

SOUTH AFRICA / JUDGMENT

S v Maaga (CC72/2023) [2024] ZAGPPHC 1377 (25 October 2024)

[2024] ZAGPPHC 1377

COURT

North Gauteng High Court, Pretoria

BEFORE

M Munzhelele

CASE / FILE NUMBER

CC72/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: CC72/2023

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES:NO

REVISED: NO

Date: 25 October 2024

In

the

matter

between:

THE
STATE
and
GERALD
TSHEPO MAAGA

JUDGMENT**ON SENTENCE**

M Munzhelele J

[1] Accused was convicted of the following offenses:

Count 1, 3, 7, and 11: Contravention of section 4(1) of the Prevention and Combating of Trafficking in Persons Act[1], read with the provisions of section 51(1) schedule 2 Part I of Act[2].

Count 4, 5, and 8: Robbery with aggravating circumstances as contemplated in section 1 of the Criminal Procedure Act[3], read with section 51(2) and Schedule 2, Part II of Act 105 of 1997.

Count 2: Theft as a competent verdict to robbery.

Count 6: Extortion.

Count 9: Contravention of section 4(1)(e) of the Firearms Control Act[4], read with sections 1, 120(10A), and 121 of Act.

Count 10: Contravention of section 36 of the General Law Amendment Act[5].

Count 12: Contravention of section 7(a) of Act[6].

Count 13: Attempted contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[7].

[2] The accused, in this sentencing trial, is represented by Advocate Kgakgara of Legal Aid, while the state is represented by Advocate Roos. The state was ready to proceed, but the accused had been causing delays throughout. The matter eventually proceeded. The accused did not testify or call any witnesses, but the defense counsel presented the accused's personal circumstances from the bar. The state also did not call any witnesses but submitted the victim impact statements as exhibits "GG1-GG4". On a prior occasion, the court had ordered that a pre-sentence report from the probation officer should be obtained. It was presented to court by Mr. Mbatha, and handed in as evidence and as exhibit "FF". The pre-sentence report includes a recommendation by the probation officer that the accused be sentenced to imprisonment for the offenses for which he was convicted.

[3] Before passing sentence, section 274 of the Criminal Procedure Act 51 of 1977, requires the trial court to obtain sufficient information to enable it to impose an appropriate and just sentence. The purpose is to ensure that the judge is well-informed about the relevant facts of the case, the circumstances of the accused, and any other factors that may affect sentencing. In *S v Samuels*[8] Ponnann JA cited with approval the following paragraph from *S v Siebert*[9]:

'Sentencing is a judicial function sui generis. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

[4] Reference is made to the following statement by Mpati JA in *Rammoko v Director of Public Prosecutions*[10]:

'Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent'.

[5] Sentencing the accused is within the discretion of the trial court. In *S v Karan*[11] where Davis AJ (Erasmus J concurring) relied on the following statements by Terblanche A Guide to Sentencing in South Africa 3 Edition (2016) at 15:

'That the power to impose a sentence on a convicted offender is the domain of the courts, the judicial authority in South Africa, is widely accepted. This principle is so deeply imbedded in our common law that it is difficult to find any source containing a statement to this effect. '

[6] The personal circumstances of the accused are as follows: He is 46 years old, divorced, and the father of a 10-year-old child who resides with the child's mother. The mother is unemployed, and prior to his arrest, the accused maintained the child by contributing six thousand rand (R6 000, 00) per month, excluding the costs of extramural activities. Since his arrest, the mother has been receiving a child support grant. The accused completed his matric and, at the time of his arrest, was in his fourth year of studying towards an LLB degree with UNISA. He engaged in business ventures and chicken farming, employing two people at his chicken farm. His businesses generated an income of twenty-thousand rand (R20 000, 00) per month. He is a first-time offender and has been an awaiting trial prisoner for five (5) years, having been arrested on 6 July 2019. The accused is also a karate instructor, training three hundred (300) children in Pretoria, and is a member of the National Executive Council of Karate. He has represented South African karate in Thailand and Hungary. Furthermore, he is the guardian of his grandmother, who was cared for by two employees, each earning three thousand five hundred rand (R3 500, 00) per month. During the sentencing proceedings, the accused received information that both his mother and grandmother had passed away.

