

SOUTH AFRICA / JUDGMENT

S v Likgopo (Sentence) (SS32/2022) [2022] ZAGPJHC 1030 (28 November 2022)

[2022] ZAGPJHC 1030

COURT

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal

CASE / FILE NUMBER

SS32/2022

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: SS 32/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

28/11/ 2022

THE STATE

versus

PALO MAHEA LIKGOPO

JUDGMENT-SENTENCE

OOSTHUIZEN-SENEKAL CSP AJ:

[1] The accused, Mr Palo, has been found guilty on the following counts;

- 1) Count 1: Murder read with section 51(2) of the Criminal Law Amendment Act, Act 105 (“the CLAA”),
- 2) Count 2: Murder read with section 51(1) of the CLAA,

- 3) Count 3: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, Act 51 of 1977 and read with section 51(2) of the CLAA,
 - 4) Count 5: Theft,
 - 5) Count 7: Attempted Murder,
 - 6) Count 8: Contravening section 4 of the Firearms Control Act, Act 60 of 2000, Unlawful Possession of firearm: Make and Calibre unknown to the State,
 - 7) Count 9: Contravening of section 90 of the Firearms Control Act, Act 60 of 2000, Unlawful Possession of ammunition: Quantity and calibre unknown to the State, and
 - 8) Count 10: Assault with the intent to inflict grievous bodily harm.
- [2] The trial has now reached the stage where appropriate sentences have to be imposed by this court for the crimes the accused has committed. The imposition of sentence is not a mechanical process, in which predetermined sentences are imposed for specific crimes. It is a nuanced process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to the legal blameworthiness of an accused.
- [3] In *S v Rabie*[1] Corbett JA outlined the approach to sentencing as following,
- “A judicial officer should not approach punishment in a spirit of anger, because being human makes it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society, which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.”*
- [4] Sentencing involves a very delicate balancing act, taking into account, inter alia, the seriousness of the offences perpetrated by the offender, the offender’s personal circumstances and the vested interests of society. This is referred to as the triad in *Zinn*. [2]
- [5] I also take into consideration the objects and purposes of criminal punishment, which are deterrence, prevention, reform and retribution. The accused personal circumstances constitute mitigating circumstances, whereas the nature of the crimes and the interest of the society amount to aggravating circumstances.
- [6] In *R v Karg*[3] it was held, while the deterrent effect of punishment has remained as important as ever, the retributive effect, whilst by no means absent from the modern approach to sentencing, has tended to yield ground to aspects of prevention and correction. It was however pointed out in *Karg* that as far as the retributive effect of punishment is concerned, that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.

- [7] Remorse is an important factor, when I have to decide as to the degree of mercy to be applied when sentencing the accused. In the matter of *S v Matyityi*[4] the meaning of remorse and regret was discussed by the Supreme Court of Appeal and the following was stated:

“...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 knowing 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 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; and whether he or she does indeed have a true appreciation of the consequences of those actions...”

- [8] I, now turn to the accused personal circumstances. This consideration is no less important than the other elements which determine an appropriate punishment. In weighing up the accused personal circumstances one should be on the lookout for indications

of possible causes which could have moved the accused to turn to such violent crimes as those under consideration here. Also, in

examination of his personal circumstances, I will look for indications of contrition or remorse which might impact on the question as to whether the accused can be rehabilitated, as reform and rehabilitation are important elements of a proper sentence.

- [9] Mr Bovu addressed the court ex parte with regard to the accused personal circumstances and the following was placed on record:

- a) The accused was born on 12 March 1989 and is 33 years old.
- b) He is single.
- c) He has no children or dependants.
- d) His highest level of education is standard 5.
- e) Prior to his arrest he generated an income by selling cigarettes and he earned R50 per day. He has a previous conviction.
- f) On 13 February 2014 he was convicted of contravening section 49(1)(a) of the Immigration Act and he was fined R400 or 40 days imprisonment.

For purposes of sentence, the previous conviction is not relevant to the crimes in this matter. Therefore, the accused is viewed as a first offender.

- g) The accused has been incarcerated since his arrest on 19 October 2021, the period spend in custody pretrial awaiting will be taken into consideration when deciding on an appropriate sentence. The approach adopted in *S v Radebe*[5] seems to me to be the correct approach, where the Supreme Court of Appeal, Lewis JA stated:

“(t)he 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: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention.”

- h) Lastly, the accused was seriously injured during his arrest. He sustained gunshot wounds to his chest and groin area; he was admitted to hospital where he remained for a few weeks.

[10] Ms Bovu addressed the court on the question of whether substantial and compelling circumstances exist, in order for this court to deviate from the prescribe sentences applicable on count 1, 2 and 3. She stated that the following can be seen as such:

- a) The period spent in custody awaiting trial, and
- b) The fact that the accused at the commencement of the trial, pleaded guilty on count 1 and 2, which can be seen as a sign of remorse. Even though, the State did not accept the plea of guilty on count 2, the fact remained, that the accused admitted that he shot and killed the deceased in count 2. It was argued that the guilty pleas tendered on the murder charges were indicative of remorse.

