted on strength thereof.
- (4) It appears from the written statement submitted by the appellant, that he only became involved after the items forming the subject matter of count 3 were robbed and removed from the house of the deceased by one Brian Dube. The appellant was approached by Brian Dube, who showed him all the hidden stolen items with a request to assist in finding a buyer for the items. The appellant agreed to look for a buyer for the firearms and the welding machine. The aforesaid items were recovered by the police upon appellant's arrest, whereafter appellant showed the police where the rest of the stolen items were.
- (5) It should at this stage be emphasised that appellant, before entering any plea on the charges, was fully informed by the court a quo that the provisions of section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 ("Act 105 of 1997"), applies in respect of counts 3 and 4, i.e. that a minimum sentence of 15 years for a first offender, 20 years for a second offender or 25 years for a third offender may be imposed on conviction of those crimes.
- (6) However and in view of the appellant's plea of guilty to theft in respect of count 3, the minimum sentence as aforesaid no longer applied to that charge.
- (7) In this regard, the court a quo correctly held that section 51(2)(a) of Act 105 of 1997 applied to count 4 (possession of a semi-automatic firearm), an offence listed in Part II of Schedule 2 to the CPA. This is in line with the judgment of *S v Thembaletu*,^[1] where the court held that the reason why the legislator singled out semi-automatic firearms may well have been the result of the

frequency with which these weapons are used in violent crimes.

- (8) Accordingly and on 10 June 2015, the appellant was sentenced to 8 years' imprisonment on count 3, 10 years' imprisonment on count 4 and 3 years' imprisonment on count 5. The court a quo ordered that the sentences imposed on counts 4 and 5 be served concurrently and fixed a non-parole- period of 12 years' imprisonment to be effective after the appellant had served his current sentence of 5 years imprisonment, imposed in respect of a different charge. The appellant was also declared unfit to possess a firearm.
- (9) It should be noted that the court a quo indeed found substantial and compelling circumstances to deviate from the prescribed minimum sentence of 15 years' imprisonment in respect of the sentence on count 4 (possession of a semi-automatic firearm), hence the imposition of 10 years' imprisonment.
- (10) It is a trite principle of our Criminal Law that sentencing discretion lies pre-eminently with the sentencing court and ought to be exercised judicially and in line with established principles governing sentencing.[2] Accordingly, a wide discretion is allowed to a trial court in the assessment of punishment, except in cases where a minimum sentence is set by statute under Act 105 of 1997.
- (11) In exercising its discretion, the court must consider the established triad enunciated in *S v Zinn*,[3] consisting of the following:
- (a) The nature, magnitude and effect of the crime itself;
 - (b) The interests of society; and
 - (c) The interests of and circumstances surrounding the offender.
- (12) It is furthermore accepted that a court of appeal should be guided by the aforesaid principle that punishment is pre-eminently a matter for the discretion of the trial court and should be careful not to erode that discretion.[4] A sentence should therefore only be altered if the discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by irregularity, misdirection or is so disturbingly inappropriate that it induces a sense of shock.[5]
- (13) During sentence of the appellant, the court a quo considered all the relevant factors pertaining to sentencing, including the personal circumstances of the appellant which were recorded as follows: "... being a 27 year old male who is customarily married and has a child of 5 years which is currently residing with his mother and who was employed previously at Karan beef, earning a R1 800.00 per month."
- (14) In addition, the court a quo correctly recorded that the appellant is not a first offender. On 24 November 2009, the appellant was convicted of theft and sentenced to 24 months imprisonment.[6] Thereafter and on 26 June 2014, the appellant was convicted of housebreaking with the intent to steal and theft and sentenced to 5 years imprisonment.[7] The appellant was serving the latter sentence during the proceedings in this matter. Most importantly though is the fact that in respect of both previous convictions, the appellant was

declared unfit to possess a firearm.