[7] The victim impact statement of J[...] M[...], marked as Exhibit "GG1", contains the following information provided under oath: She informed the court, in her affidavit, that she has been unable to sleep as she constantly thinks about the incident. She was unable to work due to her fear that the ordeal might repeat itself, which caused her financial hardship. She has been living in fear as a result of the trauma she experienced.

- [8] The victim impact statement of L[...] M[...]1, marked as Exhibit "GG2", contains the following information provided under oath: She stated that due to flashbacks and fear of the accused, she was unable to sleep properly. Her fear was so severe that she relocated to Bushbuckridge. She is no longer employed and is suffering financially as a result.
- [9] The victim impact statement of N[...] M[...]2, marked as exhibit "GG3" contains the following information provided under oath: she stated in her affidavit that she feels scared for her life. As a result of the incident, she now hates her job and herself. She experiences body tremors and headaches after the ordeal, and she is no longer working.
- [10] The victim, L[...] M[...]3, stated under oath on exhibit "GG4" that she struggled to sleep and function effectively for months after the incident. She has since stopped working and is now selling clothes, atchar, and curtains in her hometown in the Free State. To cope with the trauma, she has resorted to consuming alcohol.
- [11] The pre-sentence report exhibit "FF" compiled by Mr. Mbatha, a probation officer, contains a recommendation that the accused should be sentenced to imprisonment, taking into consideration that he has been convicted of human trafficking and robbery with aggravating circumstances.
- [12] The background of these offenses of trafficking in persons is as follows: All five victims were sex workers, a vulnerable group prone to exploitation and abuse. The accused accessed them through their advertisements on platforms such as Ads Africa, Red Velvet, Escort South Africa, and Sex Traders, which were published online. He contacted them by phone, arranging meetings under the pretense of purchasing sexual services for the night at a hotel. He booked each victim on different dates, collecting them in his Mazda sedan under the guise of transporting them to the hotel. However, instead of taking them to the hotel, he transported them to a location of his choosing. Once at the location, the accused produced a firearm (later discovered to be a toy pistol) and used it to intimidate the victims, forcing them to submit to sexual intercourse. Afterwards, he robbed them at gunpoint, taking their phones and, in some instances, extorting money. One of the victims, Mrs. M[...]2, was extorted for money. The accused did not pay for the services he had falsely solicited. After robbing the victims of their belongings, he either left them at the scene or transported them to an unfamiliar location before driving away. These incidents occurred between 12 June 2019 and 5 July 2019, when the accused was arrested. The Mazda sedan was subsequently discovered to be a stolen vehicle.
- [13] Counsel for the defense argued that there are substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences. He submitted that these circumstances including the fact that the accused is a first-time offender, has been an awaiting trial prisoner, and was a guardian to his grandmother, who passed away on 23 October 2024. The defense counsel further contended that the charges against the accused should be treated as one for sentencing purposes, to avoid an injustice. He argued that substantial and compelling circumstances need not be exceptional and that the personal

circumstances of the accused may also be regarded as substantial and compelling.

Additionally, he submitted that even in cases where there are no substantial and compelling circumstances, the court has discretion to deviate from the minimum sentence if imposing it would result in an unjust outcome

- [14] The state argued that the following circumstances should be taken into consideration when sentencing the accused. Section 14 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013) which provides 12 factors to be considered in sentencing as follows: -

"If a person is convicted of any offence under this Chapter, the court that imposes the sentence must consider, but is not limited to the following aggravating factors:

- (a) The significance of the role of the convicted person in the trafficking process. In this regard, the accused was the main character. He is the one who picked the ladies up. He is the one who abused them sexually and emotionally. He lured the complainants. He robbed the complainants at gun point, he extorts the money from the complainant and harass her with messages.
- (b) Previous convictions relating to the offense of trafficking persons or related crimes.

