

SOUTH AFRICA / JUDGMENT

S v Makhanda (CC29/2021) [2022] ZAECMHC 22 (12 August 2022)

[2022] ZAECMHC 22

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S Jolwana

CASE / FILE NUMBER

CC29/2021

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. CC29/2021

In the matter between:

THE STATE

vs

MANDISI MAKHANDA

Accused

SENTENCE

JOLWANA J:

- [1] The accused has been convicted on three counts of murder, one count of aggravated robbery and crimes related to the possession of a firearm and ammunition. All of these are very serious offences for which the State had indicated its intention to rely on section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) in respect of the murder charges for sentencing purposes in the event of a conviction. The State also indicated its intention to rely on section 51 (2) of the Minimum Sentences Act in respect of the aggravated robbery charge on the basis that during the robbery a firearm was used. In respect of the murder charges the reason cited by the State for its intended reliance on section 51 (1) of the Minimum Sentences Act was the fact that when the murders were committed the accused was with other people who were unknown to the State and acted in execution of a common purpose with them. The State also raised the issue of the murders being planned or premeditated. However, the court found that both on common purpose

and premeditation the State had not led sufficient evidence as would found common purpose and/or premeditation.

- [2] During submissions after the accused was convicted and, for the first time during the sentencing proceedings, counsel for the State submitted that the accused is liable to be sentenced to the prescribed minimum sentence of life imprisonment for the murder

convictions. The reason cited by the State was that the evidence established very clearly that the murders were committed after the robbery was committed and therefore fall under the Minimum Sentences Act sentencing legal dispensation. I must point out that this basis for seeking to rely on the Minimum Sentences Act was not referred to in the indictment and the accused was not specifically warned about it. I will deal with this issue in some detail later in this

judgment.

- [3] The relevant provisions of the Minimum Sentences Act in respect of the murder convictions is Section 51 (1) which provides that:

“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for Life.”

- [4] Part 1 of Schedule 2 to the Minimum Sentences Act provides, in the relevant part, as follows:

“Murder, when –

- (a) ...
- (b) ...
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
 - (i) ...
 - (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977).”

- [5] The sequence of events when the murders were committed, according to the uncontroverted evidence of some of the State witnesses was that the accused walked into the Nomqonde spaza shop, pulled out a firearm, and told the customers to keep quiet and lie down. He then gained access inside the counter where Novangeli was. He demanded money from Novangeli and she gave him the money. As the accused was about to leave, he noticed a cellphone on the counter. He turned back and took that cellphone. After taking the cellphone he fired a shot at Novangeli. Thereafter he fired two more shots at Fezile Nomqonde and Zalisile Nomqonde. All three of them later died in hospital from gunshot wounds.

[6] This evidence shows the indisputable fact that when these murders were committed, in the words of paragraph (c) of Part 1 Schedule 2,

“the death of the victims was caused by the accused after committing one of the following offences:

(i) ...

(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977).”

[7] Section 1 of the Criminal Procedure Act reads as follows:

(1) In this Act, unless the context otherwise indicates –

‘aggravating circumstances’, in relation to -

(a) ...

(b) robbery or attempted robbery, means –

(i) the wielding of a firearm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.”

[8] The evidence established overwhelmingly that not only was the accused wielding a firearm before he committed the robbery, he also used that firearm by shooting the deceased, after the robbery. That evidence makes the murders fit perfectly within the provisions of section 1 of the Criminal Procedure Act which is referred to in paragraph (c) (ii) of Part 1 of Schedule 2.

[9] With that having been established the next issue for consideration is the legal position regarding the fact that this basis of the State’s intention to rely on section 51 of the Minimum Sentences Act was not raised in the indictment nor was the accused warned about it specifically. In other words, can the sentencing of an accused person who was warned of a different basis for the application of the Minimum Sentences Act to the one that was established by the evidence be subjected to the sentencing that is provided for under the Minimum Sentences Act about which he not specifically warned? The Supreme Court of Appeal has recently explained the applicable legal position in *Mekuto*[1] in which Molemela JA expressed herself as follows:

“In relation to this matter, it is important to note that the applicant faced exactly the same charges as Mr Mpuqe. Section 51 (1) read with Part 1 (c) (ii) of Schedule 2 of the CLAA prescribes the imposition of life imprisonment for a murder committed in the course of committing a robbery with aggravating circumstances. The applicant conceded that as regards the robbery charge, the indictment gave an extensive description of the circumstances in which the offence was committed. The person named as

the deceased in the murder charge was the same person that was mentioned as the victim of the robbery. There could not have been any doubt that the murder described in the indictment fell squarely within the purview of Part 1 (c) (ii) of Schedule 2 of the CLAA, in respect of which the prescribed minimum sentence is life imprisonment within the contemplation of s 51 (1) of the CLAA. Under those circumstances, it is indeed difficult to understand how any of the defence counsel could have labored under the impression (and consequently informed their client) that the applicable minimum sentences for the murder charge they were facing was 15 years' imprisonment as contemplated in s 51 (2) of the CLAA and not life imprisonment contemplated in s 51 (1) of the CLAA."