[11] It goes without saying that the accused are convicted of very serious crimes. The conviction on count 2, murder, squarely falls within the provisions of the minimum sentencing regime and carry a minimum sentence of life imprisonment.[6] Furthermore, the convictions on count 1, murder and on count 3, robbery with aggravating circumstances are also subject to the minimum sentencing regime.[7] I have to find substantial and compelling circumstances in order to deviate from the minimum sentencing regime.

[12] The actions of the accused speak of a man unmoved by the loss of human life. The accused in both counts of murder had ample time for reflection and reconsideration, but he consciously chose to kill Mr Tshabalala by shooting him in the head and by firing various shots at Mr Mohlatsane, while he was lying defenceless on the ground.

[13] The post mortem report in respect of Mr Tshabalala shows a gunshot wound to the head. The version before this court in respect of count is that Mr Tshabalala struck the accused with a stick, and after he was disarmed the accused shot the deceased in the head. The killing of the deceased was totally unnecessary. The plea of guilty on count 1, to my mind, is no indication of remorse. This was evident that the accused committed further offences after murdering Mr Tshabalala on 8 May 2021.

- [14] The accused tendered pleas of guilty on the murder charges, that to my mind does not speak to the actions of a man hurt by the loss of two human beings, but rather indicate a desire to try and mitigate the consequences of being arrested and charged.
- [15] The accused did not play open cards with the court, in fact, he testified that he killed Mr Tshabalala and Mr Mohlatsane in self-defence. What is concerning is that the accused does not seem to take full responsibility of his actions. The accused furthermore, deny being involved in the robbery of Mr Boikie Amanda, despite Mr Amanda identifying him positively as his attacker.
- [16] Society demands that offenders be punished for their crimes. Given the nature of the offences which have become endemic in our society, the interests of the community play an important part in determining appropriate sentences to be imposed. However, I should not over-emphasise the public interest and general deterrence.
- [17] In *S v SMM*,^[8] the following was said:
- “[13] ...It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity.”*
- [18] As our courts have often said, the object of sentencing is to serve the public interest and not satisfy public opinion. In *S v Makwanyane and Others*^[9], Chaskalson P said;
- “Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts ... This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.”*
- [19] I will be mindful of the fact that when sentence is passed today that Mr Tshabalala and Mr Mohlatsane have been robbed of their lives. I have to give recognition that they were members of society with their own hopes and expectations, which were abruptly brought to an end when they were shot and killed. The murders were committed with an unlicensed firearm, which in itself is an aggravating factor to be considered.
- [20] In respect of count 2 the prescribe minimum sentence is one of life imprisonment. A sentence of life imprisonment is the most

severe sentence that a court may impose. It is for this reason to be reserved for the most serious or egregious offences. Its imposition suggests that there is little or no prospect that the accused can be rehabilitated or that the accused poses a danger to society and that, in the interests of the safety of the community, the accused should be incarcerated, in effect, for the rest of his natural life. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration.

- [21] The evidence on record suggests that the accused killed Mr Mohlatsane on a mere suspicion of having been involved with Ms Bahola. His conduct is morally reprehensible. The post mortem report indicates that Mr Mohlatsane was shot 6 times. The fact that the accused fired several shots at the deceased, must be regarded as an aggravating circumstance. There is no doubt that this was a vicious attack on a defenceless person. Ms Bahola witnessed the killing of the deceased, she testified that after the deceased was shot the first time, he fell to the ground, whereafter she grabbed the accused in order to prevent him from firing further shots at the deceased. I accepted the evidence presented by the State, and as such I found the Mr Mohlatsane posed no threat to the accused. The accused was jealous of the friendship between Ms Bahola and Mr Mohlatsane and that was the sole reason for him to kill the deceased.
- [22] Furthermore, during the physical altercation with Mr B[...] the accused struck her with the firearm on the forehead. She was attempting to assist the deceased; she could have been fatally wounded during the scuffle. The incident will be engraved in her memory for the rest of her life. Furthermore, the deceased was the father to her minor son, a child who will never know his father.
- [23] The way in which the accused handled the firearm in an area where members of the community reside, was callous and he could have easily have killed more people. Murder with the use of firearms is ever-prevalent. Innocent and defenceless victims continue to fall prey to these types of offences.
- [24] A sentence of life imprisonment will not bring the Mr Mohlatsane back to life, but this will bring some sort of closure to the community and the family of the deceased
- [25] Mr Amanda testified regarding the incident which transpired on 29 August 2021 whereby he was robbed of his cell phone. Evident from his evidence, he was seriously injured. The emotional scaring was visible while he was testifying in court.
- [26] Mr Amanda and Mr du Plooy, the security officer employed by Inter Active Security nearly lost their lives. I shudder to think what would have happened if Mr du Plooy did not arrest the accused in the early hours of the morning on 19 October 2021. The accused committed a murder on 8 May 2021, he robbed and shot Mr Amanda on 29 August 2021, he killed again on 18 October 2021, his actions are indicative of his disrespect for human life and law and order.

