SOUTH AFRICA / JUDGMENT

S v Mokoena (CC27/2021) [2022] ZAGPPHC 504 (22 June 2022)

[2022] ZAGPPHC 504

COURT
North Gauteng High Court, Pretoria

BEFORE
Van Veenenendaal

CASE / FILE NUMBER
CC27/2021

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IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
(VEREENIGING
CIRCUIT COURT HELD IN PALM RIDGE)
Case
number: CC27/2021

REPORTABLE:	NO OF INTEREST TO OTHER JUDGES: NO
REVISED:	YES/NO 22/6/2022 In
the matter between:	STATE VERSUS MOJALEFA SIMON MOKOENA ACCUSED

JUDGMENT

ON SENTENCE

VAN VEENENDAAL AJ

[1] The Accused has been convicted on one count of murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997; one count of attempted murder, one count of assault with the intention to cause grievous bodily harm and one count of assault. It is now the court's duty to sentence the Accused.

[2] Punishment must fit the criminal, as well as the crime, be fair to society and be blended with a measure of mercy. When sentencing an accused, a court is required to consider the four objectives of punishment (deterrence, prevention, rehabilitation and retribution) in view of the triad of factors as set out in S v Zinn 1969 (2) SA 537 (A). These factors are

(i) the personal circumstances of the offender, including his character, conduct in life and personality, and everything that influenced the commission of the offence; (ii) the nature and seriousness of the offence committed; and (iii) the interests of the community, including the necessity for a level of uniformity in sentencing.

[3] In view of the seriousness of the crimes of which the appellant is guilty, the legislature has decreed that the court is obliged to impose a minimum sentence of 25 years' direct imprisonment on the murder charge, unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. In considering whether such circumstances exist and, if so, what sentence is appropriate, it is necessary to examine the circumstances of the offence intensively and attempt to determine the exact degree of seriousness of the particular act in respect of which the accused has been found guilty, as well as the personal circumstances of the accused and the interests of the community.

[4] It is, ultimately, often a matter of reconciling competing interests in order to ensure a fair and just sentence. An appropriate balance must be struck. A sentencing court 'has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion' (per Mocumie JA in S v Mhlongo 2016 (2) SACR 611 (SCA) at [9]; see also S v Horn 2018 (1) SACR 685 (WCC) at [12] n 9).

[5] In S v RO & Another 2010 (2) SACR 248 (SCA) Heher JA stated at [30]: 'Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality.) The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.'

[6] In S v Van Loggenberg 2012 (1) SACR 462 (GSJ) Willis J said that a sentence has five important functions (at [6]):

(i) It must act as a general deterrent, in other words, it must deter other members of the community from committing such acts or thinking that the price of wrongdoing is worthwhile;

(ii) it must act as a specific deterrent, in other words, it must deter this individual from being tempted to act in such a manner ever again;

(iii) it must enable the possibility of correction, unless this is very clearly not likely;

(iv) it must be protective of society, in other words, society must be protected from those who do it harm;

(v) it must serve society's desire for retribution, in other words, society's outrage at serious wrongdoing must be placated.'

[7] The five important functions referred to above should also be read with the following 'basic principles pertaining to sentencing' as formulated by Myburgh AJ in S v Tsotetsi 2019 (2) SACR 594 (WCC) at [29]:

'(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.

(b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all

mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in S v Zinn [1969 (2) SA 537 (A)].

(c) Regard must be had to the interests of society (the third element of the Zinn triad). This involves a consideration of the protection

society so desperately needs. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.

(d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from reoffending and the deterrence of would-be offenders.

(e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.

(f) Retribution, being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.

(g) Finally, mercy is a factor. A humane and balanced approach must be followed.'

[8] The offence: The Accused and the deceased and her fiancée (two women in a same sex relationship) had an altercation in his yard, where they had come to the tuck shop to buy airtime. With the intervention of the tuck shop owner, the two women extricated themselves and got their money to buy airtime elsewhere and to avoid the accused. The accused went into the house and fetched his knife bag which contained two knives. He went to confront the two women and he waited for them at Motlatsi's Car Wash. There, he saw the ladies approaching and he assaulted the complainant with a brick, then he took out an okapi knife and opened it when the complainant came at him. She tripped and he stood over her, and he stabbed her at least twice. The deceased came towards him and he swung towards her, stabbing at her. By this time the community was chasing the accused and assisted the complainant and the deceased.

[9] Although the accused pleaded guilty, he did not plead guilty to the aspect of premeditated murder or planned murder in an attempt to avoid the minimum sentencing legislation. However, on the facts before court, it is clear that the Accused had succeeded in his altercation with the two ladies to drive them away, they had left the premises and were on their way to another destination. However, the Accused went into the house to retrieve his bag with two knives, he lay in wait for them and saw them approaching. He grabbed a brick to attack the complainant and he then proceeded to take out his knife, even though the complainant was down and at his mercy. When the deceased approached him, he continued to swing at her, stabbed her and caused her death.