Accused is a first offender

- (c) Whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance. The accused forced some of the accused to smoke dagga and or drugs but there is no evidence that they became addicted to it.
- (d) The conditions in which the victim was kept. Mrs M[...]3 was handcuffed, tied on the neck with the headrest of the car. She was again subjected to humiliation when she was told to fondle herself while a video was taken by the accused. Forced to drink water with blood. No proper toilet was shown to her. Some other ladies were subjected to sex in the car instead of the hotel as promised. Mrs Sithole was forced to smoke drugs.
- (e) Whether the victim was held captive for any period. The evidence is clear that complainants were held for some time against their will and one Mrs Sithole was kept for the whole night and was found by the police in the morning inside accused's car the day that accused was arrested.
- (f) Whether the victim suffered abuse or the extent thereof The complainants were abused emotionally and physically. Mrs M[...]3 was even made to have sex with other man who came in the house as a punishment by the accused. In the morning she was dumped at the road which is surrounded by forest at a place unknown to her. When the police found her she did not even have shoes and was on a gown only.

- (g) The physical and psychological effect the abuse had on the victims. The complainants are suffering from insomnia. Some have relocated from Pretoria to their home town, Mrs M[...]3 went back to Orange Free State which is her home province and Mrs M[...]1 went returned to Bushbuckridge.
- (h) Whether the offense formed part of organized crime. There was no evidence to this effect.
- (i) Whether the victim was a child, the complainants are all adults
- (j) The nature of the relationship between the victim and the convicted person. There is no relationship between the accused and the complainant; they were, in fact, strangers to each other.
- (k) The state of the victim's mental health. No evidence was provided.
- (l) Whether the victim had any physical disability, there is no one who had physical disability."

[15] The state further submitted that the accused should be sentenced in accordance with the minimum sentences prescribed for the charges. The state contended that a sentence of imprisonment is appropriate and that the accused should also be declared unfit to possess a firearm.

[16] The court must balance the accused's personal circumstances with the interests of the victims and society. Following this, the court must consider whether there are substantial and compelling circumstances to deviate from the minimum sentences prescribed for contraventions of section 4(1) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (trafficking), and for robbery with aggravating circumstances in terms of section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997. In *S v Malgas*[12], it was held that under these statutes, the court must impose minimum sentences unless "substantial and compelling circumstances" justify a lesser sentence. This

framework was designed to ensure that serious offenses are met with appropriately severe punishments while still allowing judicial

discretion when justified by case specifics. Courts are required to impose sentences with the understanding that the legislature has mandated life imprisonment (or the specific prescribed period of imprisonment) as the standard sentence for listed crimes under

specified conditions. Unless there are genuinely compelling reasons to deviate, these crimes should elicit a severe, standardized, and consistent response from the courts.

Personal Circumstances of the Accused:

[17] The personal circumstances of the accused are relevant in assessing whether there are grounds to depart from the minimum sentence.

1. Age and family background: The accused is 46 years old, divorced, and has a 10-year-old child who is dependent on him. He had been supporting his child with R6,000 per month prior to his arrest. His ex-wife, who now looks after the child, is unemployed, and they are receiving a child support grant in his absence.
2. Education and employment: At the time of his arrest, the accused was in his final year of studying towards an LLB degree, showing that he had the potential to contribute meaningfully to society. He also owned a chicken farm and employed two people, generating an income of R20,000 per month. His role as a business owner and as a guardian of his grandmother highlights his ability to be a productive member of society.
3. Community involvement: The accused was actively involved in the community, serving as a karate instructor to 300 children in Pretoria. He also represented South Africa internationally in karate. This speaks to his character outside of the criminal activities, showing that he was once a law-abiding and contributing member of society.
4. Time spent in custody: He has been in custody for five years awaiting trial, which can be seen as a mitigating factor. Courts sometimes view long periods of pre-trial detention as part of the punishment.
5. Grief and loss: The accused lost both his mother and grandmother while awaiting trial, which could be seen as an additional emotional burden.