- [10] Earlier this year the applicable considerations were also explained by the Supreme Court of Appeal in Mpuqe[2] which was also referred to in Mekuto in which Mbatha JA said:

"The question that arises in this case is whether there was a failure to apprise the appellant of the provisions of the CLAA, which vitiated his right to a fair trial. This court settled this issue in Kolea v S, where the court emphatically stated that the CLAA does not create new offences. The fact that the charge sheet is not amended does not translate to invalid proceedings. A formal application to amend the charge sheet is not always required. The test is whether the accused suffered any prejudice. In this case, it is clear that it was always uppermost in the mind of the trial court that it was dealing with the murder in terms of s 51 (1) of the CLAA. As a matter of fact, the pertinent issues relating to the elements of the conviction in terms of section 51 (1) were conclusively proved by evidence."

- [11] It is important to emphasize that in this case section 51 (1) was specifically invoked in the indictment and the accused was

accordingly warned about the consequences thereof in the event that he was convicted on the murder charges. The only issue is that the indictment did not make specific reference to the fact the murders were committed in the course of the robbery as provided for in Part 1 of Schedule 2 (c) (ii). However, the evidence proved conclusively that the death of all the three deceased persons was caused by the accused after having committed robbery with aggravating circumstances.

- [12] It must be remembered that at all times the question is always whether when all is said and done the accused received a fair trial. This much was made clear in September[3] in which the Constitutional Court explained the legal position as follows:

"It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not,

however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the

applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the

circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness of the trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35 (3) right to a fair trial was not in fact infringed."

[13] I have therefore come to the conclusion that the murders committed by the accused in this case fall within the purview of section 51 (1) of the Minimum Sentences Act as provided for in Part 1 (c) (ii) of Schedule 2. The question of the accused's section 35 (3) constitutional right to a fair trial cannot arise particularly because in the indictment the intention of the State to invoke

section 51 of the Minimum Sentences Act was made abundantly clear. Secondly, the court explained the implications of the State's

intentions to apply to the court for the accused to be sentenced to life imprisonment if convicted, at the pleading stage. This is over and above the fundamental duty of the accused's legal representative to explain those implications, including what the evidence may in fact establish.

[14] The only issue for consideration is therefore whether the accused has established the existence of substantial and compelling circumstances such as would result in the court exercising its sentencing discretion to depart from the prescribed minimum sentences of life imprisonment. The same applies in respect of the robbery conviction for which the State invoked the provisions of section 51 (2) of the Minimum Sentences Act and thus bringing it within the realm of the prescribed minimum sentences. Section 51 (2) reads:

"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;"

[15] The relevant part of Part II Schedule 2 reads:

"Robbery –

(a) when there are aggravating circumstances."

[16] The evidence has established that there were aggravating circumstances as a firearm was wielded before the robbery after which

the deceased were shot and subsequently succumbed to death.

[17] In Vilakazi[4] the approach to sentencing where the Minimum Sentences Act is applicable was explained as follows:

“It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the ‘offence’ in that context

‘consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.’

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed

sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in Malgas, which said that the relevant provision in the Act

‘vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling

circumstances exist which ‘justify ... it’”

[18] I turn now to look at the accused personal circumstances and in particular, whether there are any substantial and compelling

circumstances in this case on the basis of which this Court may depart from the prescribed minimum sentences.

[19] The accused did not testify in mitigation of sentence. His legal representative prepared comprehensive heads of argument and made submissions from those heads of argument. Those heads of argument assisted the court a great deal in understanding the accused’s

contentions and submissions on sentencing. The court was urged not to over emphasize the seriousness of the offences above the accused’s personal circumstances. The accused’s personal circumstances mentioned were that he is 35 years old, unmarried with two children one of whom is still a minor of eight years old. It was further submitted that he was remorseful for his actions and would like, through the court, to convey his sincere apologies to the families of the deceased for the pain and suffering he has put them through.

