

SOUTH AFRICA / JUDGMENT

S v Mahlangu and Others (0025/10)

[2011] ZAGPJHC 227; 2012 (2)

SACR 373 (GSJ) (2 August 2011)

[2011] ZAGPJHC 227

COURT

South Gauteng High Court, Johannesburg

BEFORE

Satchwell

CASE / FILE NUMBER

0025/10

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SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO:0025/10

DATE:02/08/2011

In the matter between

THE STATE

and

MAHLANGU T AND OTHERS.....Accused

S E N T E N C E

SATCHWELL J: The purpose of sentencing is usually considered to be threefold. Firstly to punish the wrongdoer. Secondly to deter or discourage both the wrongdoer and society generally from offending. Thirdly to rehabilitate the offender so that he turns away from crime.

In order to achieve these purposes in determining the appropriate sentence we usually take into account the following factors, the nature and the details of the crime which have been committed, the personal circumstances of the accused and the needs of and the response of society generally.

In the present case the offences of which these three accused have been convicted each have a specified sentence. Unlawful possession

of firearms and ammunition carry a maximum sentence. Murder where it is committed in the course of a robbery, which is a robbery with aggravating circumstances, or where it is a planned or premeditated murder or where it is a murder committed by a group of persons acting together in the course of their common purpose or conspiracy is a crime which Act 105 of 1997 has identified as a crime attracting a prescribed minimum sentence of life imprisonment. Robbery, where there are aggravating circumstances has been identified by Act 105 of 1997 as an offence where a first offender must be sentenced to imprisonment for a prescribed minimum sentence of not less than 15 years. In the present case the robbery is one with aggravating circumstances, an extremely dangerous weapon having been used, namely the golf club.

Accordingly I am obliged in terms of Act 105 of 1997 to sentence each of these accused to a minimum sentence of life imprisonment plus imprisonment for a period of not less than 15 years in respect of the robbery. However, if I am satisfied that substantial and compelling circumstances exist to justify the imposition of a lesser sentence of imprisonment then I may do so. Accordingly I must examine whether or not there are substantial or compelling circumstances.

The first relevant circumstances is the age of each of the accused. This offence was committed on 18 May 2009. On that date accused 1 was just 20 years old. Accused 2 was 25 years old. Accused 3 was nearly 22 years old. They are all young men. They are not as young as the age of 18 and under as identified in Act 105 of 1997 but they are certainly within the age group which our courts have traditionally taken into account youth as a mitigating factor. Younger persons are treated more leniently when it comes to sentencing because it is thought that younger people are less mature, more susceptible to influence from others and are perhaps more irresponsible generally.

However, youthfulness is not an automatic factor leading to a determination of substantial and compelling circumstances. In the

present case it is interesting that accused 1 who is the youngest of all three must have been the ringleader. He must have

told the other two that he was able to gain access to this property. He must have told the other two accused of the existence of the safe. He must have told the other two that on that particular Monday 18 May there would be no one at the house, certainly not his brother and the other builders. In other words the youngest of the group was the one exercising the most influence.

Youthfulness has not been held to be a mitigating factor when it is assessed against other factors such as the gravity of the offence, and the gravity of the offence outweighs youthfulness. In this regard a refer to a judgment of this division *State v Obisi* 2005

(2) SACR 350 (WLD). What was said there by Judge Makhanya was:

"The nature of the crime, the brazenness, the callousness and the brutality of the appellant's conduct show that he attaches no value to other people's lives or physical integrity or to their dignity."

In that case the court confirmed life sentence of imprisonment where:

"The deceased was doing what ordinary people do everyday, walking home from work when the deceased, who posed no threat to the appellant, was suddenly mowed down by the appellant."

Secondly, the next factor to which I must give consideration is the period of time that these three accused have spent in custody. They have been incarcerated in prison for a period of nearly one year and 11 months, namely since October 2009. During this time they have not been found guilty of these offences and yet they have been suffering as convicted prisoners. This consideration of course applies less to accused 1 who has been convicted, apparently of theft from his father, and who has been serving a two year sentence of imprisonment. But certainly for some of the time he has been an awaiting trial prisoner, and for all of the time have accused 2 and 3.

There can be no doubt that to be an incarcerated person is a great hardship. This is particularly the case where one is not a serving prisoner but awaiting trial. One does not receive the benefit of remission or parole or amnesties. One does not receive the benefit of the various courses offered by the Department of Correctional Services. One simply sits in limbo and waits. To the extent that the Department of Correctional Services is able to offer any employment to while away the day, even that is not offered to an awaiting trial prisoner.