The Nature of the Offenses:

[18] While the accused's personal circumstances are compelling, the nature and seriousness of the offenses weigh heavily against him:

Human Trafficking:

Human trafficking is one of the most serious offenses under South African law. It involves the exploitation and abuse of vulnerable individuals. In this case, the victims were sex workers, a particularly vulnerable group susceptible to coercion and exploitation. The accused lured these women under false pretenses, sexually assaulted them, and robbed them.

The law recognizes human trafficking as an especially heinous crime because it strips individuals of their autonomy and subjects them to physical and psychological abuse. The victims in this case were subjected to a range of degrading and abusive treatment, including being forced to perform sexual acts and being robbed.

Robbery with Aggravating Circumstances:

Robbery with aggravating circumstances is defined by the Criminal Procedure Act as robbery that involves the use of a weapon or the infliction of grievous bodily harm. In this case, the accused used a toy gun, but the victims believed it to be real, which induced fear and trauma. The emotional impact of believing they were facing imminent death or serious harm is significant.

The victims were robbed of their possessions, including their phones, and some were extorted for additional money. The repeated nature of the offenses (multiple victims over a short period) shows a pattern of premeditated and opportunistic criminal behavior.

Victim Impact:

- [19] Emotional and psychological harm: The victim impact statements demonstrate the profound emotional harm caused by the accused's actions. The victims reported insomnia, fear, flashbacks, and relocation due to the trauma of the events. Some have lost their jobs or relocated due to fear of the accused, showing the long-term damage inflicted on them.
1. Physical abuse: The victims were subjected to physical abuse and degrading treatment. For example, one victim was handcuffed, tied, and forced to engage in humiliating acts, while another was forced to take drugs.
 2. Vulnerability of the victims: The victims, as sex workers, were particularly vulnerable to exploitation. This vulnerability was exploited by the accused, who used their trust to lure them into dangerous situations. South African law places particular emphasis on protecting vulnerable groups, and this is a significant aggravating factor in the sentencing process.

Comparison with the Triad:

- [20] The triad of sentencing includes the gravity of the offense, the interest of society, and the personal circumstances of the offender.
1. Seriousness of the Offenses: The accused was convicted of serious offenses, including human trafficking, robbery with aggravating circumstances, extortion, possession of a toy gun, and contravention of section 36 for possession of suspected stolen property, specifically a Mazda sedan, among other charges. These crimes involved coercion, physical abuse, and psychological trauma inflicted on vulnerable sex workers who were deceived, violated, and robbed. The impact on the victims was severe, as detailed in their victim impact statements, which describe substantial emotional and psychological harm, including insomnia, trauma, relocation due to fear, and inability to work.
 2. Interests of Society: In *S v Swart*[13];

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 rehabilitation of the offender will consequently play a smaller role. Moreover, as pointed out in *S v Malgas* 2001 (1) SACR 469 (SCA) where the court finds that it is not bound to impose a prescribed sentence 'the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislator provided'. Society has a strong interest in deterring human trafficking, sexual exploitation, and violent crime, particularly when vulnerable groups are targeted in this case the

sex workers. The offenses committed by the accused are socially egregious and violate fundamental human rights especially section 10 of the Constitution of the Republic of South Africa Act, No. 108 of 1996 which provides that "Everyone has inherent dignity and the right to have their dignity respected and protected". A strong message must be sent to potential offenders that such actions will not be tolerated, which justifies the imposition of minimum sentences under normal circumstances. Trafficking and violent robbery undermine public safety. In *S v Kruger*[14] Shongwe JA (Harms AP and Plaskett AJA concurring) confirmed that '[p]unishing a convicted person should not be likened to revenge. It must have all the elements of and purposes of punishment, prevention, retribution, individual and general deterrence and rehabilitation'.

