

SOUTH AFRICA / JUDGMENT

S v Masilela (SS005/2018) [2018] ZAGPJHC 621 (21 September 2018) [2018] ZAGPJHC 621

COURT

South Gauteng High Court, Johannesburg

BEFORE

Du Plessis

CASE / FILE NUMBER

SS005/2018

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

CASE NO: SS005/2018

DATE: 2018-09-21

In the matter between:

THE STATE

and

WANDA MASILELA Accused

S E N T E N C E

DU PLESSIS J: The accused stands convicted as follows: Count 1: Murder read with Section 51(1) of Act 105 of 1997.

Counts 2 and 3: Kidnapping.

Count 4: Robbery with aggravating circumstances as contemplated in Section 1 of Act 51 of 1977 read with Section 51(2) of Act 105 of 1997.

Counts 5 and 6: Illegal possession of a firearm and ammunition.

Where the court is now called upon to impose appropriate sentences on the accused, the court is obliged to give consideration to what the appellant division, now the Supreme Court of Appeal, has termed the 'Triad', consisting of the crime, the offender and the interest of society.

In assessing an appropriate sentence the aims of punishment, namely deterrence, retribution, prevention and rehabilitation have to be considered.

An element of mercy according to the circumstances of the case must also be considered. (See *S v Zinn* 1969 (2) SA 537 (A) and *S v Swart* 2004 (2) SACR 370 (SCA) at 377 F- 378 E).

The court will summarily bear in mind the minimum sentencing and regime which was explained to the accused. In assessing appropriate

sentences the court will have regard in not over or under emphasising any of the factors referred to in the Triad.

The court has considered all factors in mitigation and aggravation in its quest to arrive at a suitable sentence. Mr Mphanza for the accused addressed the court in mitigation of sentence.

The accused did not testify. The following personal circumstances were brought to the court's attention: The accused is now 28 years of age.

He has two children aged 5 years and 9 months respectively. The youngest child was born whilst the accused was in prison and he did not contribute to her maintenance. Before his imprisonment he paid R2000 towards the maintenance of his oldest child.

However, before his arrest he was unemployed. He did assist in the family's taxi venture by supervising the taxis travelling

between Johannesburg and Swaziland.

Out of this income he also assisted in the support of his three siblings. They stay with their family. Both his parents

are deceased.

He had paid lobola towards the mother of his child of 9 months old. The accused was educated up to grade 10.

The accused has the following previous convictions: He was convicted for housebreaking with the intent to steal and theft on 7 October 2013, which was committed on 21 May 2013. He was sentenced to 30 months imprisonment.

On the 10th of January 2014 he was convicted of theft committed on 5 September

2013. He was sentenced to 12 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition that the accused is not convicted again of theft, fraud or an attempt to commit any of the mentioned offences committed during the period of suspension.

In terms of Section 103(1) of Act 60 of 2000 the accused was deemed unfit to possess a firearm. The crimes the accused committed

and of which he stands convicted of are of a very serious nature, especially so in that a person has lost his most precious possession,

his life.

Whether one is a pauper or a king one's life is precious. It is again to be reiterated that our country is plagued by a scourge of violent crimes that do not abate. It is patently clear from the totality of the evidence that the killing of the deceased was senseless, brutal and callous.

The accused and his co-perpetrators acted with absolute disregard towards the deceased and Ms Zulu. Even after she begged them to let her and the deceased free they continued driving around.

This continued whilst the deceased was wounded and his condition progressively deteriorated. Ms Zulu testified in aggravation

that as a consequence of the killing of the deceased she and her family are suffering emotionally and financially.

Ms Zulu, suffered severe personal, emotional pain as a result of the loss of her husband was evident during her evidence. She and the children went for counselling.

The one child is still receiving counselling. The deceased had three children of his own before he married Ms Zulu.

He has three children with the deceased. The children are 22, 16, 14, 12, 10 and 3 years old. Four of the children stay with Ms Zulu. She is a teacher but her income falls short in providing for them. The deceased primarily provided for the family's financial needs. He practiced as an advocate and also conducted two businesses. His one business supplied work to about twelve people.

He has thus financially contributed to society. There is a public outcry that our system seems unable to combat and curb the scourge of violence.

The court has to consider the public interest and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the interest of justice may fall into disrepute and injure persons and other affected by crime may take the law into their own hands, something that cannot be tolerated in a civilised society.