There are indeed judgments, particular a full bench judgment of this division, *State v Brophy* which have attempted to do an arithmetical calculation of the equivalent of an awaiting trial period of time to a convicted period of time. The difficulty with such arithmetical equivalents is that one does not know all the factors particular to each awaiting trial period of time. I am therefore reluctant to say that accused 2 and 3 have spent therefore approximately two years' as awaiting trial prisoners equal to a four year period of sentenced imprisonment. What I certainly am prepared to say is that they have suffered great hardship and this is a factor to be taken into account.

The third factor concerns the difficult circumstances under which these accused have grown up. They appear to have lived partially in the rural areas, partially in the urban areas. Some have parents in employment, others not. Not one of them has completed high school, they have given various reasons for this. But I must take into account at the end of the day it is a great financial sacrifice for parents and grandparents to pay for children to go to school and their family circumstances will have had an impact. It can also be seen that none of the accused have any training for any particular skill. It is therefore not surprising that without qualifications, without skills and training none of them have proper jobs. They have done their best with piece jobs here and there but they have never really earned enough to support themselves and their family. In such circumstances it is not difficult to appreciate that there is great temptation to young people to make quick and easy money by theft or robbery.

However, in response to that understanding and appreciation there are two important comments. Firstly these three young men did not only commit theft and robbery they committed murder. Their robbery could not have been successful without the murder. The two went hand in hand. They were not stealing or robbing from a stranger, they were robbing from someone, Mrs

Patricia Kauitsane who knew accused 1. Therefore they had to kill her, they were prepared to kill her, and she was murdered. The second comment is that the rest of society does not turn to robbery and murder. There are many people in this society who have also suffered hardship and depravation and unfairness. They have left school. They have no training. They often have no jobs but they do not prey like monsters on ladies like Patricia Kauitsane who was just going to work.

The fourth factor which I take into account is the fact that, as I have pointed out, this murder was premeditated. There is no point in a robbery where you say to the person you are going to rob here I am, it is Thokozani, and then do the robbery and walk away, because the first thing that Mrs Patricia Kauitsane would have done was phone her boss, phone Mr Coetzee and he would have phoned the police and they would have been looking for Thokozani. There was no disguise of Thokozani because the only way the three of you could get into that house was by telling Mrs Patricia Kauitsane who you were. As I therefore stated yesterday in my judgment, you could not hope to achieve this robbery without doing the murder. This murder was planned and premeditated. You were being, as was said in that judgment to which I referred yesterday, *State v Musingadi* a "household traitor". Accused 1 was betraying the trust of Mrs Patricia Kauitsane and the way in which you killed her was vicious and brutal. Injuries on her face and body and her head smashed in so that there could be no doubt that she was dead, and the way in which you killed her was using a golf club. Using a big swing to hit her on the head.

The final factor to be taken into account is that there probably were different roles for each of the accused. Accused 1 had to be the leader. He had the information about the safe, the address, and the way to gain entrance. He was the person who introduced himself to Patricia Kauitsane, and as a result all three of them were let into the property. However, there is nothing to suggest that accused 2 and 3 were reluctant or had to be persuaded. They obviously wanted to participate in the robbery and therefore they made common purpose and agreement before the robbery took place, with the murder.

These then are the different factors which I have taken into account in deciding whether or not there are substantial and compelling circumstances.

In *State v Malgas* 2001 (1) SACR 469 (SCA) the judgment to which our courts always refer concerning minimum sentences and substantial and compelling circumstances had much to say about the approach to be taken by the court. Firstly the legislature, in enacting Act 105 of 1997 aimed at ensuring a "severe, standardised and consistent response from the courts". Secondly the emphasis in sentencing has shifted "to the objective gravity of the type of crime". Thirdly substantial and compelling circumstances must be "truly convincing reasons". There must not be marginal differences in personal circumstances or degrees of involvement. At the end of the day "the ultimate cumulative impact of the circumstances must be such as to justify a departure".

Accordingly what I, as a sentencing court am obliged to do is to take into account all the relevant factors and look at their combined impact to see whether they are convincing enough to justify a deviation from the prescribed minimum sentence. In favour of the accused is their youth and the fact that at least two of them have been in custody for a lengthy period. Against the accused is this extremely brutal and vicious murder.