[21] Personal Circumstances of the Accused: The accused's circumstances, though compelling, are typical for sentencing considerations. In the case of *S v Van Wyk*[15] and *S v Voges*[16], and *S v ABT*[17] it has been said that:

"Being a first offender does not mean that such effect should override all the other principles to be considered during the sentencing process. First time offenders are therefore not entitled to non-custodial sentences merely because they are first offenders. So the value of being a first offender should be considered by the trial Court against the other factors under consideration during the sentencing process."

[22] His status as a first-offender, his contributions to his family and community, his long period of pre-trial detention, and the potential for rehabilitation suggest some grounds for leniency. However, his actions were premeditated, calculated, and persistent over a period of time, which may diminish the weight of these mitigating factors. In *S v Vilakazi*[18] Nugent JA said that in cases of serious crimes as these, the personal circumstances of the offenders by themselves will necessarily recede into the

background.

Once it becomes clear that the crime is deserving of a substantial period of imprisonment. The question whether the accused is married or single, whether he has two children or three, whether he is in employment are themselves largely immaterial to what the period should be and those seems to be the kind of flimsy reasons, or flimsy grounds that *Malgas'* case said should be avoided. But they are nonetheless relevant in other respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted, his circumstances might assist in making at least some assessment. Accused's actions during the commission of these crimes show a disregard for the law and the rights of others.

Analysis

of Substantial and Compelling Circumstances:

[23] The law requires the court to consider whether there are substantial and compelling circumstances to deviate from the prescribed minimum sentences. Here, the accused's personal circumstances and his potential for rehabilitation may suggest that a non-life

sentence could be appropriate. However, the premeditated nature of his offenses, the prolonged impact on multiple victims, and the fact that these were not isolated incidents weigh heavily against a significant departure from the prescribed sentences. Human Trafficking (Count 1, 3, 7, and 11): The accused played a central role in exploiting vulnerable women, inflicting both physical and emotional harm. In *S v Qamata*[19];

"An appropriate sentence actually means a sentence in accordance with the blameworthiness of every individual offender."

- [24] The aggravating factors include the calculated method in which he lured the victims, used coercion, and humiliated them. The absence of any evidence suggesting organized crime may mitigate slightly, but the gravity of the harm inflicted and the vulnerable status of the victims suggest that no substantial and compelling circumstances exist to justify deviation from the minimum sentence for trafficking.
- [25] Robbery with Aggravating Circumstances (Count 4, 5, and 8): The robberies were accompanied by the use of a weapon, creating fear and traumatizing the victims. Although the firearm was later revealed to be a toy pistol, the victims believed it to be real, which significantly contributed to their trauma. Again, the seriousness, premeditated, and repeated nature of the offenses, along with the significant harm inflicted on the victims and the societal need for deterrence, weigh against the accused in all these charges. Despite the accused's personal circumstances, the gravity of these offenses outweighs any mitigating factors. Accordingly, I find no substantial and compelling circumstances to justify a deviation from the prescribed sentences.
- [26] Theft (Count 2), Extortion (Count 6), and Other Counts: These lesser offenses are tied into the larger pattern of criminal behavior. The extortion, for example, involved threatening victims for financial gain, compounding the psychological harm already inflicted. While these counts on their own might not justify harsh sentences, they form part of the larger scheme of exploitation and abuse. In *S v Mokela*[20] the court noted that an order that sentences run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent'. Again in *S v Sekwat*,[21], where Makgoba J wrote as follows:

'It is a salutary practice that if an accused is sentenced in respect of two or more related offences, sentencing court should have regard to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences in respect of which the accused has to be sentenced.'