- [27] In respect to counts 8 and 9, the proliferation of unlicensed firearms has become difficult to control in South Africa. The courts continue to impose harsh sentences for these types of offences, but the commission of these crimes continue unabated. On a more frequent basis, crimes in this country are committed using illegal firearms. In fact, the proliferation of illegal firearms throughout the country has contributed to the high incidents of violent crime.
- [28] The behaviour of the accused and others like him, impact negatively on the quality of freedom of all living in South Africa. The possession of unlicensed firearms continues and it is important that this court sends a clear message to potential offenders that this conduct will not be tolerated by the courts.
- [29] The accused stated during his testimony that he acknowledges the fact that he was in possession of an unlicensed firearm and ammunition. He told the court that he bought the firearm and ammunition from a male person residing at a hostel. To this court's surprise, the accused testified that he was not aware that he had to be issued with a licence for such possession in terms of the law. Even though, he testified that prior to the incidents, he would bury the firearm on his premises in order for the Police not find it. No formal admissions were made regarding the unlawful possession of a firearm or ammunition, it is evident that the accused knew the state has difficulties in obtaining the ballistic report relating to the firearm. This clearly does not point to a person accepting his responsibility in committing a crime. In fact, this is rather an indication of a person taking chances and thinking, "I will rather take my chances during the trial as the State cannot provide a ballistic report."
- [30] In my view there are no substantial and compelling circumstances present that warrants a departure from the prescribed statutory norm in respect to count 1, 2 and 3. There is also nothing explaining to this Court why the accused changed from ostensibly normal citizen, to gun wielding criminal, killing, robbing and injuring people.

Cumulative Effect of Sentences

- [31] That leaves for consideration the question of the cumulative effect of the sentences to be imposed. Two aspects require consideration.

The first is whether the sentences to be imposed for certain of the offences should not be served concurrently because of the close interrelationship between the offences. The second is the proportionality of the sentences cumulatively considered.

- [32] Sections 280(1) and (2) of the CPA provide as follows:

"(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose."

2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”

[33] I have to consider the fact that if individual sentences are imposed in this matter, the accused would be spending the rest of his natural life in prison. Though the circumstances under which the offences were committed are repulsive, the sentence I impose today has to be blended with mercy. Therefore I will take into consideration the cumulative effect of the sentences imposed today.

[34] The accused is sentenced as follows:

Count 1: Murder read with section 51(2) of the CLAA -15 years imprisonment.

Count 2: Murder read with section 51(1) of the CLAA - Life imprisonment.

Count 3: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, Act 51 of 1977 and read with section 51(2) of the CLAA - 15 years imprisonment.

Count 5: Theft - 2 years imprisonment.

Count 7: Attempted Murder- 8 years imprisonment.

Count 8: Contravening section 4 of the Firearms Control Act, Act 60 of 2000, Unlawful Possession of firearm: Make and Calibre unknown to the State - 10 years imprisonment.

Count 9: Contravening of section 90 of the Firearms Control Act, Act 60 of 2000, Unlawful Possession of ammunition: Quantity and calibre unknown to the State - 3 years imprisonment.

Count 10: Assault with the intent to inflict grievous bodily harm - 3 years imprisonment.

[35] In terms of s 39(2)(a)(i) of the Correctional Services Act, Act 111 of 1998 the sentences imposed on count 1, 3, 5, 7, 8, 9, and 10 shall run concurrently with the sentence imposed on count 2.

[36] The accused is declared unfit to possess a firearm as contemplated in terms of section 103(1) of the Firearm Control Act, Act 60 of 2000.

Section 299 A in terms of the CPA: No family member/s of the deceased present in Court.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

30 October, 1, 2, 4, 8, 11, 16, 18, 22, 23, 28 November 2022

DATE JUDGMENT(SENTENCE) DELIVERED: 28 November 2022

APPEARANCES:

On Behalf of the State: Advocate Mthiyane

On behalf of the Accused: Ms Bovu

[1] 1975

(4) SA 855 (A).

[2] S v Zinn 1969

(2) SA 537 (A).

[3] 1961

(1) SA 231 on page 236 A-B.

[4] 2011(1) SACR 40(SCA).

[5] 2013

(2) SACR 165 (SCA) on page 170 at paragraph 14b.

[6] Section 51 (1) of Act 105 of 1997- read with Part I of Schedule 2.

[7] Section 51 (2) of Act 105 of 1997 – read with Part II of Schedule 2- “(2) Notwithstanding any other law but subject to subsections (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; (iii) a third or subsequent offender of any such offence, to imprisonment for a period less than 25 years.

[7] Section 51 (2) of Act 105 of 1997 – read with Part II of Schedule 2-

“(2) Notwithstanding any other law but subject to subsections (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;

(iii) a third or subsequent offender of any such offence, to imprisonment for a period less than 25 years.

[8] 2013

(2) SACR 292 (SCA) at paragraph [13].

[9] [1995] ZACC 3; 1995 (2) SACR 1 (CC) at para 88-89.

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