

SOUTH AFRICA / JUDGMENT

Raphoko and Another v S (A94/2020)

[2020] ZAFSHC 261 (27 November 2020)

[2020] ZAFSHC 261**COURT**

Free State High Court, Bloemfontein

BEFORE

Mbhele, Raikane

CASE / FILE NUMBER

A94/2020

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Source record**INTHE****HIGH COURT OF SOUTH AFRICA****(FREE****STATE DIVISION, BLOEMFONTEIN)****Case****number: A94/2020****In**

the Appeal between:

LETOANE

JOHANNES

RAPHOKO

Appellant 1

MOLEFI

SHOLEDI

Appellant 2

and

THE

STATE

Respondent

CORAM:

MBHELE, J et RAIKANE, AJ

JUDGMENT

BY: RAIKANE, AJ

HEARD ON: 19 OCTOBER 2020

DELIVERED: 27 NOVEMBER 2020

[1] The appellants were charged with 3 counts, namely Murder (count 1), Robbery with aggravating circumstances (count 2) and assault with intent to do grievous bodily harm (count 3). They pleaded not guilty to all charges preferred against them.

The first appellant was convicted on counts 1 and 3 while the second appellant was convicted on counts 1 and 2. They were each sentenced

to life imprisonment on count 1. The first appellant was convicted on a lesser charge on count 3 and sentenced therefor to 6 months'

imprisonment. The second appellant was sentenced to 15 years' imprisonment on count 2.

[2] Aggrieved by the sentences, the appellants approached this court on appeal against sentences on counts 1 and 2.

[3] The appellants exercised their right to automatic appeal in respect of count 1.

[4] They were both legally represented by Mr Seitheiso, an attorney from Legal Aid South Africa.

[5] I take note that there is no record anywhere by the court a quo explaining to both the appellants in details the ramifications of being charged under the

Criminal Law Amendment Act 105 of 1997 (Minimum sentence Act), especially with regard to the penal provisions. This is a requirement

as was confirmed in *S v Maake* 2011 (1) SACR 263 (SCA) par [27] regardless of whether an accused person is legally represented or not.

[6] The state led evidence in count 3 and before any evidence was led in respect of counts 1 and 2 the appellants tendered statements in terms of section 220 of the Criminal Procedure Act (CPA).

[7] Mr Seitheiso when drafting the statements simply regurgitated the elements of the offence as follows:

7.1 "I, the undersigned Letoane Johannes Raphoko hereby declare as follows. I an adult male accused make the following admissions freely, voluntarily and without influence. I admit that on the 2nd July 2016 at Bloemfontein near Mahundra I intentionally and

unlawfully killed Gabana Nkosi Andries Mkoloko, a male person by hitting him with a knopkerrie. I admit that it was my intention to kill the deceased. I admit intention to kill the deceased. I admit that I knew my action is unlawful and punishable by law."

7.2 The same was drafted on behalf of appellant 2 with the following addition: "I unlawful and intentionally assaulted Gabana Nkosi Andries Mkoloko and took with force his money and two cell phones. The said property belonged to the accused."

[8] The statements were handed in as exhibits and admitted into the record. The statements contained no information on how the offences

were committed. The appellants simply admitted commission of relevant offences. The conviction of the appellants flowed directly from the admission of the above statements.

[9] In *S v SELEKE en Ander* 1980 (3) 745 (A) it was confirmed that an admission in terms of section 220 is intended to admit a pure fact which has been put in issue and is regarded as sufficient proof, especially if a plea of not guilty was tendered with the aim of curtailing the proceedings.

[10] The post mortem report as well as the photo album of the scene of crime were also handed in and admitted into record as exhibits. No other evidence was led. Both the state and the defence rested their cases and the accused were thus convicted.

THE GROUNDS OF APPEAL:

[11] The appeal on count 1 and 2 is premised on the following submissions that:

11.1 The court a quo erred in not finding that there are substantial and compelling circumstances present justifying deviation from the prescribed minimum sentences by disregarding the following:

11.2 the time both spent in custody awaiting trial;

11.3 both admitted their involvement by way of Section 220 admissions and as such; and

11.4 took responsibility for their actions.

[12] Submission by the respondent is that the sentence imposed is just under the circumstances and that it is trite law that the court should not deviate from imposing the minimum sentence in such matters for flimsy reasons and that the sentence is also prescribed even

for first offenders as was confirmed in *S v Malgas* 2001(2) SA 1222 (SCA)

[13] Further that the nature of the offence, the purpose of the sentence must come to the fore when the aim of punishment is considered and that none of the sentences imposed induce a sense of shock or are strikingly inappropriate.

SENTENCING:

- [14] It is trite law that imposing a sentence is a matter falling within the discretion of the trial court, and that such a discretion should not be eroded as outlined in *S v RABIE* (1975) 4 SA 855 (A) at 857 D F the court further emphasized that any sentence imposed should only be altered if the discretion has not been "judicially and properly" exercised.
- [15] In *S v Flateni* 2007 (2) SACR 590 SCA 354 CF it was also confirmed that interference with a sentence must only occur if it is found that no reasonable man ought to have imposed such a sentence, or it is found to be totally out of proportion to the gravity or magnitude of the offence, or it invokes a feeling of shock or outrage.
- [16] However the mandatory minimum sentencing regime introduced by the minimum sentences Act prescribes the sentence to be imposed, eroding that discretion on certain prescribed offences, though it left an escape route to judicial officers to deviate from applying same in cases where they are "satisfied that substantial and compelling factors are present that justify the deviation.
- [17] *S v Malgas* (supra) further introduced the "determinative test" in terms of which if: "the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, is entitled to impose a lesser sentence"
- [18] In *S v DODO* [2001] ZACC 16; 2001 (3) SA 382 (CC) , entrenching the constitutionality of the minimum sentence , the court outlined the following test to be applied that of, "gross disproportionality" must be applied in order to determine whether a sentence mandated by law is inconsistent with the offender's 12(1)(e) constitutional right and the offender not to be punished in a cruel, inhuman and degrading way. "
- [19] Lastly the underpinning principle in sentencing is the principle highlighted in *S v MASUKU* 1985(3) SA 908 (A) at 912 F that: "the factual findings on the merits of the case are of great importance for the purposes of sentencing".

