

SOUTH AFRICA / JUDGMENT

S v Mogale and Others (CC76/2018; 10/2/11/1-L41/18) [2020] ZALMPPHC 69 (6 July 2020) [2020] ZALMPPHC 69

COURT

Limpopo High Court, Polokwane

BEFORE

Mudau

CASE / FILE NUMBER

CC76/2018; 10/2/11/1-L41/18

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED : YES / NO

CASE NO: HGC: CC76/2018

DPP REF NO: 10/2/11/1-L41/18

6/7/2020

In the matter between:

THE STATE

And

MOGALE, CHARLES

ACCUSED 1

NTHUTANG, SEHLABE LOUIS

ACCUSED 2

APHANE, BOITUMELO DANIEL

ACCUSED 3

J U D G M E N T ON SENTENCE

MUDAU J:

- [1] The 3 accused appeared before this court charged jointly in an indictment which contained 11 counts. They have all since been convicted of conspiracy to commit robbery with aggravating circumstances, in contravention of section 18 of the Riotous Assemblies Act 17 of 1956 (count 2); three counts of attempted murder (counts 3-5); two counts of murder read with the provisions of section 51 (1) of Act 105 of 1997 (counts 6 and 7); and finally, against accused 1 only, reckless negligent driving in contravention of section 63 read with other relevant provisions of the National Road Traffic Act 93 of 1996 (count 11) as well as possession of stolen property in contravention of section 36 of the General Law Amendment Act 62 of 1955. They were all acquitted of the remaining charges.
- [2] It is trite that in the determination of an appropriate sentence, the personal circumstances of an accused, the nature of the offence or offences committed, and the interests of the community must be considered according to the well- established Zinn triad.[1] In the assessment of an appropriate sentence, regard must be had to inter alia, the main purposes of punishment mentioned by Davis AJA in *R v Swanepoel*[2], namely deterrence, prevention, reformation and retribution.[3]
- [3] However, as Schreiner JA stated in *R v Karg*: [4] "It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."
- [4] In the instant case, the accused's sentencing is subject to the relevant provisions of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") which prescribes a variety of mandatory minimum sentences to be imposed by courts in respect of a wide range of serious and violent crimes that include murder, rape and aggravated robbery cases. The accused were warned upfront in this regard at the start of the trial.
- [5] Accordingly, the accused face a minimum sentence of life imprisonment in respect of counts 6 and 7 (the murder charges), unless I find there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentences. The accused face mandatory life terms of imprisonment in respect of counts 6 and 7 because the offences were committed by the accused acting in the execution or furtherance of a common purpose or conspiracy.

- [6] Accused 1's legal representative addressed this court from the bar in mitigation of sentence. Accused 1, Mogale is 51 years of age. He was approximately 48 years of age when the crimes were committed. His highest educational achievement is matric. He is currently in his second marriage. From his first marriage, he fathered three children aged 33, 26 and 23 years respectively with his now deceased wife. Of these three children, the youngest is studying at a tertiary institution. From his second marriage, he fathered two minor children, a boy and a girl aged one month and 10 years respectively. The mother of the two minor children is gainfully employed. He is self-employed and makes aluminium doors and windows as well as related products for a living from which he derived approximately R15000-00 before the COVID-19 pandemic lockdown. With the current lockdown restrictions, he makes approximately R5000-00 a month.
- [7] Mogale has a colourful record of previous convictions dating back to an era when he was obviously a young man. Some of them are evidently outdated for purposes of sentence. However, for the record they are as follows. On 8 December 1987, he was convicted of theft by the Polokwane magistrate's court. The passing of sentence was in that instance postponed for a period of five years subject to customary conditions. On 19 May 1992, he was convicted by the Potgietersrus (now Mokopane) magistrate's court for theft. He was sentenced to receive five lashes with a light cane in terms of the now repealed section 294 (1) A of the Criminal Procedure Act 51 of 1977 ("CPA"). In addition, he was sentenced to undergo six months imprisonment suspended for a period of four years on customary conditions. That did not deter him. On 9 June 1992 at the Mokopane magistrate's court, he was convicted on another theft charge and as a result sentenced to undergo 12 months imprisonment.
- [8] On 3 July 2008 at the Alberton magistrate's court, he was convicted for contravening section 120 (8)
- (b) (ii) of Act 60 of 2000, loss of a firearm in respect of which he was fined R1000-00, alternatively, ordered to serve three months imprisonment. However, the only relevant other previous conviction is by the Mokerong magistrate's court in Mahwelereng on 17 September 2015 where he was convicted of possession of presumably stolen property. A sentence of six years imprisonment wholly suspended for a period of five years on condition he is not convicted of unlawful possession of a suspected stolen motor vehicle during the period of suspension was imposed. I was urged to find substantial and compelling circumstances justifying a departure from the mandatory minimum sentences particularly with regard to the murder charges by Ms Alberts during her address regarding mitigation of sentence, from the above overall facts. Accused 1 drove his motor vehicle at high speed in wilful or wanton disregard for the safety of persons; disregarding traffic signs; and in this instance red traffic lights; under circumstances where traffic was heavy, by his own admission. He also refused to stop when ordered to do so, quite clearly, by the police.
- [9] Accused 2, Nthutang, is 41 years old. He testified in mitigation of sentence. In his testimony, he maintained that he was innocent of any wrongdoing regarding the charges in spite of this court's findings to the contrary. Accused 2 is a father of five children, an adult son, aged 23,

