
SOUTH AFRICA / JUDGMENT

S v Makhala and Others (CC06/19) [2019] ZAWCHC 183 (13 December 2019)

[2019] ZAWCHC 183

COURT

Western Cape High Court, Cape Town

BEFORE

R C A Henney

CASE / FILE NUMBER

CC06/19

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, KNYSNA)

[REPORTABLE]

CASE NO: CC 06/ 19

In the matter between:

THE STATE

versus

MAWANDE MAKHALA

Accused 1

VELILE WAKA

Accused 2

VELA PATRICK DUMILE

Accused 3

SENTENCING JUDGMENT: 13 DECEMBER 2019

HENNEY, J

Introduction

- [1] The enquiry into what would be an appropriate sentence a court has to impose on an offender is one of the most difficult task of any judicial officer in a criminal court. The reason for this is because the court has to take into consideration a number of factors and circumstances. Over the years, the main aspects which a sentencing court has to consider had been broadly referred to the so-called aims of punishment which would be the rehabilitation the offender, deterrence, prevention and retribution. As well as the so-called triad, which would be the personal circumstances of the accused, the seriousness of the offence and the interest of society. When the court considers an appropriate sentence it should as far as possible try to impose a balanced sentence. It should not over or under emphasise any of these considerations. And that is what makes the task of the sentencing court so difficult.
- [2] A further consideration particularly in this case is that the court in respect of count 1, the murder charge, will also have to have regard to the provisions of the Criminal Law (Sentencing) Amendment Act, Act 105 of 1997 ("CLAA"). And the court should always have in mind what Corbett JA (as he then was) said in *S v Rabie* 1975(4) SA 855 (A) at 866 A-C ... "[a] judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests 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 himself 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 ."

The personal circumstances of Accused 1

- [3] The accused is 43 years old. He is divorced and is the father of 5 children. His eldest child is 15 years old. He has two children who are 8 years old, one that is 5 years old and a one year old child. His highest standard of education is grade 4. He has 5 brothers and sisters and he grew up in the Eastern Cape. He started to work as a field worker on a casual basis for the Knysna municipality in 2002 where he was responsible for the demolishing of unlawful structures. And in 2005 he took up a permanent position as a clerk in the housing department, and he was employed in this position until his arrest on 14 August 2018.
- [4] He earned a net salary of R13,000. He has previous convictions for malicious injury to property committed on 2 August 2003 for which he was sentenced on 16 August 2004 to fine of R500 or hundred days' imprisonment which was suspended for a period of 4 years on certain conditions. Driving with an excessive amount of alcohol in his blood for which he was convicted on 12 April 2010 and sentenced to a fine of R6000 or 6 months imprisonment which was suspended for a period of 5 years on certain conditions.

- [5] Lastly, he has a previous conviction on two counts of contravening the provisions of the Domestic Violence Act 116 of 1998 for which he was convicted and sentenced on 6 November 2013. Both charges are taken together for the purposes of sentence and he was sentenced to a fine of R600 or 3 months imprisonment which was suspended for a period of 4 years also on certain conditions.

The personal circumstances of the Accused 2

- [6] He is 59 years old and he is married. He is the father of 5 children of which two were born out of the marriage. They are respectively 18 years old and 7 year-old. The 18 year old son has just completed matric. And the 7 year old will be going to primary school in 2020. The 3 other children were born out of the relationship he had with other women of which the oldest one is 31 years old, the second oldest one is 28 years old and the last one is also 18 years old. He has 8 siblings of which 7 are still alive.
- [7] Accused 2 completed his matric in 1980 whereafter he attended Lumko Educational College in Lady Frere where he qualified as a teacher. He started teaching in Queenstown until he moved to Knysna, where he started teaching at Percy Madala High school from 1993 to 1997. In 1997, he retired and took up a post with the Knysna municipality as an administrative officer. In 2000, he became a housing official in the housing department of the Knysna municipality. This post he held until he became a full-time politician in 2011 when he became a PR councillor for the ANC. And as a counsellor, he earned R15,000 per month and as a mayoral committee member he earned R23,000 per month. He was finally removed as a counsellor during the October 2018 and since that time, he did not earn any salary. He has no previous convictions.