[20] It was further submitted that he escaped from the Rooigrond Correctional Centre in Mahikeng where he was serving sentences

because of the tribalism related ill-treatment he was allegedly subjected to. He made numerous requests to be transferred from that facility but in vain. His father passed away in 1998 and now his closest surviving relatives are his sickly mother and two younger siblings. He made some bad choices in life and went with a wrong crowd which led to alcohol and drug abuse. This led to criminal activities which resulted in his arrest and convictions after which he was sentenced,

inter alia, to life imprisonment at the age of 26 years. Since his incarceration he has not been taking drugs. He has been in custody in respect of this matter since November 2018 following his arrest.

- [21] In my view there is nothing substantial or compelling about the accused's personal circumstances especially taking into account that he has been convicted of serious crimes. On the contrary, there are very serious aggravating factors. I may mention just a few. When Novangeli was shot and killed, she had not even offered resistance to the robbery. She was a young woman at the age of 36 years when she was killed. She was living a very productive life which was cut short abruptly for reasons that the accused has not taken the court into confidence about. According to the evidence of her brother, Zolani Nomqonde, she was employed by the O.R. Tambo District Municipality earning an income with which she looked after her three children two of whom are still minors at the ages of 16 and 15 years old. All three of them, Zinje, Mfezeko and Ntombivelile are now all basically orphaned as they stayed with her before she was murdered senselessly. The father of one of her children died and the fathers of the other two are unknown to the family.
- [22] Fezile Nomqonde who was also shot and killed was self-employed as a builder. He was 38 years old when he was murdered. He had a child of about 13 years old who is still schooling. This child stayed with Fezile. The last person who was killed by the accused was Zalisile Nomqonde who was also an independent builder. He was only 32 years old when he was murdered by the accused. He stayed with his father and had no children. Only his father is still alive and had to go through the pain of burying his son following his senseless killing.
- [23] Zolani Nomqonde further testified that his father who is also the father of Novangeli and Fezile is 80 years old and their mother is 75 years. They had to experience the pain of losing two children in one day on that fateful day, the 4 October 2018 which will forever be etched in their memories. They were both badly affected by the sudden loss of two of their children resulting in their health deteriorating. The spaza shop has since been rented out following the death of Novangeli who ran it. Zolani further testified that after the incident three other family members also died as Novangeli was assisting them during her life time by taking them to doctors and looking after them. What this means is that Novangeli was not only looking after her children, she also took care of her parents and other people within the broader Nomqonde family. All the three deceased persons were young law abiding citizens who died at the hands of a ruthless criminal, the accused.
- [24] The worst and most disturbing aspect of this case which is also a very serious aggravating factor, is that the accused had escaped from Rooigrond Correctional Centre where he was serving a life sentence for a murder conviction for which he was sentenced in September 2013. He was also serving a 12-year sentence for attempted murder and a six-year sentence for kidnapping when he escaped five years into his sentences. It is clear that whatever rehabilitation programmes he would have been put through by the Department of Correctional Services before his escape did not work. He escaped from prison and went on to commit aggravated robbery and three murders with a firearm that he dispossessed from a

Correctional Services officer on duty in less than five months after he escaped. When the said firearm was dispossessed from the said officer at Rooigrond Correctional Centre he was also shot and wounded when the accused and four others escaped. This in my view, makes the accused to rank among the most dangerous criminals who should be completely removed from society and remain in custody until the end of his natural life. In the absence of substantial and compelling circumstances justifying a departure from the prescribed minimum sentences, which in his case, are non-existent, he must be sentenced as provided for in the Minimum Sentences Act.

[25] I therefore sentence you as follows:

1. Life imprisonment for the murder of Novangeli Nomqonde.
2. Life imprisonment for the murder of Fezile Nomqonde.
3. Life imprisonment for the murder of Zalisile Nomqonde.
4. Fifteen years imprisonment for aggravated robbery.
5. Five years imprisonment for the unlawful possession of a firearm on 4 October 2018.
6. Five years imprisonment for the unlawful possession of a firearm on 7 November 2018.
7. Three years imprisonment for the unlawful possession of ammunition.
8. The sentences referred to in 5,6 and 7 above are ordered to run concurrently with the sentence in respect of aggravated robbery.
9. You are declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: M.F Mzila

Instructed by: Director of Public Prosecutions

MTHATHA

Counsel for the Accused: M. Sakwe

Instructed by: Legal Aid South Africa

Heard on : 28 July 2022

Delivered on : 12 August 2022

[1] Thembinkosi Mekuto v The State (1120/2020) [2022] ZASCA 86 (08 June 2022) para 18.

- [2] Sibongile Luphumlo Mpuqe v The State (53/2021) [2022] ZASCA 37 (4 April 2022) para 15.
- [3] MT v S; ASB v S, September v S 2018 (2) SACR 592 (CC) para 40.
- [4] S v Vilakazi 2009 (1) SACR 552 (SCA) para 15.
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