

SOUTH AFRICA / JUDGMENT

## S v Lekhooana and Another (CC 1/2021) [2023] ZAECQBHC 24 (19 April 2023)

[2023] ZAECQBHC 24

### COURT

Eastern Cape High Court, Gqeberha

### BEFORE

S Cubungu

### CASE / FILE NUMBER

CC 1/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GQEBERHA)

Case

No: CC 1/2021

In

the matter between:

THE  
STATE  
And  
LEBOHANG  
LEKHOOANA  
Accused 1  
VUSUMZI  
MSI  
Accused 2

### JUDGMENT

ON SENTENCE

Cubungu AJ:

## INTRODUCTION

[1] The court has reached a difficult stage of proceedings that of imposing appropriate sentences to the offenders before court. This process involves a very delicate balancing act, taking into account, the seriousness of the offences perpetrated by the offenders, their personal circumstances and the interest of society. In the case of *S v Zinn* 1969 (2) SA 537 (A) [1] this is what is mostly referred to as the triad. The court must also consider the recognised objectives of sentencing being

prevention, rehabilitation, deterrence and retribution.

[2] The offenders before court are convicted of murder of Phumza Wendy Skade (the deceased), as well as unlawful possession of firearm and ammunition in contravention of the Fire Arms Control Act. The provisions as contemplated in section 51, Part 1 of Schedule 2 of the Criminal Law Amendment Act[2] are applicable in this matter and the issue, which the court has to grapple with, is whether to impose the prescribed minimum sentences

or to deviate from such sentences.

Criminal Law Amendment Act

[3] The prescribed minimum sentences have been ordained to be the sentences that should ordinarily be imposed unless the court finds substantial and compelling circumstances, which justify a departure therefrom.[3] The Supreme Court of Appeal has indicated that the minimum sentences must not be departed from for 'flimsy reasons'

and are a starting point when imposing a sentence.

[4] In the case of *S v Malgas*, the proportionality test was developed in cases where substantial and compelling circumstances do not exist, which is if the court is of the view that, having regard to the nature of the offence, the personal circumstances of the offenders, and the interest of society, it would be disproportionate and unjust

to impose a prescribed minimum sentence, then a sentencing court is entitled to depart from imposing such sentence.

What are substantial and compelling circumstances?

[5] The meaning of substantial and compelling circumstances is not defined reason being that when sentencing an offender a court has to evaluate all the evidence, including the mitigating and aggravating

factors to decide whether substantial and compelling circumstances exist. A court must consider all circumstances and for circumstances

to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender.

- [6] In circumstances where a court is convinced, having considered all the factors that an injustice would be done if a minimum sentence is imposed, then it can characterise such factors as constituting

substantial and compelling circumstances.

- [7] In *S v Vilakazi* 2009 (1) SACR 552 SCA the court held that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial and compelling circumstances. In deciding whether these circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof.

- [8] When sentencing a court takes into account the offenders 'personal circumstances, however, only some of these carry sufficient weight to tip the scales in favour of the offender to impact on the sentence to be imposed. The fact that the offender is young and is a first offender has the effect of reducing a sentence, as there is potential for the offender not to repeat the crime and to be rehabilitated.

Mitigating and Aggravating circumstances

- [9] The offenders did not lead any evidence in mitigation of sentence but Ms Coertzen made submissions from the bar to be considered by the court when imposing sentence and which she argued should be regarded

as substantial and compelling circumstances.

- [10] The probation officer's report were submitted as exhibits, "T" in respect of the first offender and "U" in respect of the second offender.

- [11] Ms Landman on behalf of the state, during sentencing part of the proceedings, led the evidence of the deceased's sister Linda Skade. This evidence and her submissions were to show that no substantial and compelling circumstances existed warranting a deviation from the prescribed minimum sentence.

- [12] I shall now in summary deal with the evidence and the submissions made by the parties during the sentencing proceedings and consider these and the triad of Zinn in determining the appropriate sentences to be imposed.

The Offenders: The personal circumstances of the offenders

- [13] Mr Lekhooana, accused number one who has passed as informed by his legal presentative Ms Coertzen. He was a 39 year old unmarried man with eight children. He completed matric and immediately secured employment at Transnet as a yard official and worked there from 2001 – 2007. A death certificate and a letter from the Head of prison, St Albans Medium A was received to confirm his demise. Prior to his arrest, he was self-employed practising as a Sangoma, selling clothes, weaves and cooked meals. With the income received from his business, he was able to support his family financially. He comes from a family of two

siblings; his parents are married to each other though their marital relationship is strained. He shares a very close bond with his mother. He has no previous convictions, stands in front of this court as a first offender, reportedly in good health, and is not on any chronic medication. Further to this the following was reported in respect of accused one, that he has a strong support network in the form of his family, he has no history of violence or aggressive behaviour and he is known to be a good hearted and humble person.