The personal circumstances of accused 3

- [8] He is 38 years old and he is not married, but the father of 2 daughters. They are respectively 7 years old and 2 ½ years

old. The 7 year old child stays with his sister in Delft who is the primary caregiver of this child and by means of a rental income she earns, is able to care for this child. The 2 ½ year old daughter stays with her mother who is a teacher and she is the

primary caregiver of this child. He is a first offender and has no previous convictions. He managed to pass grade 10, whereafter he became a driver by profession and has worked for 3 companies as a driver. He earned R4500 per month until he had to give up his job because of an injury he incurred during an assault. Since this injury he has not been working. This injury caused the left side of his body to be partially paralysed and he also suffers from epilepsy and has to take medication on a daily basis. He receives a social grant from the State in the amount of R1700 van per month.

The Offence

- [9] The accused have been convicted of very serious offences. The murder charge attracts a prescribed sentence in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 ("Act 105 of 1997"), of life imprisonment. This is because it is listed in Part 1 of Schedule 2, firstly because the court convicted all three accused of a murder that was planned and premeditated, and secondly, a murder that was committed by a group of persons in the execution or furtherance of a common purpose or conspiracy. The court in its finding of guilt came to the conclusion that this was a planned and premeditated murder as well as the fact that it was committed by a group of persons in the furtherance of a common purpose or conspiracy.
- [10] The other two charges relates to contraventions of the Firearms and Ammunition Act 60 of 2000, which respectively is a charge of possession of a firearm without a licence as well a charge of unlawful possession of ammunition. And in this particular case, this firearm was used to kill the deceased. The circumstances under which the offences were committed are aggravating. In this particular case, as has been highlighted by the prosecutor in his address to the court the accused were convicted of a very serious offence which was a murder by means of a contract killing.
- [11] In this particular case, I do not think it can be regarded as an overstatement or exaggeration to highlight the following aggravating

circumstances. These are, that accused 2 enlisted the assistance of accused 1 and his brother Luzuko, to acquire the services of a so-called hitman, accused 3 to assassinate the deceased. After accused 1 enquired from Luzuko whether he is able to enlist the

services of an assassin, Luzuko and accused 2 on 18 July 2018 came to an agreement that Luzuko, would transport accused 3 from Cape Town to Knysna. In order for this to happen accused 2 paid an amount of R1000 into a Shoprite Money Market account for Luzuko to withdraw to use as petrol money to drive down Knysna. Luzuko and accused 3 after having arrived in Knysna on 22 July 2018 immediately had a meeting with accused 2 to discuss the details and the sum of money that accused 2 would be paying to accused 3 to kill the deceased.

- [12] The planning and preparation was preceded with a lot of phone calls and messages between the various actors. After meeting with accused 2, it seems that they immediately made preparations to execute their plan. The movements of the deceased were monitored from the evening of 22 July 2018, after accused 1 went to show accused 3 where the deceased stays. It seems that given the fact that accused 3 thought that they might be going back to Cape Town on the same evening of 22 July 2018, that the initial planning was to execute the assassination on the evening of 22 July 2018. I say this because it seems after accused 1 had on 22 July 2018 shown accused 3 where the deceased stayed. At that stage, he was unsuccessful in executing the plan because the deceased was not at home. Then he once again went there for a second time under false pretences, wanting to see the deceased to assist him with the verification of his address for a job application in Knysna on 23 July 2013. So the purpose of him going to the house on 22 July 2018 was already to kill the deceased,

but he was unsuccessful in his attempt because the deceased was not at home. That is why he had to go back for the second time.

- [13] From the evidence and from the position where the deceased was later found it would seem that accused 3 after he was at the house about an hour before the killing was at the house of the deceased. And it seems from what Luzuko said in his statement that Accused 3 waylaid the deceased near to his house in order to ambush him, whereafter he shot him in a very cold-blooded manner in front of his house. According to the post-mortem report as a result of the shot that was fired at the deceased, there was some blackening of the skin of the upper chest due to heat which are usually caused when a person is shot at point-blank range.
- [14] Although the evidence reveals that 3 shots were fired at the deceased, it seems that the deceased was hit only twice, once in the chest and once in the head. This is a clear indication that all the accused had the direct intention to kill the deceased and accused 3 had to fulfil this instruction. That is in the nature of a planned and premeditated contract killing. In order to comply and to fulfil the desired effect the killing must be effected in a manner that would have the desired effect. It was for this reason that he had to make sure that the deceased would be killed and that is why the last shot fired by accused 3 was in the head, which left the deceased with very little chance of survival, which was later evident that despite medical assistance, he did not survive.
- [15] Our courts have consistently viewed contract killings such as these, as most grave and particularly heinous. In *S v MLUMBI EN 'N ANDER* 1991 (1) SACR 235 (A), the following was said quoting from the headnote:

"The Court in the present case, where the deceased had been killed in an 'assassination contract', found that the murder was an exceptionally serious one, that the consideration of the public interest was decisive and that the aggravating factors in respect of both of the appellants overshadowed the mitigating factors to such an extent that the death sentence for each of the appellants was the only proper sentence for the murder. The Court accordingly confirmed the death sentences which had been imposed on the appellants in a Local Division. The Court remarked further that a contract assassination was a heinous offence which has from early times filled people with horror. It was also the kind of offence which held deadly danger for

any community and was in fact the kind of atrocity which gave a particularly sombre meaning to the age-old expression 'homo homini lupus'. The Court pointed out further that the present South African

society was seriously threatened by such conduct and dared not tolerate it."

- [16] And in a further decision of *S v Dlomo & others* 1991(2) SACR 473 (A) Goldstone J at 477, he said the following "... Any decent member of society will instinctively and roundly condemn the hired killer. The reasons therefor are obvious and reference with regard thereto may be made to *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A) at 251g-h. When giving consideration to the objects of punishment (deterrent, preventive and retributive) it may be said that the

appellants are capable of reform. Having regard to their conduct and their mature ages, however, I must confess to having some doubt on that score. In any event in a case such as the present it is the deterrent and retributive objects which come to the fore. Hired killers must be made aware that, save possibly in exceptional circumstances, the Court will impose the ultimate sentence upon them."

[17] Our courts has similarly even taken a harsher stance in the sentencing of a person, like accused 2 who did not want to make his hands dirty, who procures the services of another person to effect or execute a contract killing. In my view, such conduct is despicable because whilst the person that effects and executes the killing conduct are not less reprehensible. In the instance of the procurer he or she incites another person with the enticement of usually a reward or gratification in the form of an amount of money to commit a very serious and heinous crime. In most cases, given the levels of poverty in our society more affluent persons would usually prey on the less affluent by enticing them with a sum of money. It seems in the recent past as pointed out by the prosecutor that not a large amount of money because of people in desperate need of money that even small amounts offered to contract killers will persuade them to effect an assassination .

[18] In *S v KGAFELA* 2001 (2) SACR 207 (B) the following was said by Friedman JP and in my view, with particular reference to a person that hires a contract killer.

"[81] Society has not, will not and cannot tolerate murder attendant on an 'assassination contract'. This has been designated as a heinous crime by our Courts, and which inspires a sense of revulsion and horror, and strikes at the very root of the social order. To consider that gratuitously, or for payment, a person may be hired to take the life of another is a chilling thought, whatever the circumstances.

[82] Our Courts have in a whole series of judgments visited hired killers and persons who acted in concert with them with severe punishment. See *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A); *S v O/omo and Others* 1991 (2) SACR 473 (A).

[83] Assassination contracts contain profound dangers and are a type of atrocity to be combatted, and the Courts have a duty in the discharge of its function to visit such perpetrators with the severest punishment. As M T Steyn JA once stated this type of crime exemplifies and gives a sombre meaning to the expression 'homo homini lupus'.

[84] In consequence of the foregoing, the hiring of assassins has been treated as a serious aggravating factor. When a person is convicted of murder by hiring a killer, the Court in considering sentence, takes into account the well-established triad, namely,

(i) the offender as a person; (ii) the nature of the crime and the manner in which it was committed; (iii) the interests of the community affected thereby. The Courts a/so take into account the purposes of punishment, namely, deterrence, prevention, reformation (rehabilitation) and retribution. The objectives of deterrence and retribution emerge in the forefront of the process in imposing punishment for crimes of assassination.