Conclusion:

- [27] While the accused's personal circumstances, including his first-offender status, his five-year pre-trial detention, and his potential for rehabilitation, are factors the court has considered, they do not, in my view, amount to substantial and compelling circumstances that would

justify deviating from the minimum sentences for the trafficking and robbery counts. The premeditated nature of the crimes, the prolonged emotional and psychological trauma suffered by the victims, and the societal interest in deterring such offenses strongly suggest that the minimum sentences should be imposed. Thus, the court finds that no substantial and compelling circumstances exist to justify a departure from the minimum sentences for the trafficking and robbery counts.

[28] Accordingly, the following sentence is deemed appropriate.

1. Count 1, 3, 7, and 11(trafficking) accused is sentenced to life imprisonment on each.
2. Count 4, 5, and 8: (robbery with aggravating circumstances) accused is sentenced to 15 years' imprisonment on each count.
3. Count 2: (Theft as a competent verdict) accused is sentenced to 3 years' imprisonment.
4. Count 6: (Extortion) accused is sentenced to 5 years' imprisonment.
5. Count 9: (contravention of section 4(1)(e) of the Firearms Control Act) accused is sentenced to 5 years' imprisonment.
6. Count 10: (Contravention of section 36 of the General Law Amendment Act) accused is sentenced to 6 years' imprisonment.
7. Count 12: (Contravention of section 7(a) of Act 32 of 2008) accused is sentenced to 3 years' imprisonment.
8. Count 13: (Attempted contravention of section 3) accused is sentenced to 6 years' imprisonment.

In terms of Section 280(2) Act 51 of 1977 the Court directs that the sentences imposed in respect of all these counts shall run

concurrently with the sentence of life imprisonment.

[29] Ancillary

orders

1. In terms of Section 103 (1) of firearms control act 60 of 2000 the court makes no order. This means accused is deemed unfit to possess a firearm.
2. In terms of section 103 (4) of firearms controls act 60 of 2000. The court makes an order of search and seizure of accused's premises for firearms, ammunitions licenses and or competency certificate.

3. In terms of section 299A (1) of Act 51 of 1977 the court informs the complainants that they have a right to make representations to the commissioner of the correctional services when placement of the prisoner on parole is considered, to attend any relevant meetings of the parole board, when the accused's parole is to be decided. This is subject to the directive issued by the commissioner of correctional services under section 4 of the correctional services Act.
4. Accused is having the right to appeal the convictions sentences which were imposed on him today. You can request the legal aid attorneys or an attorney where you pay out of your own pocket to assist you in bring a substantive application for leave to appeal the conviction and sentences within 14 days of this sentence. If your application is later than 14 days then you should apply for the condonation, to be allowed an extension of time to file the application for leave to appeal out of time.

M Munzhelele J

Judge of the High Court, Pretoria

Heard On: 23 October 2024

Delivered On: 25 October 2024

APPEARANCES:

For the State: Adv A Roos

Instructed by: The National Director for Public Prosecutions

For the Accused: Adv B Kgagara

Instructed by: Legal Aid South Africa

[1] 7 of 2013

[2] 105 of 1997

[3] 51 of 1977

[4] 60 of 2000

[5] 62 of 1955

[6] 32 of 2008

[7] 32 of 2007

[8] 2011 (1) SACR 9 (SCA) at [8]

[9] 1998 (1) SACR 554 (SCA) 558j-559a

[10] 2003

- (1) SACR 200 (SCA) at [13]
- [11] 2019 (2) SACR 334 (WCC) at [21]
- [12] 2001 (1) SACR 469 (SCA)
- [13] 2004 (2) SACR 370 (SCA)
- [14] 2012
- (1) SACR 369 (SCA)
- [15] 1997
- (1) SACR 345 (T) 3669-h
- [16] 1975
- (3) SA 88 (AD) 890E
- [17] 1975 (2) SA 214 (AD) 219H
- [18] 2009(1) SACR 552 (SCA) at para 58
- [19] 1997 (1) SACR 479 (E) 483a
- [20] 2012
- (1) SACR 431 (SCA) at [11]
- [21] (unreported, GP case no A445/2015, 14 September 2016) at [13]
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