

SOUTH AFRICA / JUDGMENT

S v Malele and Others (CC104/13) [2015] ZAGPPHC 793 (11 November 2015)

[2015] ZAGPPHC 793

COURT

North Gauteng High Court, Pretoria

BEFORE

BAM

CASE / FILE NUMBER

CC104/13

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/11/2015

Case number CC104/13

In the matter of:

THE STATE

vs

MESHACK MALELE ACCUSED

1

THAMSANQA NGEMA ACCUSED

2

PERCY JONATHAN MNISI ACCUSED

3

BONGAMUSA MDLULI ACCUSED

4

SIPHO SYDWELL NGOBENI ACCUSED

5

LUNGISA GWABABA ACCUSED

6

BONGANI KOLISI ACCUSED

7

LINDA SOLOLO ACCUSED

8

JUDGMENT ON SENTENCE

BAM J

Appearances: For the State: Adv R Mnisi and Adv G Mosethla

For Accused 1,2, 4, 6 and 8: Adv M van Wyngaardt

For Accused 3, 5, and 7: Mr. BP Ndaba

1. The accused were convicted of murder. The reasons for the conviction were dealt with in this Court's judgment on the merits and need not be repeated.
2. Concerning sentence it was found that the accused acted with a common purpose. Consequently Act 108 of 1997 provides for a minimum sentence of life imprisonment. However, the said Act further provides that in the event of the Court finding that substantial and compelling reasons exist, justifying a lesser sentence, the Court shall impose a lesser sentence. In the latter regard the Court has discretionary powers.
3. In order to determine whether substantial and compelling circumstances, justifying a lesser sentence, exist, it is incumbent on the court to consider the nature and extent of the crime, the personal circumstances of the respective accused, the interests of the community and the circumstances of the particular case. It is however trite that the Court should guard against deviating from imposing a prescribed minimum sentence for flimsy reasons. See *S v Malgas* 2001(1) SACR 469 (SCA), at par [37].
4. Murder is probably the most serious offence any human being can commit. In this case a young man lost his life within a few hours after having encountered the accused and being arrested. Although the murder was not pre-planned or pre-meditated, the

facts

proved that the form of mens rea in this case was *dolus eventualis*. It means that the accused foresaw the possibility that the accused could die as a result of their conduct, but, nevertheless, did not refrain, stop or prevent the infliction of serious injuries on him, and therefore reconciled themselves with his eventual death.

5. The deceased was a family man who had obligations towards his dependants. His family is now left without a breadwinner, creating an obviously difficult situation for them. The emotional effect on the family in the circumstances having lost their breadwinner, and a loved one for that matter, is probably incalculable. This issue was comprehensively dealt with in all the pre-sentence reports handed in on behalf of the accused. It is imperative that the impact of the deceased's death on his family has to be taken into account. See *S v Matiyi* 2011(1) SACR 40 SCA, par [16].
6. The personal circumstances of the accused are contained in the said pre-sentence reports. I deem it expedient to attach the said reports to this judgement. The reports include the personal circumstances of the respective accused, their families as well as reference to the impact the death of the deceased had on his family.
7. The personal circumstances of the accused can be summarised as follows: They were members of the police force. They have good service records. Not one of them has any previous convictions. They have good family relations and also dependants to care for. Any sentence of direct imprisonment will obviously have a devastating effect on the accused and their families.
8. Concerning the interests of the community it has to be accepted that the community depends on members of the police force for protection and safety. Rogue policemen, for obvious reasons, are unacceptable in society and cannot be tolerated. Although policemen are in many occasions subjected to rude, provocative and aggressive behaviour of members of the public, they are expected to conduct themselves in a proper and reasonable manner within the ambit of our laws. This includes that they have to respect the individual's rights entrenched in the Constitution. Of course policemen are entitled to use reasonable force to affect lawful arrest, but, in this case, regrettably, that right was abused, with dire consequences.
9. It is so that, in so far as the initial arrest of the deceased is concerned, that only accused 1 and 2 were aware of the true facts.

Both of them knew very well that the deceased's arrest was unlawful. Their wrongful conduct started with their decision to arrest the deceased, obviously to teach him a lesson. To that extent the situation of accused 3 to 8 differs. On the probabilities they were misled by accused 1 and 2, with words or conduct, to accept that the deceased was lawfully arrested. The wrongful conduct of accused 3 to 8 therefore only commenced when the deceased, against standing orders, rules and regulations, was manacled to the rear of the police vehicle and then dragged off behind it. Thereafter, unfortunately for all the accused, their unlawful conduct continued up to the point where the deceased was fatally injured in the holding cell.