as well as four minor children, two boys and two girls aged 12, 10, 4 and 2 years respectively, by two different mothers. Both women are gainfully employed. The older three children attend school. He is unmarried. The highest education level he reached is matric. He has been in custody ever since his re-arrest for these charges, a period of approximately 13 months. He

is self-employed and transports schoolchildren from which he derives approximately R13000-00 to R15000-00 a month. He has records of previous convictions. He maintained his innocence regarding the commission of the offences. That he innocently got a lift to Gauteng from a group of men in a motor vehicle under circumstances where the conspiracy and the mission by a group of armed men was quite clearly to rob, was a version that I dismissed as highly improbably and nonsensical.

[10] Accused 2 has a highly decorated record of previous convictions, which he admitted. On 6 December 2000 he was convicted by the Johannesburg magistrate's court for a contravention of section 39

(1) (i) of Act 75 of 1969 for pointing a firearm at another person. He was sentenced to undergo one-year direct imprisonment. On the same date, he was convicted for possession of a firearm without a license as well as ammunition. For both convictions taken together for purposes of sentence, he received three years imprisonment. On the same date as above, he was also convicted on another charge of pointing of a firearm at another person. He was declared unfit to possess a firearm. On 15 June 2004, the Wynberg regional court convicted him for robbery committed in Sandton in respect of which he was sentenced to seven years imprisonment.

[11] On 12 January 2011, the Newlands Regional Court, Johannesburg, convicted him on housebreaking with intent to rob and robbery in respect of which he received 20 years imprisonment. There he appeared under the names Nthutang (Lerato Louis Sehlabi). On the same day, and before the same court, he was convicted of four counts for possession of firearms in contravention of the relevant provisions of Act 60 of 2000 (the Firearms Control Act) in respect of which two years imprisonment was imposed for each count were ordered to run concurrently with the 20 years prison sentence. On the same day and by the same court he was also convicted of four counts of attempted murder. All the charges of attempted murder were taken together for purposes of sentence for which he received five years imprisonment ordered to run concurrently with the 20 years imprisonment referred to above. In terms of section 103 of Act 60 of 2000, he was declared unfit to possess a firearm. However, in his evidence, he testified that the latest conviction and sentences were in 2015 on appeal set aside. The state did not challenge his evidence.

[12] For her part, counsel for accused 2, Ms Mohlaka also urged this court to find substantial and compelling reasons justifying a departure from the mandatory minimum sentences. She was of the view that a sentence of 15 years imprisonment would be adequate for each murder charge as the victims and the co-perpetrators were shot dead by the police.

- [13] Counsel for accused 3 addressed this court from the bar. Accused 3, Aphanani, is 33 years of age. He was approximately 30 years old at the commission of the offences. He has been in custody ever since his arrest, 1 April 2017, which is a period of a little over three years. He is not married but is a father to three minor children aged, 10, 10 and 4 years respectively by three different mothers. The children are in the care and custody of their respective mothers. Before his arrest, he was unemployed. He passed matric and in addition acquired certificates in business management as well as in nature conservation.
- [14] Accused 3 also admitted to a record of a previous conviction. On 13 February 2014, at Mokopane magistrate's court, he was convicted of attempted robbery. Consequently, he was sentenced to three years imprisonment of which one year thereof was suspended for a period of five years on customary conditions. Counsel for accused 3, Ms Makweya also added her voice to the chorus of submissions made to the effect that, essentially, this court must find substantial and compelling circumstances in favour of accused 3 in that he was, for his role in the commission of the offences, under peer pressure from the deceased, Solly and also for the taste of the finer things in life.
- [15] The offences committed are viewed by this court in a very serious light. All of them, without exception, are not petty offences as counsel conceded. The conspiracy charge involves an element of planning. It is evident that none of the accused have learned much from their respective previous brushes with the law. I am mindful of course that in the case of accused 1, the offences were committed when he was a youth and for the majority, not to be considered for purposes of sentence. It of concern to this court however, that not so long ago he was convicted and sentenced for possession of a stolen motor vehicle in respect of which, he received a paltry wholly suspended sentence. In addition, his role, which led to ultimate incidents of the capital crimes, cannot be ignored. Had he not driven away from the scene to facilitate an escape, it is doubtful whether there would have been any shooting with fatal consequences.
- [16] In addition, accused 1 expressed no regret for the commission of the offences nor for the role, he played. Accused 2 is also unremorseful in light of convictions for the crimes charged, given his improbable version in this trial. He maintained that in essence, as he got a lift, he was at the wrong place and at the wrong time. As I indicated in the main judgment, the occupants of the Ford Ranger were clearly on an unlawful mission and armed to the teeth with firearms that included an RS automated assault rifle in respect of which the serial numbers were removed. As I indicated in the main judgment in dismissing accused 2's version, it is inherently improbable that the others would have given him a lift under circumstances where, as I found, the conspiracy was to commit armed robbery as belatedly and essentially confirmed by an address from counsel on behalf of accused 3.
- [17] Turning to accused 3, his belated expression of remorse is nothing more than, as the proverbial saying goes 'crocodile tears'. More than anything, he is evidently feeling sorry for himself. He tried to extract himself from a confession made a day after the incidents of crimes, which I admitted in evidence despite his protestations to the contrary. Neither did