- [85] It must be so, as this is a method of expressing the instinctive public reaction and perception of this horrendous crime."
- [19] And in a decision of The Director of Public Prosecutions, *Gauteng v Tsotetsi* 2017 (2) SACR 233 (SCA) at [28] the Supreme Court of appeal with reference to the minority judgment of Marias JA in *S v Ferreira & others* 2004 (2) SACR 454 said the following ..."Contract killing has always been regarded as a severely aggravating circumstances and an abomination. In *S v Ferreira & others* Marais JA, albeit in a dissenting judgement, describes a premeditated and deliberate desire to kill as 'the most offensive. .. known to the law... and describes a contract killing for reward, as one which 'in the eyes of most reasonable people 'constitutes an 'abomination which is corrosive of the very foundations of justice and its administration. It is therefore imperative for the court to consistently send out a clear message that such crime shall be severely punished".
- [20] Such a crime where a person is unexpectedly gun down, after he had been ambushed can only be described as nothing short of an act of extreme cowardice. Because a person who is a target of a planned assassination, unless forewarned would not have any chance of taking any precautions against such a cowardly and dastardly attack. A further factor which the court takes into consideration is that this type of cases are usually planned and premeditated and can seldom be properly policed and prosecuted, because it is planned and perpetrated in a clandestine and underhand manner.
- [21] Contract killings which involves the slaying of politicians as pointed out by the prosecutor has become pervasive in our society,

and has continued unabated, without the perpetrators being brought to book in this country. A further aggravating factor which the court has to take into consideration is the fact that none of the accused has shown any remorse for their conduct. This despite the pain and suffering the widow and family of the deceased are enduring. It seems that Mrs. Molosi, the widow of the deceased, who was a witness in this case had difficulty to come to court because of the pain and emotional trauma that she was still suffering more than 18 months after the killing of her husband. The killing of the deceased had an enormous impact on his family. None of the accused had played open cards with the court and took the court into their confidence. See *S v MATYITYI* 2011 (1) SACR 40 (SCA).

Interests of Society

- [22] This brings me to the interests of society. This is a typical case where the interests of society are of utmost importance. Firstly, because of its abhorrence to the type of crime that the accused has committed, which in this case is a planned and premeditated contract killing. Secondly, where a leader of a political party who was a representative of the people in the local municipal Council was brutally slain. Society demands that its elected members of government should be protected against people who commit such cowardly acts. Especially where one of the killers is a political rival or adversary. In a democratic and civilised society, such as ours, we cannot allow political leaders to be assassinated. A political leader should

be removed by democratic means, through the ballot box and not by means of the criminal conduct of any person. This is what our Constitution prescribes and demands. This is clearly a case where a sentence of direct imprisonment would be the only appropriate sentence. It is a case where Parliament has prescribed that the court should impose a prescribed sentence of life imprisonment unless there are substantial and compelling

circumstances to deviate from such a sentence.

[23] The approach a court should follow in determining whether there are substantial and compelling circumstances present had been laid down in the oft quoted *S v Ma/gas* 2001 (1) SACR 469 (SCA) at 470G - 471D:

"[20] It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which could rank as substantial and compelling or those which could not. The best one can do is to acknowledge that one is obliged to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence which must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling. When justifying a departure a court is to guard against lapses, conscious or unconscious, into sophistry or spurious rationalisations or the drawing of distinctions so subtle that they can hardly be seen to exist.

[21] It would be foolish, of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate

and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some

discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great

harm will be done."

[24] In respect of accused 1, Miss Kuun, submitted that because he played a lesser role and that there is no evidence that he gained anything financially. Further, that he has a substandard level of education and that he was not sent to prison on a previous occasion. All of this together with his personal circumstances should be regarded as sufficient for this court to make a finding that there are substantial and compelling circumstances to deviate from the prescribed sentence. These circumstances either individually or

collectively in my view are not weighty enough to justify such a conclusion, that the court should deviate from the prescribed

sentence.

[25] Mr Dercksen on behalf of accused 2 conceded that he cannot convincingly argue that there are glaring, outstanding substantial

and compelling circumstances to impose a lesser sentence. He, however submitted after relying on *S v Monyane* 2008 (1) 543 SCA at 551 that because accused 1 had a number of unblemished record he is deserving of leniency and for that reason the court should together with the totality of the circumstances of this case conclude that there are substantial and compelling circumstances to deviate

from the prescribed sentence. I also do not agree with the submission. In fact it seems that accused 2 was the architect and the

brain behind the conspiracy to assassinate the deceased and he used the other accused and Luzukho to execute his plan. His conduct can be described as nothing but an act of cowardice and is extremely reprehensible.