[10] The Accused had a way out, he did not have to follow them, he did not have to take his knife bag and two knives with him, he did not have to attack the complainant with a brick, he did not have to stab the deceased.

[11] The question of why he went to this extreme end of the spectrum of causing more hurt than necessary, is answered by the social worker, who drafted the pre-sentencing report. The Accused felt humiliated and he felt disrespected. He is normally a fellow who walks away and keeps quiet. The community was shocked at his vicious attack.

[12] Turning to the personal circumstances of the Accused: The Accused is now 57 years old. He has some previous offences, which can be safely disregarded due to the age and an attempted assault in 2008. Through a presentencing report, the further circumstances of the Accused and the family was placed before court. The Accused is described as a loving person who loves his family. He is proud of his children and encourages his children, while he assists his daughter in taking care of his grandson, eg by taking him for his immunisations. The accused's son finds it difficult to deal with the consequences of his father's arrest and continued incarceration.

[13] The Accused initially worked as a taxi driver and then worked for Iscor as a quality controller and analyst in the laboratory until he was retrenched in

2007. He was a taxi driver after that, and apart from a short contract with the Expanded Public Works Programme, he has not been formally employed. He has a small income from letting rooms in the yard, his wife takes care of the son's needs and his daughter assists when there is a need.

[14] The Accused does have a problem that alcohol affects him quickly. He says he becomes more talkative but other sources say he becomes argumentative. Otherwise the Accused is humble, friendly, helpful, loves socializing, willing to help someone in need, giving assistance and therefore also assists with the CPF. The accused admits his temper creates problems when he feels he is not heard, when he feels disrespected or not given time to talk. He would not always speak up, but walk away, when angry.

The victims and the community

[15] The complainant suffered severe injuries and can no longer work as independent contractor installing solar geysers. She suffers from nightmares and physical pains. She has lost her life partner. Financially, she is suffering as she had to pay for hospitalization for herself and the deceased and she can no longer work. The deceased is described as a darling, loved by all the family members. Her children are now growing up without a mother and a mother had to bury her only child.

[16] South Africa suffers from high levels of violence and high levels of violence against vulnerable persons. The accused was involved with an altercation with two women, much younger than himself and went looking to a second altercation. Although he expresses his remorse, recognizing that he has wronged and harmed another person, taking responsibility up to a point, realizing that his life has changed, internal turmoil and a desire to make good what he had done wrong, asking for forgiveness and make reparation somehow, the accused does not address what led to him actually fetching his knife bag and lying in wait for the women to appear.

[17] The Accused had ample time to reflect on what the possible outcome may be of the actions of lying in wait for the women. He took his knives with him. He went on with his conduct, irrespective of what the outcome may be. Although he now expresses that he understands he must make right and that he should have avoided the conduct at that time, the consequences of his conduct will never go away. His conduct was violent in nature and aimed at achieving the maximum impact to reflect his punishment of what he interpreted to be their "slight" towards him.

[18] The court has to apply the minimum sentences and should not depart from it for flimsy reasons. The case law is very clear on that. See S v Malgas 2001 (1) SACR 469 SCA. Although there were instances where there was deviation from this principle, the Supreme Court of Appeal has never deviated

from its warning that there should be truly convincing reasons for deviating from the prescribed minimum sentence.

[19] In S v Malgas (supra) the court, at paragraph 22 says the following regarding finding something that convinces the court to deviate from the prescribed minimum: “What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

[20] The court must try to find substantial and compelling circumstances to individualize sentence for each Accused, balancing it against the interests of the community and also trying to serve as deterrent example to others who consider embarking on a life of crime.

[21] The court has to consider whether the personal circumstances of the Accused constitutes circumstances that are substantial enough to avoid being called “flimsy” in order to deviate from the prescribed minimum. The state argued that the reasons for deviation as forwarded by the Defence, did not establish substantial and compelling reasons to deviate from the prescribed minimum sentences.

[22] Severe punishment has been prescribed for murder. A court is not to embark on speculative hypotheses favourable to the offender, express undue sympathy or an aversion to imprisoning first offenders or express personal doubts as to the efficacy of the policy underlying the legislation.

[23] The case of S v Matyityi 2011 (1) SACR 40 (SCA), expressed the difference between remorse and regret. Ponnan JA had the following to say about this aspect at para 13: 'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

[24] The Accused does not deny his role in the death of the deceased. It would appear that he has a gnawing pain of conscience or at least some appreciation and acknowledgment for the extent of his error.

[25] The accused is an older man, he should have paused and decided to let these ladies go, as further confrontation was not worth the eventually “win” it would have meant for him. who has life experience and who should be capable of withdrawing and acting differently than he actually did on that fateful day.

