

SOUTH AFRICA / JUDGMENT

S v Farrel (CC56/2023) [2024] ZAGPPHC 1039 (25 July 2024)

[2024] ZAGPPHC 1039

COURT

North Gauteng High Court, Pretoria

BEFORE

PD Phahlane

CASE / FILE NUMBER

CC56/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC56/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 25/07/2024

SIGNATURE: PD PHAHLANE

In the matter between:

THE STATE

And

WAYNE ROBERT FARREL

ACCUSED

JUDGMENT ON SENTNCE

PHAHLANE, J

- [1] “The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine

the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

It incorporates the right to dignity. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity”. These were the words expressed by Justice O’Regan, in the Constitutional matter of *S v Makwanyane and Another*[1].

[2] His Lordship Mossop J, in the case of *S v Phakathi and Others*[2] said the following: “Murder, without fail, brings tragedy. There are always people who suffer when the life of a loved one is unlawfully and unexpectedly taken. The chilling thing about this is that there appears to be no way of guarding against it happening. The only thing that one can do is live one’s life the best as one can, do right by others, obey the law and hope that our fellow man will do so as well. That hope, unfortunately, was not realised in this instance. You decided that the laws that most people observe and obey did not apply to you”.

[3] This court will restate those words and say to the accused, Mr Farrel, ‘you decided that the laws that most people observe and obey do not apply to you’. You have been convicted on three (3) counts, namely: Murder read with the provisions of section 51(1) of the CLAA; Attempted Murder; and Robbery with aggravating circumstances read with the provisions of section 51(2) of the CLAA.

[4] The Supreme Court of Appeal (“SCA”) in *S v Kekana*[3] pointed out that “the purpose of stipulating that a particular charge should be read with specific minimum sentence provisions of the Act is essentially two-fold: First, is to alert the accused of the

applicability of the prescribed minimum sentence. Second, to afford the accused an opportunity to place facts before the court on which a deviation from the prescribed sentence would be justified”.

[5] This means that the accused must satisfy the court that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment on count 1 and fifteen (15) years imprisonment on count 3 - because the court is enjoined with the powers in terms of section 51(3)(a) of the Act, to deviate from imposing the prescribed minimum sentence.

[6] The offences which the accused has been convicted for, are very serious in nature. The deceased was killed in a ruthless manner by the accused and his girlfriend Ms Pretorius who had no regard for human life. The evidence before court is that the offences were pre-planned, and this was confirmed by the accused.

[7] In respect of count 1, the accused makes it clear in his evidence that he was already in possession of an axe when the deceased came inside the house after being called into the house by Ms Pretorius. The deceased tried to run when he noticed that the accused was holding an axe, but the accused pulled him back into the house, and the deceased was struck on the back of his head with a big, rounded metal axe as described by the accused. The deceased tried to fight back but he was overpowered and struck several times until blood started spurting out of his head, and he could no longer move.

7.1 After the two had mercilessly bludgeoned him to death, they tied his hands from his back using a rope which was wound several times

around each wrist. A similar method was used to tie the ankles together using a separate rope. The ropes from the hands and feet

were also tied and secured around what appears to be the leg of the table as depicted from photos 3 and 5 admitted by the accused in terms of section 220 of the CPA.

7.2 The complainant in count 2, Mr Golding, suffered the same fate as the deceased because he was also assaulted with the same axe and tied with ropes like the deceased, and left for dead. His property was also taken after a list of the items to be taken was made by Ms Pretorius.

[8] It is appropriate to refer to the guidelines on sentencing as was aptly articulated by the court in *S v Thonga*[4] that during the sentencing phase, the trial court is called upon to exercise its penal discretion judicially after careful and

objectively balanced consideration of all relevant material, and the punishment must be reasonable and reflect the degree of moral

blameworthiness of the offender.

[9] Having said that, it is trite law that sentencing the accused should be directed at addressing the judicial purposes of punishment which are deterrence; prevention; retribution and rehabilitation as stated by the Appellate Division in the case of *S v Rabie*[5]. In considering an appropriate sentence to be imposed on the accused, I must in the exercise of my sentencing discretion have due regard to the “triad” factors pertaining to sentence namely: – the nature and seriousness of the crimes committed by the accused including the gravity and extent thereof, the personal circumstances of the accused, and the interests of society[6]. Added to these basic triad is the fourth element which relates to ‘the interests of the victims of the offence’.