[26] Mr Theron, also submitted that the court should find that accused 3 if regard should be had to his personal circumstances and in particular his medical condition, that such circumstances can be regarded as substantial and compelling. I also do not agree, because

he was the ultimate killer who pulled the trigger notwithstanding the fact that he suffers from some sort of disability. That did not deter him from proceeding with this callous and heinous deed. I agree with the submissions of the prosecutor that accused 3 is actually a dangerous person.

[27] Clearly, this is a case where the personal circumstances of the accused must give way to the deterrent and retributive aspects of

punishment. In *S v Swart* 2004 (2) SACR 370 (SCA) , Nugent JA also had the following to say after a series of cases relevant to this aspect about the retributive aspect of punishment in serious cases, at para [11] - [12]:

"[11] While it was observed in *R v Karg* 1961 (1) SA 231 (A) at 236A that the retributive aspect of punishment has tended to yield ground to the aspects of prevention and correction, more recently this Court said the following in *S v Nkambule* 1993 (1) SACR 136 (A) at 147c - e:

'Retribusie moet nie uit die oog verloor word nie. Retribusie het nie 'n vaste plek laag op die rangorder van strafoorwegings nie. Sy oorwegingskrag hang van die omstandighede af *R v Karg* 1961 (1) SA 231 (A) op 235G - 2360 bevestig dit. . . .

Niemand is genee om strafoplegging aan die hand daarvan te motiveer nie omdat dit die indruk van 'n oog-vir-oog benadering skep. Ek het vantevore in *S v Mafu* 1992 (2) SASV 494 (A) op 497 gepoog om verge/ding in sy juiste perspektief te stel. Dit is nie 'n oorweging wat in isolasie staan nie maar wat in samehang met die faktor deur Nigel Walker "denunciation" (dit is "to show society's abhorrence": sien Grosman aw op 23) genoem, gesien word. En hoewel dikwels reeds gese is dat retribusie sy belang verloor het, het hierdie Hof dit reeds by herhaling as deurslaggewend by die op/egging van bepaalde doodvonnisse gegee. Sien

bv *S v Nkwanyana and Others* [1990] ZASCA 95; 1990 (4) SA 735 (A) op 749C - D.'

And in *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519d - e; 2004 (2) SACR p378 NUGENT JA

'Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence (cf Windlesham "Life Sentences: The Paradox of Indeterminacy" [1989] Crim LR at 244, 251).

Retribution may even be decisive (*S v Nkwanyana and Others* [1990] ZASCA 95; 1990 (4) SA 735 (A) at 749C - D).'

And earlier in *S v Di Blasi* 1996

(1) SACR 1 (A) at 10f- g:

'The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct.'

[12] What appears from those cases is that 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. Moreover, as pointed out in *S v Ma/gas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222) in para [25] at 482f (SACR) and 1236E (SA), where a 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 Legislature has provided.'

[28] Therefore, after having taken all these factors and circumstances into consideration, I am of the view that the court should impose in respect of count 1 the prescribed sentence on each of the accused.

Accused 1, on count 1, for the murder of Mr Victor Molosi, I sentence you to life imprisonment.

Accused 2, on count 1, for the murder of Mr Victor Molosi, I sentence you to life imprisonment.

Accused 3, on count 1, for the murder of Mr Victor Molosi, I sentence you to life imprisonment.

In respect of count 2 and 3, both these charges are taken together for the purposes of sentence and the accused is sentenced to 5 years imprisonment.

In terms of the provisions of section 280 (2) of the Criminal Procedure Act 51 of 1977, I hereby order that the sentences imposed on counts 2 and 3 be served concurrently with the sentence imposed on count 1 in respect of each of the accused.

In terms of section 130 (2) and do that of the Firearms and Ammunition Act, 60 of 2000, the automatic declaration in terms of this act as a result of the conviction and sentence of the accused remains unchanged. In other words the declaration that they are not to possess a firearm, remains intact.

R. C. A. Henney

Judge of the High Court

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Prepared on 12 October 2026 · Esheria