- (15) The court a quo also took into account that the appellant pleaded guilty to the offences and that it should be "seen as a sign of remorse"; that the appellant is still relatively young; and that the appellant is willing to co-operate and did co-operate with the police during his arrest and will do so once the main perpetrator (Brian Dube) is arrested.
- (16) In considering whether substantial and compelling circumstances exists in respect of the minimum sentence to be imposed, the court a quo referred to *S v Vilakazi*[8] where Nugent J said the following:
- "[18] It is plain from the determinative test laid down in *Malgas*, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed minimum sentence is seldom imposed in cases that fall within the specific category. If that occurs it will be because the prescribed minimum sentence is seldom proportionate to the offence. For the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice."[9]
- (17) In conclusion, the court a quo found that a sentence of 15 years' imprisonment would indeed be disproportionate under the circumstances, hence the deviation to a sentence of 10 years' imprisonment on count 4.
- (18) Although decided cases on sentencing should be viewed as guidelines rather than straightjackets,[10] it is noteworthy to refer to the matter of *Swartz v The State*,[11] where the full bench confirmed a minimum sentence of 15 years' imprisonment for the unlawful possession of a semi-automatic firearm,

under circumstances where the accused in that instance per chance discovered the said firearm in a rubbish heap. In doing so, the court referred to various cases where a sentence of 15 years' imprisonment were imposed on a first offender for possession of semi-automatic

firearms, whereafter it stated the following:

"[41] Unlicensed position of semi-automatic firearms is very serious matter. Violent crime involving the use of such weapons has not diminished since *Thembaletu* was decided. I have no doubt that the lawmaker, in requiring a minimum sentence of 15 years' imprisonment to be imposed in the absence of substantial and compelling circumstances, had in mind that generally an unlicensed weapon of that kind is possessed for use (whether by the possessor himself or by one to whom he passes the weapon) in other serious crimes such as murder, robbery with aggravating circumstances, hijacking and the like. Very often the perpetrators of violent crime are not apprehended."

- (19) In view of the foregoing, I do not believe that the court a quo erred in imposing the sentence in respect of counts 3, 4 and 5, and quite correctly held that there were substantial and compelling

circumstances to depart from the minimum sentence of 15 years' imprisonment in respect of count 4. Accordingly and all things considered, it cannot be said that the court a quo, on imposing the sentence, did not exercise its discretion judicially and properly, wherefore the appeal must therefore fail in this regard.

- (20) Before us, counsel for the State conceded that we should reconsider the court a quo's order to fix a non-parole period of 12 years' imprisonment, mainly due to the fact that the court a quo apparently assumed that it was obliged to do so in terms of the provisions of section 276B(2) of the CPA.

- (21) Section 276B of the CPA reads as follows:

"276B. Fixing of non-parole-period

(1)(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)(b), fix the non-parole- period in respect of the effective period of imprisonment."

- (22) It is apparent from the provisions of section 276B of the CPA that a court is not obliged to fix a non-parole-period, but is vested with a discretion in that regard, hence the use of the word "may" in section 276B(1)(a) of the CPA.[12] Moreover, a court should only exercise its discretion to impose a non-parole-period in exceptional circumstances,[13] which must relate to parole and not only aggravating factors of the crime committed. I am convinced that no exceptional circumstances

existed in this case for the imposition of a non- parole-period and this order made by the court a quo is therefore non-suited and must be set aside.

- (23) In the result I propose the following order:

1. The appeal against sentence imposed on the appellant in respect of all the charges is hereby dismissed.
2. The order made by the court a quo fixing a non-parole-period of 12 years calculated from the date on which the appellant's current sentence of 5 years has expired, is hereby set aside.

I. ELLIS

ACTING JUDGE OF THE HIGH COURT

I AGREE

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

IT IS SO ORDERED

APPEARANCE ON BEHALF OF APPELLANT: Adv B.M.T. More

APPEARANCE ON BEHALF OF RESPONDENT: Adv G.J.C. Maritz

Date of hearing: 13 March 2017

[1] 2009 (1) SACR 50 (SCA).

[2] S v PB 2013

(2) SACR 533 (SCA) at [19].

[3] 1969 (2) SA 537 (AD) at 540G.

[4] S v Rabie 1975

(4) SA 855 (A).

[5] S v Kekana 2013

(1) SCAR 101 (SCA) at [11].

[6] Exhibit "C" to the record of proceedings.

[7] Exhibit "D" to the record of proceedings.

[8] 2009 (1) SACR 552 (SCA).

[9] S v Vilakazi 2009

(1) SACR 552 (SCA) at [18].

[10] S v D 1995

(1) SACR 259 at 260E.

[11] 2016 (2) SACR 268 (WCC).

[12] S v Mthimkulu 2013

- (2) SACR 89 (SCA) at [16]; Mhlongo v The State 2016 (2) SACR 611 (SCA).
- [13] S v Stander 2012 (1) SACR 537 (SCA) at [23]; Director of Public Prosecutions, North Gauteng: Pretoria v Gwala & Others 2014
- (2) SACR 337 (SCA) at [21].
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Prepared on 11 October 2026 · Esheria