[10] The court in *S v Zinn* recognised that the seriousness of the offences and the circumstances under which they were committed, as well as the victims of crimes are also relevant factors in respect of the last triad, where the interest and protection of society’s needs should have a deterrent effect on the accused.

[11] As far as the deterrent effect is concerned, the Supreme Court of Appeal (“SCA”) in *S v Mhlakaza & another*[7] also pointed out that, ‘given the high levels of violent and serious crimes in the country, when sentencing such crimes, emphasis should be on retribution and deterrence’. In affirming that retribution should carry more weight because of the seriousness of the offences which an accused person has been convicted of – when the court considers the aspects relating to the purpose of punishment, the SCA in the case of *S v Swart*[8] stated the following:

“In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each, according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role”.

[12] The accused testified in mitigation of his sentence and placed the following circumstances on record:

1. He is 34 years old, and unmarried with no children.
2. Before his arrest he was not formally employed but did odd jobs in building and doing farm work on a daily basis.
3. He has one previous conviction of theft committed in February 2013 and was sentenced in July of the same year.

[13] The accused pleaded with the court to exercise an element of mercy on the sentence which will be imposed on him. He expressed his regret by stating that he feels sorry for the complainant, Mr Golding, and the family of the deceased, and stated that it was not his intention to hurt anyone. This unfortunately contradicts what he previously stated under cross-examination when he was taken to task about his action of viciously attacking Mr Golding and the deceased and he stated that “the way Mr Golding was assaulted, it was only by the grace of God that he survived”.

[14] Under cross-examination, he continued blaming his actions on Ms Pretorius and stated that he was only following her instructions on what to do. He testified that the court should have mercy on him because he needs a second chance in life and can be rehabilitated.

[15] The State also led evidence in aggravation of sentence and called two witnesses. This was done in terms of section 274(1) of Criminal Procedure Act 51 of 1977 which provides that: “A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed”.

[16] Mr Clifford Golding, the complainant in count 2 of attempted murder also gave viva voce evidence. Explaining the impact which the offence had on him and his family, he testified that his marriage is on the rocks because his wife blames him for allowing the accused and his girlfriend to live in their property and has since moved out and expressed her fears of staying in the house because she had bad memories of the day when she found him (Mr Golding) tied and heavily assaulted.

16.1 He further testified that as a result of the attack on him, his right eye can no longer see, meaning, he is blind on the right eye. He is not mentally stable because he regularly gets blackouts and flashbacks and does not feel safe because he is alone in the farm where the incident occurred.

16.2 He explained that the deceased was his right-hand man for twenty (25) years and had a close relationship with him because he worked for his father before working for him when their families met in the 1960s, and stated that that family relationship has now been broken as a result of the death of the deceased.

16.3 Regarding the property he lost, he stated that the items had sentimental value to him because he collected them over a period of years and his life has been turned upside down.

[17] He confirmed under cross-examination that his wife refuses to stay in their house and stated that because of this incident, the accused has destroyed his family and marriage. When asked about forgiveness, he expressed that he knows that he must forgive but he finds it difficult to forgive the accused for what he has done and stated that the accused is a threat to other people

[18] Ms Nonhlanhla Florence Maseko, the niece of the deceased also took the stand and testified that the deceased left his 23-year-old son whom he was taking care of and maintaining financially. She testified that the death of the deceased has caused a financial strain on the family because he was the breadwinner. She said the deceased was like a father to her and explained that the deceased was not only maintaining his son but was also supporting her and the entire family financially.

18.1 Ms Maseko testified that at the time of the deceased death, the son was not working and had just been admitted at tertiary. She explained that they struggled and could barely survive on their grandmother's pension grant. She testified that although the son of the deceased is currently employed, he is still struggling financially because he is not making enough.

18.2 She confirmed that the deceased lived in Mr Golding's plot where he worked and stated that when he was not in the plot, he would be home in Maboloka.

[19] When asked under cross-examination if she would be in a position to forgive the accused, she responded in the negative and said although she is a forgiving person, the circumstances under which the deceased was found, and the fact that he had already decomposed, makes it difficult for her to forgive the accused.