In *S v Swart* mentioned earlier the court indicated that given this fate of violence and serious crimes it seems proper that sentencing for such

crimes should place the emphasis on retribution and deterrence. (See also *DPP North Gauteng v Thusi* 2012 (1) SACR 423 (SCA) at 429 D – I.

Both the state and defence counsel have addressed me on whether substantial and compelling circumstances are present and whether I ought to deviate from the minimum sentencing regime prescribed with regards to the counts pertaining to the robbery and the murder of the deceased.

It was submitted by counsel for the accused that substantial and compelling circumstances exist, that would allow the court to deviate

from the prescribed minimum sentences prescribed in respect of counts 1 and 4. He submitted that the accused is still a relatively

young person.

He was arrested on 2 August 2017 and as thus has been in custody for about 1 year. He did not pull the trigger of the firearm that killed the deceased. All the offences were committed during the same course of events. These factors should accumulatively be regarded as substantial and compelling. It was also submitted that the court should take the cumulative effect of the sentences to be imposed into consideration.

The state argued that there are no substantial and compelling circumstances to be found in the personal circumstances of the accused.

These circumstances demeanours in the weight they are to be regarded with when considered against the heinousness of the killing of the deceased.

The accused also showed no remorse. It is submitted that the only proper sentence to be imposed in respect of count 1 is one of life imprisonment.

In order to decide whether substantial and compelling circumstances as contemplated in Section 51 (3) of Act 105 of 1997 exists.

The issue is to be approached as described in *S v Malgas* 2001 (1) SACR 469 (SCA) and it proved by the Constitutional Court in *S v Dodo* [2001] ZACC 16; 2001 (1) SACR 594 (CC). The following from *Malgas* is to be emphasised:

“If the sentencing court on consideration of the 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.”

It is clear from *Malgas* that the court should not for flimsy reasons impose a lesser sentence than the one prescribed. In applying the test referred to in *Malgas* it is obvious that the conspectus of mitigating and aggravating factors have to be considered to decide whether substantial and compelling circumstances exist.

I am unable to find substantial and compelling circumstances in the personal circumstances of the accused. Being 20 years of age is not under consideration of the facts of the matter a factor that would authorise or would help this court to deviate from the prescribed minimum sentence.

In *S v Mabuza and Others* 2009 (2) SACR 435 (SCA) at paragraph 23 it was held that:

“Although youthfulness can in certain circumstances constitute substantial and compelling circumstances. The legislature in requiring a sentencing court to depart from the prescribed sentence in respect of offenders who have attained a age of 18 years only if substantial and compelling circumstances justify this departure as clearly intended that youthfulness no longer be regarded as per se a mitigating factor.”

The accused is far from being a youthful offender. The accused showed no remorse for his deeds.

Taking into account the gravity of the murder of the deceased and the prescribed minimum sentence of life imprisonment the period of about 1 year detention pending the finalisation of the trial fades into oblivion.

This on its own cannot in the circumstances be regarded as a substantial and compelling circumstance. (See *Selowa and Others v The State*, decided in this division under case number A5/2017 on 28 June 2017).

The accused previous convictions are relevant and have to be taken into account. His previous convictions and the offences he has now been convicted of demonstrate the accused disregard for the law.

Life imprisonment is a severe sentence. Our constitution reflects our ideals of a society. Amongst these ideals is that freedom is a most precious condition of men and woman.

Contrasted against this there is an ancient adage “*Salus populi suprema lex*”, which means the safety of the people is the supreme law.

I would be failing in my constitutional duty as a representative of the judicial pillar of the state if I did not give a judgement designed to ensure that no member of our society ever falls victim to the accused murderous tendencies again.

I similarly cannot find substantial and compelling circumstances pertinent to count 4.

Having given the facts of this matter considerable thought the accused is sentenced as follows:

Count 1: Murder read with the provisions of Section 51(1) of Act 105 of 1997 in that the accused and his co-perpetrators acted with a common purpose and committed the murder during the course of a robbery, imprisonment for life.

Count 2: Kidnapping 5 years’ imprisonment.

Count 3: Kidnapping 5 years’ imprisonment.

Count 4: Robbery with aggravating circumstances as contemplated in Section 1 of Act 51 of 1977, read with Section 51(2) of Act 105 of 1997, 15 years’ imprisonment.

Count 5: The illegal possession of a firearm, 6 years’ imprisonment.

Count 6: The illegal possession of ammunition, 2 years’ imprisonment.

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On behalf of the State: Adv Serepo

On behalf of the Defence: Adv Mphaza

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