- [14] Ms Coertzen highlighted paragraph 10.12 of the probation officer's report handed in and submitted that considering these factors cumulatively with all the other factors, I must find that substantial and compelling circumstances do exist which will justify deviation from imposing the prescribed minimum sentence.
- [15] In respect of Mr Msi, accused two before court he is thirty years old unmarried with no children, he has no previous convictions and is standing before this court as a first offender. He is self-employed selling cooked meat. He lost his mother at the tender age of nine and was raised by his grandmother who also died when the accused was 15 years of age. He has no relationship with his father and it is reported that the first contact from his father was in 2009, as a

result growing up he had no role model or father figure for some guidance. Ms Coertzen submitted on behalf of accused two as well that I consider all these factors taken cumulatively and find that substantial and compelling circumstances do exist that will justify an imposition of a lesser sentence than that prescribed.

- [16] It was further submitted on behalf of the accused that sentences imposed must have a measure of mercy.
- [17] In aggravation, Ms Landman led the evidence of the deceased sister who testified about the trauma suffered by the family because of the deceased's death.
- [18] More especially the deceased's mother who fell ill and eventually died after having severely affected negatively by the death of her daughter. The deceased's minor child is motherless and that in no doubt has negatively affected this child. One cannot help but imagine the trauma of a minor child who was dropped off at crèche by her mother and the mother was never to be seen again. No minor child should go through that because of offenders. The Skade family lost a breadwinner and had to make ends meet in order to bury their sister, as she did not have any burial society.
- [19] Ms Landman submitted that the life has become cheap, because of that, the community does not feel safe, and the courts should impose sentences that would prevent further perpetration of these offences. She submitted further that no substantial and compelling circumstances exist which will justify the imposition of a lesser sentence. In a nutshell, she submitted that given the circumstances of this case the prescribed minimum sentence is appropriate.

### Interest of society

[20] Due to the nature of the offences, which have become endemic in our society the legislature deemed it necessary to enact the provisions governing the prescribed minimum sentences. The society demanded that offenders be punished for their crimes. However, a court should strike a balance and must not over-emphasise one factor.

[21] In *S v RO and Another*[4], Heher J stated the following at paragraph 30 :

*“Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interest of society with different nuance, prevention, retribution and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different*

*conclusions”.*

[22] There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional.

[23] The Supreme Court of Appeal in *S v Scott –Crossley*[5] at Para 35 the court said the following:

*“Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.”*

*“it is true that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interest of justice nor those of society”*

### Circumstances of the offence

[24] In my judgement, I have dealt extensively with facts on which the accused were convicted of the offences. Whilst seeking assistance to sort out her personal problems, unbeknown to her the deceased led herself into the hands of the criminals and unfortunately met with her sudden death leaving behind the minor kids and the Skade family heartbroken and without the breadwinner. Their lives will never be the same again.

[25] The accused still maintained their innocence despite the overwhelming evidence pointing in a different direction and the ultimate convictions for the offences charged with.

### CONCLUSION

[26] In coming to an appropriate sentence to be imposed for all the counts I have considered the facts of the case, the interest of the society, the accuseds' personal circumstances and a measure of mercy as expected of the sentencing court. Having done so I am of the view that this is one of those cases demanding the deviation from the prescribed minimum sentence.

[27] Three families have been affected by this tragedy, the family of the deceased but also the family of the accused, their lives irreversibly altered forever.

[28] It is without a doubt a painful reality that no sentence will ever bring back the deceased.

[29] I find that taking into account all that is relevant cumulatively, and as correctly submitted by Ms Coertzen, the substantial and compelling circumstances do exist justifying the imposition of a lesser sentence.

[30] In the result, the sentences I impose are the following:

Count 2: The accused is sentenced to 18 years imprisonment

Count 3: The accused is sentenced to 5 years imprisonment

Count 4: The accused is sentenced to 2 years imprisonment

I order that the sentences in count 3 and count 4 should run concurrently with the sentence imposed in count 2.

The accused is sentenced to an effective 18 years imprisonment.

The accused is declared unfit to be licenced for a firearm in terms of the provisions of the Firearms Control Act.

S. CUBUNGU

ACTING JUDGE OF THE HIGH COURT

Appearances

Obo the State: Adv L. Landman NDPP, Gqeberha Obo the Defence: Adv J. Coertzen Legal Aid South Africa, Gqeberha Date of Conviction: 16 January 2023 Date of Argument on sentence: 10 March 2023 Date of Sentence: 19 April 2023

[1] S v Zinn 1969 (2) SA 537 (A)

[2] Act 105 of 1997

[3] S v Malgas 2001 (1) SACR 469 (SCA).

[4] 2000 (2) SACR 248 (SCA)

[5] 2008 (1) SACR 223 (SCA)

## Source & reproduction note

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Prepared on 14 October 2026 · Esheria