19.1 She said the deceased's son, Jabulani is struggling to come to terms with the death of his father and that the accused should be punished because her family wants justice for the deceased.

[20] The State submitted that the circumstances of the accused do not warrant a deviation from the imposition of the prescribed minimum sentences on counts 1 and 3, and that the accused is not remorseful for his actions because even during the sentencing stage, he still persists on blaming Ms Pretorious, and distance himself from the axe which he used to kill the deceased with. In this regard, the State submitted that there are no chances of rehabilitation for the accused and that society should be protected from violent people such as the accused.

20.1 It was further submitted that the attack on Mr Golding was perpetuated by greed because the evidence of both the accused and Ms Pretorious was that they planned the attack, made a list of the items to rob, and ultimately acted in accordance with their plan.

[21] Because the accused has been convicted of the offences which fall under the purview of the Minimum Sentences Act, he must satisfy the court that substantial and compelling circumstances justifying a deviation from the imposition of the prescribed sentences exist. This means that the accused has a duty to place sufficient and acceptable evidence or facts before the court to satisfy the court that the mitigating factors justify a departure from the imposition of the prescribed minimum sentences[9].

[22] It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Nonetheless,

the SCA in *S v Malgas*[10] which has since been followed in a long line of cases, set out how the Minimum Sentences Act should be approached and in particular, how the enquiry into substantial and compelling circumstances is to be conducted by a court. The SCA in *S v Matyityi*[11] referring to *Malgas*, reaffirmed that: "The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer has a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It has to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present".

[23] If one considers the circumstances in which the offences of aggravated robbery was planned and carried out, the case of *S v Mhlakaza & another*[12] comes to mind. This court stated the following regarding the offence of robbery and the sentence to be imposed: - "Robbery is the most feared and despicable crime. The sentence must express the indignation of society about the crime. The more heinous the crime in the view of the law-abiding public, the more severe the sentence needs to be". In *S v Dlamini*[13] the court described robbery as an aggravated form of theft, namely, theft committed with violence.

- [24] Our country is constantly witnessing an ever-increasing wave of violence against innocent and defenceless victims who continue to fall prey to these types of offences committed by people such as the accused. The brutal attack on Mr Golding and the deceased clearly shows a well thought out plan which was in any way confirmed by the accused and his girlfriend, which was carried out with precision. Hence this court has found, after a careful consideration of all the evidence before it, including the concessions made by the accused under oath, that the murder of the deceased was premeditated. It is on record that the accused has admitted and uttered the following words under cross-examination: “I admit that we have planned to rob Mr Golding, and I am guilty of robbery”.
- [25] In respect of the count of murder, the court in *S v Madikane*[14] stated that “the value of human dignity lies at the heart of the requirement that a sentence must be proportionate to the offence”. Having said that, Constitution[15] of our country provides in section 11 that “everyone has the right to life”. The right is the most basic, the most fundamental, and the most supreme right which every human being is entitled to have and can never be compromised or intentionally terminated. Every human being has the right not to have the quality of their life diminished. Accordingly, it should never be compromised in any way, because it is guaranteed and protected by the constitution as an unqualified right.
- [26] The SCA in *S v Msimanga and Another*[16] held that violence in any form is no longer tolerated, and our courts, by imposing heavier sentences, must send out a message both to prospective criminals that their conduct is not to be endured, and to the public, that courts are seriously concerned with the restoration and maintenance of safe living conditions and that the administration of justice must be protected.
- [27] It is trite that sentencing involves a very delicate balancing act, taking into account, inter alia, the purposes of punishment, the seriousness of the crime committed by the accused before me, the personal circumstances of the accused and the interests of society as enunciated in *S v Zinn* supra. There is no doubt in my mind that the only appropriate punishment to be imposed on the accused is a sentence prescribed by the legislature. I say this being mindful of the warning given by Malgas that prescribed sentences are not to be departed from lightly or for flimsy reasons. Nonetheless, this court still has the duty to determine whether the circumstance of this case calls for a departure from the prescribed minimum sentence.
- [28] With regards to the State’s submission that the accused is not remorseful, I concur with the State that the accused is not remorseful and was only apologizing because he is feeling sorry for himself. I cannot - under the circumstances - find that the accused is truly remorseful for his actions because he still shifts the blame for the murder on Ms Pretorious, - considering the nature and the brutality of the manner in which the deceased was killed. Genuine remorse was correctly described by Ponnan JA in *Matyityi* supra as follows:

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those actions”. (underlining added for emphasis)

[29] Mr Rakobela had difficulty making submissions with regards to substantial and compelling circumstances. Save to state that the accused is 34 years old and is unmarried, there are no factors placed before court that persuade this court to deviate from imposing the prescribed minimum sentences.