[20] I now turn to deal with submissions on behalf of appellants as evident from the record.

20.1 Mr. Reyneke on behalf of the appellants, submitted that the appellants were convicted following the section 220 admissions and this amounted to a plea of guilty as no evidence was further led thereafter. This should be regarded as a sign of remorse and it also curtailed the proceedings,

20.2 that the court erred in not considering the 14 months that the appellants spent in prison awaiting trial and the fact they proffered their apologies to the deceased's family as substantial and compelling circumstances justifying a departure from the prescribed minimum sentences.

[21] The state led the evidence of the two major children of the deceased and his fiancé.

21.1 The daughter was married but unemployed; she is looking after her minor sibling. She is struggling to cope with the death of his father and has resorted to therapeutic intervention in trying to cope with the loss.

21.2 The son is unemployed and had repeatedly failed matric. He is in financial distress as he wanted to attend curriculum extension

classes. He is not keen to look for any employment other than the career he wanted to follow whilst his father was alive and still

awaiting his father's pension payout.

21.3 The fiancée is also not coping with the traumatic loss and has resorted to counselling. She is employed as a teacher and has her own child but not with the deceased. She is not able to help the deceased's children due to her own financial obligations.

21.4 They acknowledged the apology but it was not going to bring back the deceased. They all agree further that a long term imprisonment was an appropriate sentence to be meted out. It also emerged during their testimony that the deceased was in the employ of the South African Police Services.

[22] Mitigation on behalf of the appellants as evident from the record is as follows:

APPELLANT 1:

22.1 he is from Lesotho, age 28, his highest standard of education is grade 5.

22.2 he was employed as a security guard earning R700.00 per week. He is the sole breadwinner

22.3 he is married with three kids who are staying in Lesotho with his wife. He is also helping is younger brother as both their parents have passed on.

22.4 he was once convicted of contravening the immigration Act.

22.5 he is a first offender of on this kind of offence.

22.6 he offered his apology to the family through his legal representative.

APPELLANT 2:

22.7 he is also from Lesotho, age 27 and his highest educational qualification is grade 7.

22.8 he was employed at Mahindra garage earning R700.00 per week.

22.9 he is a sole breadwinner back home for his parents and siblings back. He is not married and have no children.

22.10 he is a first offender.

- [23] Further they both apologised to the family owning up to their conduct. The court was also implored to regard these factors as sufficient to assist the court to deviate from the minimum sentence.
- [24] The daunting task that a sentencing court must perform at the end of the trial is to balance the principles of punishment as outlined in the Zinn triad, that of deterrence, rehabilitation and prevention.
- [25] Both were convicted based on their statements in terms of Section 220 which did not contain any sufficient details however assisted the court could consider whether deviation from the minimum sentence is justify or not.
- [26] I am of the view that:
- 26.1 the traditional mitigating factors of the Appellants cannot just be easily discarded as nothing prevented the court from regarding appellants as capable of being rehabilitated through a lengthy imprisonment sentence. They are very young, in permanent employment, and sole breadwinners.
- 26.2 the time spent awaiting trial prior to conviction is a factor that the Court should have considered on assessing whether deviation is warranted though as case law has shown that there is no mechanical formula that can be used to determine the extent to which a sentence can be reduced.
- [27] The apology proffered to the family and the admissions are generally an element of remorse factors to taken into account.
- [28] It only emerged during evidence in mitigation that the deceased was in the employ of the SAPS and the sentencing court also confirmed that it is obvious that there was no prior dealing between him and the appellants unlike in *S v Khathi* 2008 (2) SA 589 (w) though persuasive, wherein the murder of a traffic cop while on duty was found to be premeditated and hence the minimum sentence was held to be befitting.
- [29] Nowhere in the record can it be ascertained that the sentence was blended with an element of mercy as per *Rabie* (supra). The gravity and callousness of the offence cannot and should not be understated.
- [30] The court overemphasized the nature and seriousness of the offence, the interest of the society and balancing act as outlined in the triad principle became clouded.
- [31] It will always remain a factor to be considered that in offences falling under the minimum sentence the list of the circumstances to be considered as substantive and compelling is not exhaustive and should always be based on the circumstances of each and every case.
- [32] Resultantly, the following order is made;

- (a) The appeal is upheld.
- (b) The sentences imposed by the Court a quo are set aside and replaced as follows:
- (c) The appellants are sentenced to 28 years' imprisonment on count 1,
- (d) Appellant 2 is further sentenced to 12 years on count 2,
- (e) All the sentences to run concurrently,
- (f) The sentences are antedated to 7 September 2017.

T. V. RAIKANE, AJ

I, Concur

N. M. MBHELE, J

On behalf of Appellants: Mr D Reyneke

Instructed by: Legal Aid South Africa

BLOEMFONTEIN

On behalf of Respondents: Adv. J DU P Botha

Instructed by: Public Prosecutions

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