10. In regards to the question of the most appropriate sentence, the Court, in *S v Malgas* 2001 (1) SACR 469 (SCA), par [25], remarked as follows:

"If the sentencing court on consideration of circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

11. In this case the whole incident lasted only a few hours but the events got totally out of control. Taking into account the circumstances of the case, however, I have arrived at the conclusion that life imprisonment would be disproportionate to the crime committed by the accused. In my view there are indeed substantial and compelling circumstances justifying a deviation from that sentence. These circumstances are the following:
 - (i) The problem started when the deceased became arrogant and aggressive when confronted by accused 1 and 2 with an alleged traffic violation. It justifies the finding that the deceased's conduct in respect of accused 1 and 2 was clearly provocative. In respect of accused 3 to 8 it has to be found that on the probabilities they subjectively believed that deceased was arrogant and resisting lawful arrest.
 - (ii) The gathering of the angry crowd complicated matters.
 - (iii) The accused were policemen on duty. They have good service records and no previous convictions. They have now lost their employment and their future is bleak.
 - (iv) In view of the unblemished records of employment of the accused, their rehabilitation seems to be a realistic proposition.
 - (v) Prior to being granted bail they were detained in prison for several months before they were released on bail.
12. It was conceded by the State, as submitted by counsel for the accused, that there are indeed substantial and compelling circumstances justifying a lesser sentence than the prescribed life imprisonment.
13. It follows, as alluded to above, that the Court is now obliged to impose a lesser sentence than life imprisonment.
14. To impose the most appropriate sentence is an onerous and difficult task. All relevant circumstances must be considered and balanced in accordance with the guidelines that have emanated from previous decisions of especially the Supreme Court of Appeal.
15. The main purposes of punishment are prevention, retribution, deterrence and rehabilitation. See *S v Rabie* 1975(4) SA 855 (AD), at 861-862. The element of mercy, however, should also be kept in mind. In *S v Harrison* 1973 (3) SA 684 AD at 686A, the Court remarked as follows:

"Justice must be done, but mercy, not a sledgehammer, is its concomitant."

16. In *S v Zonele* 1959(3) SA 319 AD, at 330E, the Court emphasized that the punishment must fit the criminal and the crime. Due to the fact that the individual personal circumstances of the accused differ, each accused's circumstances will have to be considered in order to determine

whether it may result in the individualization of the sentence. However, I could not find that the personal circumstances of any of the accused differed from those of the other accused others to that extent that it justified the imposition of different sentences.

17. Although the personal circumstances of the accused are taken into account, it has been stated in *S v Vilakazi* 2009(1) SACR 552 SCA, at par [58], that in matters of a serious nature, those circumstances necessarily recede into the background.
18. The aggravating features in this case speak for itself. The arrest of the deceased and the dragging behind the vehicle was totally unnecessary, uncalled for and not justified. The accused attempted to hide behind their right, as law enforcement officers, to use force to arrest and detain the deceased. They clearly abused this right and the situation was aggravated when the deceased was dragged behind the vehicle. However, what made their conduct more reprehensible was their cowardly attack in the cell on a defenceless and already seriously injured man. What happened in the cell not only confirmed that they acted with a common purpose but is regarded as seriously aggravating.
19. The continuous conduct of the accused concerning the injuries inflicted on the deceased was barbaric and totally unacceptable. It goes without saying that the community is entitled to protection against such behaviour of rogue police officers. Unfortunately this protection can only to a limited extent be provided by the Court in imposing severe sentences in an attempt to prevent and deter other potential perpetrators.
20. Unfortunately for the accused they did not show any remorse. In the pre-sentence reports all of them maintain that they are innocent. However, a court should be slow, and careful, to, without more, regard the lack of remorse as aggravating. The accused were entitled to plead not guilty and to maintain this attitude throughout. True remorse, or contrition, on the other hand, is an important factor that could have had a mitigating effect on the sentence. See *S v Seegers* 1970(2) SA 506 AD, at 511G.
21. Although accused 1 and 2 started the whole incident, the difference in blameworthiness between them and accused 3 to 8 evened out when accused 3 to 8 participated in the assault on the deceased in the cell. Accordingly there is no basis concerning their respective contributions requiring the imposition of different sentences.
22. Therefore, in my view, the interests of justice in this case demand that there should be uniformity in the sentences of the accused and, accordingly, that they should receive the same punishment.

See *S v Giannoulis* 1975(4) SA 867 (AD), at 873.

23. Finally, it is kept in mind that the appropriate sentence should be proportionate and commensurate to the crime in question. But, as alluded to before, murder is and remains a most serious crime. It is unfortunate that the dependants of the accused will suffer as a result of the accused being sentenced to direct imprisonment.
24. After having considered all the mitigating and aggravating circumstances, the accused are sentenced as follows:

Accused 1 to 8 are each sentenced to 15 years imprisonment.

A J BAM JUDGE

11 November 2015

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