[30] As much as the accused have the right to the benefit of the least severe of the prescribed punishments[17], society and communities must be protected against violent crimes, and against the greed for money resulting in people’s lives not being respected. Law abiding citizens must be protected against this lawlessness and extreme disrespect for the law. The constitution

should not only be seen as a tool or a shield to be used by criminals in the event of any violation of their constitutional rights which is extremely important in our constitutional democracy in general and our criminal justice system.

[31] But it is important to remember that our constitution, including the Bill of Rights, also protect all the citizens of this country, including the victims of crimes who also have, and are entitled to the protection of their constitutional rights such as the right to life and the right of the victims of robberies to have the enjoyment of their properties which they have worked hard for. In *S v Nyangwa*, [18] the court stated the following:

The prevalence of the crime of murder is such that cognizance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all the rights vested in that person: dignity, equality and freedom, and the right to life itself. Not only is a life ended, but the lives of family and friends are irreparably altered. It is for this reason that the rule of law requires that the perpetrator should, generally, be visited with harsh punishment. The act of punishment serves as retribution. It serves also to signify that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator. It is this which our theory of criminal justice posits as the basis for deterrence”.

[32] The above remarks are equally relevant to this case. Apart from explaining how the plan was hatched, the accused also gave details of how the attack on the deceased and Mr Golding

was

perpetrated. Clearly the actions of the accused left an indelible mark on both the family of the deceased which now face the financial

strain because of the accused, and Mr Golding whose relationship with his wife has been affected by the accused. In his words, Mr Golding said his “marriage is a mess, and the wife no longer wants to sleep in the house and has moved out”. Mr Golding’s property was robbed and sold to satisfy the urge for drugs and gambling for the benefit of the accused and his girlfriend.

[33] In line with the fourth triad principle relating to the interest of the victims of crime, it is the duty of the courts to protect the society in general from the scourge of these violent crimes and to send a clear message that this behaviour of the accused is unacceptable. In this regard, the court in *Matyityi supra* held that: “by accommodating the victim during the sentencing process, the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved.

[34] With regards to the question whether the accused can be considered as a candidate for rehabilitation, I am bound by the decision in *S v Swart*[19] cited above, and it is my considered view that the accused is not remorseful and cannot be rehabilitated. Accordingly, I can find no reason to conclude that he can be rehabilitated, considering the fact that even though he explains how he struck the blows to the head of the deceased, he still fails to appreciate the wrongfulness of his actions.

[35] I am mindful of the accused’s previous conviction of theft, which in my view is relevant to the current case. Although it dates back to 2013, one would have expected the accused to have learned a lesson, and I agree with the State that the accused has not learnt from his previous conviction.

[36] With regards to the pre-sentence detention, I have also taken into account the time spent by the accused in custody awaiting finalisation of his case. There is no rule of thumb in respect of the calculation of the weight to be given to the time spent by an accused awaiting trial. The SCA in *S v Livanje*[20] considered the role played by the period that a person spends in detention while awaiting finalisation of the case, and referred with approval, to the decision in *S v Radebe*[21] where the court held that: ‘the test is not whether on its own that period of detention constitutes a substantial and compelling

circumstance, but whether the effective sentence proposed is proportionate to the crime committed: whether the sentence in all the circumstances, including the period spent in detention, prior to conviction and sentencing, is a just one. This court further held that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective

period of imprisonment to be imposed is justified.