he testify in support of the suggestion that he is genuinely remorseful for his part in the commission of the offences. Crimes that involve the loss of life are considered in a very serious light, as everyone has a right to life as enshrined in the Bill of Rights of our Constitution. The loss of lives of the two deceased, although involved in hazardous activities in respect of which death can be anticipated, could have been avoided. They as well, were parents of children who deserve to have their fathers around them, but for these crimes.

[18] In closing submissions however, the state in essence conceded that this court might deviate from the mandatory minimum sentences. The state called for effective sentences of 56 years, 55 years and 45 years respectively (in order of appearance of the accused). In the oft stated case of *S v Malgas*[5] it is set out how a court is to approach the minimum sentence regime, and in particular, how the enquiry into "substantial and compelling circumstances" is to be conducted. The following passage is of particular relevance: "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances." [6]

[19] In *S v Vilakazi*[7] Nugent JA stated: "In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it

becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided'. [8]

[20] Accordingly, I find that regard being had to the overall relevant circumstances in respect of each accused as detailed above; and in particular the circumstances under which the murder charges attributed to the three accused for reasons outlined in the main judgment were committed; constitute substantial or compelling circumstances that render the minimum sentences of life imprisonment unjust, in respect of each accused. With that said, it is imperative for the courts to remain steadfast by consistently sending out a clear message that crimes such as these, shall not be tolerated, but be met with attendant severe punishments in justifiable circumstances. This is such a case. The accused's removal from society for a considerable period is warranted. The sentences suggested by the state in my view remain unduly harsh. In the result, each of the accused is sentenced as follows:

20.1 On count 1 (Possession of stolen property in contravention of s 36 of the General Law Amendment Act 62 of 1955 (accused 1 only)): twelve (12) years imprisonment of which ten (10) years is to run concurrently with the sentence imposed in respect of count 6, the murder charge.

20.2 On count 2 (conspiracy to rob in contravention of section 18 (2) (a) Act 17 of 1956: 15 years imprisonment.

20.3 On counts 3, 4 and 5 (attempted murder charges taken as one for purpose of sentence): five years imprisonment.

20.4 On count 6 (Murder): 25 years imprisonment.

20.5 On count 7 (Murder): 25 years imprisonment.

20.6 On count 11 (reckless driving in contravention of section 63 (1) Act 93 of 1996 (accused one only): five years imprisonment. The accused's driver's licence is suspended for 24 months from the date hereof in terms of section 35 (1) (b) (i) of the Road Traffic Act, 1996.

20.7 In terms of section 280 (2) of the CPA it is ordered that the sentences in respect of each accused run concurrently with the sentence imposed on count six (the murder charge). The effective sentence for accused 1 is therefore 27 years imprisonment and 25 years respectively in respect of accused 2 and 3.

20.7 In terms of section 280 (2) of the CPA it is ordered that the sentences in respect of each accused run concurrently with the sentence imposed on count six (the murder charge). The effective sentence for accused 1 is therefore 27 years imprisonment and 25 years respectively in respect of accused 2 and 3.

Finally, all the accused are declared unfit to possess firearms as intended in section 103 of the Firearms Control Act 60 of 2000.

T P MUDAU

[Judge of the High Court]

[1] S v Zinn 1969 (2) SA 537 (A)

[2] 1945 AD 444 at 455

[3] See also S v Whitehead 1970 (4) SA 424 (A) at 436E-F; S v Rabie 1975 (4) SA 855 (A) at 862

[4] 1961 (1) SA 231 (A) at 236 A-B

[5] 2001 (1) SACR 469 (SCA)

[6] At para [9]

[7] 2009 (1) SACR 552 (SCA)

[8] At para [58]

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