I am of the view that there are not substantial and compelling circumstances to justify a lesser sentence of imprisonment. Accordingly I am obliged, in terms of the legislation to impose upon each of you a sentence of imprisonment for the rest of your life in respect of the murder of Mrs Patricia Kauitsane and a sentence of 15 years' imprisonment in respect of the robbery.

I should point out that I can see nothing unfair in this. Mrs Patricia Kauitsane is dead forever. She is not getting

up in the morning and choosing the clothes she will wear. She is not going home to her family. She is not spending time with children or grandchildren. She will never go to church if she wants to, and all this is because you decided to kill her and did kill her. Our society, because of our constitution does not require that your life be exchanged for her life. In some countries where the death penalty is imposed you would be sentenced to hang by the neck until you are dead,. But that is not constitutional in South Africa, but it is certainly not unfair or unjust that having taken the life of Mrs Patricia Kauitsane you should spend the rest of your lives in punishment, in reflecting upon her death and hopefully this kind of sentence will cause other young men who think of killing people, not to do so.

The question arises the extent to which, if at all, the sentence in respect of the murder and the sentence in respect of the robbery

should run concurrently. There is much to suggest that they should run concurrently. After all the robbery required the murder. The murder took place in order to achieve the robbery. The one depended on the other. However, on the other hand having planned the robbery and murder and committed the robbery and murder the accused continued with their unlawful behaviour. They left the house removing certain items. They travelled to a place where they had the safe broken open. They removed the contents of the safe and sold some of them. They divided up the money and the firearm and the watch were kept. Accused 1 and 2 were found on the bed where the firearm was hidden in the mattress.

Not all the activities of the robbery and the murder took place at the same time or in the course of the same purpose. Accordingly I am not ordering that all the sentences are to run concurrently.

You might wonder why I even consider having a sentence separately from or in addition to a life sentence of imprisonment. That is because the Correctional Services Act indicates that a life sentence of imprisonment does not necessarily mean that a person spends their entire life in prison. You may be considered for release after you have served 25 years. Since there is the possibility therefore of a release before you die therefore the sentence in respect of the robbery and the firearm must itself be calculated.

The unlawful possession of the firearm and ammunition has happened because the firearm and the ammunition were the spoils or the rewards of the robbery. Your convictions in respect of the firearm and ammunition should therefore run concurrently with the robbery

conviction. But I have found that two months later accused 1 and 2 were in possession of the firearm, therefore not all the

sentences imposed in respect of the firearm and ammunition will run concurrently.

Accordingly in respect of count 1 I intend to impose a sentence of life imprisonment on each of you. In respect of count 2, the

robbery, I intend to impose a sentence of 15 years' imprisonment on each of you. Ten years of that sentence will run concurrently with the sentence imposed in respect of count 1. In respect of the unlawful possession of the firearm, count 3, I shall impose a sentence of ten years' imprisonment. In respect of count 4, the unlawful possession of ammunition I shall impose a sentence of two years' imprisonment. The sentence in respect of count 3 and 4 will run concurrently. In respect of accused 1 and 2 seven years of counts 3 and 4, seven out of those ten years will run concurrently with the conviction on count 2, the robbery. In respect of accused 3 all the sentence, namely the ten years on counts 3 and 4 will run concurrently with the sentence imposed in respect of count 2. Accordingly accused 1 Mr Mahlangu, you are sentenced to serve a term of imprisonment for life for the murder of Mrs Patricia Kauitsane plus an effective sentence of five years' imprisonment in respect of the robbery and plus an effective sentence of three years' imprisonment in respect of the unlawful possession of the firearm and ammunition. This results in an effective sentence of life imprisonment plus eight years. Accused 2 Mr Seluma, you are sentenced to serve a term of life imprisonment for the murder of Mrs Patricia Kauitsane plus an effective term of five years' imprisonment in respect of count 2, the robbery plus an effective term of three years' imprisonment in respect of the unlawful possession of the firearm and the ammunition, resulting in an effective sentence of life plus eight years. Accused 3 Mr Sello, you are sentenced to serve an effective term of life imprisonment for the murder of Mrs Patricia Kauitsane plus an effective term of five years' imprisonment in respect of the robbery and all the term of imprisonment which I have imposed in respect of counts 3 and 4, the unlawful possession of firearm and ammunition will run concurrently. This is an effective sentence of life plus five years' imprisonment.

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