

SOUTH AFRICA / JUDGMENT

S v Moleleki (37/2020) [2021] ZAFSHC 19 (29 January 2021) [2021] ZAFSHC 19

COURT

Free State High Court, Bloemfontein

BEFORE

M A Mathebula

CASE / FILE NUMBER

37/2020

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 37/2020

In the matter between:

THE STATE

and

TEBOHO TSHEPO MOLELEKI

ACCUSED

SENTENCE BY: MATHEBULA, J

DELIVERED ON: 29 JANUARY 2021

- [1] Both counsel made impassioned submissions why this court should impose particular sentences for the crimes that the accused has been convicted of. The State Counsel is of the view that sentences of fifteen (15) years imprisonment for charge number one (1) and life imprisonment for charge number two (2) should be imposed. Defence Counsel argued that a cumulative sentence of eighteen (18) years imprisonment is the appropriate punishment. Both are ad idem that whatever sentences are imposed, they must run concurrently because they arise from the same set of facts. I agree with them.

[2] It is trite that the court imposing a sentence must exercise its discretion properly and judicially. Such sentence must be balanced between the interests of society, the offence and personal circumstances of the accused. In this matter the accused has been convicted of offenses that the Legislature has ordained minimum sentences. It is the law that a court can only deviate from imposing such minimum sentences if there are substantial and compelling circumstances.

[3] The mitigating factors that were submitted by defence counsel are as follows:

(i) The accused was born on 3 December 1991 meaning he is 29 years old. He is the eldest of two (2) children.

(ii) No submissions were made about his marital status and whether he has any dependants. It is safe to assume that he is unmarried with no children.

(iii) He had a normal upbringing with good academic and sporting achievements. His academic excellence earned him leadership positions at school. As a result of his sporting prowess he was selected to take part in provincial teams.

(iv) His highest scholastic achievement is a Higher Certificate in Business Principles obtained from Varsity College in 2014.

(v) He has been a productive member of society in that he was in gainful employment until he became self-employed.

(vi) He stands before the court as a first offender.

(vii) He has been in custody since July 2019 awaiting trial.

[4] On the other hand the aggravating circumstances are the following:

(i) The accused took away the life of a person who was a breadwinner. The deceased was taking care of his parents and siblings.

(ii) He took away a young life for whom the best was still to come.

(iii) The accused lured the deceased into his trap, robbed him of the motor vehicle and killed him.

(iv) The accused perpetrated the crime in a cold blooded manner. Having killed the deceased, he took steps to conceal his body and bury it in the most denigrating manner.

(v) The accused has not shown remorse. Even at this late hour, the accused has not owned up to his dastardly deeds.

- [5] In *Bailey v S*[1] the court said the following: “The most difficult question to answer is always: What are substantial and compelling circumstances? The terms are so elastic that it can accommodate even the ordinary mitigating instances”. All I am prepared to say is that it involves a value judgment on the part of the sentencing court. The learned Bosielo JA referred to para 22 in the celebrated judgment of Marais JA in *S v Malgas*[2] The paragraph reads as follows:
- “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.”*
- [6] In *S v Kruger* 2012 (1) SACR 369 (SCA) Shongwe JA stated that “punishing a convicted person should not be likened to taking revenge. It must have all the elements and purposes of punishment, preventing retribution, individual and general deterrence and rehabilitation.” This is a confirmation that every sentence must have an element of mercy in it. In *S v V* 1972 (3) SA 611(A) at 614 D Holmes JA emphasized that “the element of mercy, a hallmark of civilized and enlightened administration, should not be overlooked.”
- [7] In this matter, the accused person is a fairly young person whose one lapse of judgment brought dire consequences. Obviously not only to himself but to the family of the deceased. He comes before the court as a first offender and no history that he has propensity for violence. There is no doubt that he has committed heinous crimes and the interest of this society is that such people must be removed from them. This court ventures to say that it should be the case until the accused person is rehabilitated.
- [8] The accused is a candidate to be considered for rehabilitation given his track record and that he has the potential to be a useful member of the society. There is also no evidence that in perpetrating the offences, sheer brutality was the order of the day. In the robbery of the motor vehicle, it was found the same day with no damages reported. Furthermore, it cannot be ignored that he had spent some substantial time in custody, awaiting his trial.
- [9] It is the considered opinion of this court that there are substantial and compelling circumstances to deviate from imposing the minimum sentences. However, a cumulative sentence of long term imprisonment must be imposed to achieve the core purpose of the punishment. This court is acutely aware that whatever sentences are imposed will not necessarily be palatable to all kith and sundry. However, this court is convinced that these sentences evokes the notion of basic fairness and justice applicable to all parties to the case.
- [10] The sentences imposed on the accused are as follows:

10.1 Charge 1 – Robbery with aggravating circumstances – The accused is sentenced to thirteen (13) years imprisonment.

10.2 Charge 2 – Murder – The accused is sentenced to twenty (20) years imprisonment.

10.3 It is further ordered that the sentence imposed on charge 1 will run concurrently with the sentence on charge 2. The effective term of imprisonment is twenty (20) years.

10.4 Further, in terms of section 103 of Act 60 of 2000, the accused is declared unfit to possess a firearm

M. A. MATHEBULA, J

On behalf of the State:

Adv. L. B. Mpemvane

Instructed by:

Director of Public Prosecutions

BLOEMFONTEIN

On behalf of Accused:

Adv. J Nel SC

Instructed by:

N S Letsela Incorporated

BETHLEHEM

[1] 2013(2) SACR 533 (SCA) at para 21

[2] 2001 (1) SACR 469 (SCA) at para 22

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