[26] Sentencing must also serve as deterrence of others who consider embarking on a life of crime. The message that must go out to others in the community, must be that even though a perpetrator may try to evade the long arm of the law, he will be found, linked to offences and will have to stand his trial and face conviction and sentence. The message that must go out to persons considering committing offences that may look like hate crimes or reflect intolerance of same sex relationships or show a lack of understanding of persons who are different from the norm, like physically or mentally disabled persons, must stop in their tracks, reflect and reconsider the possible consequences of their conduct. South Africa has progressed far intolerance of persons in same sex relationships and the court’s appetence of intolerance must be reflected in the sentence.

[27] Although the interests of society and the deterrence and sense of conveying the anger of society at the Accused must be reflected in the sentence, the offender must not be sacrificed on the altar of deterrence. This was stated by Ackermann J in S v Dodo [2001] ZACC 16; 2001 (1) SACR 594 (CC) at [38]: ’Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others bears no relation to the gravity of the offence . . . the offender is being used essentially as a means to another end and the offender’s dignity assailed.’

[28] I consider that these circumstances together may, in conjunction with each other, justify a finding of substantial and compelling reasons, and might allow for a reduction in sentence. The Accused is not a hardened criminal, he was not trying to evade his responsibility in toto. However, I do believe that the Accused still has a long road to facing the impact of his deed. The above, however, is offset by the conduct of the accused at the scene of the offences. He made poor choices and acted out of revenge, allowing these feelings to override all his other impulses, even though he had sufficient time to consider his actions and their potential consequences. I can see reason to find that substantial and compelling circumstances exist for the court to deviate from the prescribed minimum sentences. I have also taken into consideration the age of the accused.

[29] Showing the extent of remorse as the accused is doing, is a start towards having a conversation with the community about the effect of crime on the members of the community. The trust that the community had in him, when he accompanied women and ensured their safety, has been broken, and it is questionable that the society can simply forgive him and trust him again.

[30] The Department of Correctional Services has a duty not only to house persons convicted and sentenced to imprisonment, but also to rehabilitate offenders in order to release offenders into the community and to be gainfully employed and contribute to the economy and to become productive citizens. To this end, the Case Management Committee at each prison has the duty to draft a sentencing plan when a newly sentenced offender enters its doors. The CMC has the duty to ensure that an offender attends programme that are suitable to him or her and to ensure that victims also have input in the drafting of these plans and eventually in the consideration of that offender for release on parole. The CMC must ensure that victim-offender dialogue be encouraged and that the principles of restorative justice and rehabilitation be achieved.

[31] The victim-offender dialogues is a road that both victims and offender can walk: by first attending conferences in which they are separately led to express their realisations about the impact of the offence on their lives, the victims and the offenders are eventually encouraged to meet and to openly discuss their emotions and realizations, if not specifically in their own situations, then at least with other offenders or other victims. This is a path to healing and rehabilitation.

[32] The court wishes to instruct the Accused to ensure that he maintains good relationships with his family while in prison and to follow the programmes offered in the prisons for his personal benefit, including the so-called victim-offender programmes in order to realize the impact of his conduct on the society.

[33] I also wish to encourage the complainant and the family of the deceased to take part in the programmes available to victims of crime, in order to make sense of what had happened to them. Furthermore, the family can keep the prison authorities up to date with their contact details so that they can contribute to the dialogue at the parole board, once the Accused is being considered for parole.

I make the following order:

1. The sentence on count 1, murder, I impose 25 years imprisonment,

- on count 2, attempted murder, I impose 8 years imprisonment

- I take counts 3 and 4 together for sentencing and impose 5 years imprisonment,

- All the above sentences are to run concurrently with the 25 years imprisonment,

2. the accused is declared unfit to possess a firearm,

3. Case Management Committee is directed to take note of the following remarks:

3.1 A copy of this sentencing judgement is to be kept on record and to be referred to frequently while considering the progress of this accused;

3.2 That the sentencing plan incorporates the remarks in this judgement;

3.3 That the CMC encourages the accused and the family of the deceased and the victim to follow a restorative justice programme and victim-offender dialogue;

3.4 That the CMC ensures that the Accused is encouraged to develop life skills, and be prepared for a possible return to the community.

4. The State is directed to assist the complainant in obtaining appropriate counselling for a period to make sense of the losses she has suffered.

CARLA VAN VEENENDAAL

ACTING JUDGE OF THE HIGH

COURT, GAUTENG DIVISION,

PRETORIA

FOR THE STATE : ADV. S SCHEEPERS

FOR THE ACCUSED : ADV. M MONARENG

DATE OF JUDGMENT : 22 JUNE 2022

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Prepared on 9 October 2026 · Esheria