[37] Having applied my mind to all the factors to be considered during the sentencing phase, and in exercising my discretion, the question whether the period spent by the accused in custody awaiting trial is proportionate to the period of imprisonment to be imposed, and whether it justify a departure from the sentence prescribed by the legislature – this question in my view must be answered in the negative. Consequently, it is my considered view that the time spent by the accused in custody awaiting finalisation of his case does not justify any departure from the prescribed sentences as it is not proportionate to the crimes he committed.

[38] Regarding the accused's personal circumstances, I am mindful of the warning given by the SCA in *S v Vilakazi*[22] that: "In cases of serious crime the personal circumstances of the offender by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided".

[39] While the court in *S v Lister*[23] held that: "To focus on the well-being of the accused at the expense of all other aims of sentencing such as the interest of society is to distort the process and to produce in all likelihood a warped sentence", the majority of the SCA in *S v Ro and Another*[24] held that: "To elevate the personal circumstances of the accused above that of society in general and the victims in particular, would not serve the well-established aims of sentencing, including deterrence and retribution".

[40] It is also imperative that this court should not lose sight of the fact that the legislature has ordained specific sentences for the offences which the accused has been convicted for.

[41] As far as the issue of substantial and compelling circumstances is concerned, I have taken into account, the personal circumstances of the accused; his lack of remorse; the aggravating features of the offence; the purposes of punishment, and all the other factors to be considered when imposing sentence, and I am of the view that the personal circumstances of the accused are just ordinary circumstances.

[42] Consequently, I am of the view that the aggravating factors in this case far outweigh the mitigating factors, and there are no substantial and compelling circumstances which warrant a deviation from the imposition of the prescribed minimum sentences. I cannot

find any justification why this court should deviate from imposing the prescribed minimum sentences.

[43] Having considered the cumulative circumstances of this case, the submissions made by both counsels, and applying the above principles as they relate to sentence, I concur with all the authorities cited above. This court is bound by the doctrine of stare decisis and by statute, and it follows that the accused must be sentenced as prescribed by the legislature.

[44] In the circumstances, the following sentence is imposed:

1. Count 1: (Murder): - the accused is sentenced to Life imprisonment
2. Count 2: Attempted Murder: - the accused is sentenced to 8 years imprisonment
3. Count 3: (Robbery with aggravating circumstances): - the accused is sentenced to 15 years imprisonment.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

APPEARANCES

For the State

: Adv. A. Welsenach & Adv. Germhuis

Instructed by

: Director of Public Prosecutions, Pretoria

For Accused 1

: Adv. S. Rakobela

Instructed by

: Legal Aid South Africa

Heard

: 19 June 2024

Judgment

Delivered : 25 July 2024

- [1] S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 at para 325-326 (6 June 1995)
- [2] (CCD52/2021) [2024] ZAKZPHC 20 at para 2 (18 March 2024)
- [3] 2019 (1) SACR 1 (SCA) at para 24.
- [4] 1993 (1) SACR 365 (V) at 370 (c)-(f).

- [5] 1975 (4) SA 855 (A).
- [6] See: *S v Zinn* 1969 (2) SA 537 (A)
- [7] 1997 (1) SACR 515 (SCA).
- [8] 2004 (2) SACR 370 (SCA).
- [9] SS Terblanche in his book - *A Guide to Sentencing in South Africa*, 3rd Edition (2016) at 211 states that: It is essential that a party wishing to rely on a particular mitigating or aggravating factor

provide sufficient factual basis for that factor through the production of evidence. The court should not be left to speculate.

- [10] 2001 (1) SACR 469 (SCA).
- [11] 2011 (1) SACR 40 (SCA).
- [12] 1997 (1) SACR 515 (SCA).
- [13] 1975 (2) SA 524 (N).
- [14] 2011
(2) SACR 11 (ECG).
- [15] Act 108 of 1996.
- [16] 2005
(1) SACR 377 (A).
- [17] In terms of section 35(3)(n) of the Constitution Act 108 of 1996.
- [18] (CC25/2018) [2019] ZAECPHC 46 (7 August 2019).
- [19] See para 11 above.
- [20] 2020 (2) SACR 451 (SCA).
- [21] 2013 (2) SACR 165 (SCA) at para 14.
- [22] *S v Vilakazi* (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) at para 58 (3 September 2008).
- [23] 1993 SACR 228 (A)
- [24] 2010 (2) SACR 248 (SCA)

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