

SOUTH AFRICA / JUDGMENT

S v Mongale (Sentence) (K/S4/2023)

[2024] ZANCHC 67 (31 July 2024)

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COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

K/S4/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: K/S4/2023

Reportable:

YES / NO

Circulate to Judges:

YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

and

WILLIAM MONGALE

ACCUSED

Heard on: 29/07/2024

Delivered on: 31/07/2024

Summary: This is the judgment on sentence. On 2 May 2024 the accused was convicted on two counts: Count 1: Assault with intent to cause

grievous bodily harm; Count 2: Murder with dolus directus as the form of intent.

ORDER

- (a) In respect of count 1: assault with intent to do grievous bodily harm, the accused is sentenced to 12 months imprisonment.
- (b) In respect of count 2: murder, the accused is sentenced to 18 years' imprisonment.
- (c) The sentence in respect of count 1 is ordered to run concurrently with the sentence in count 2 as well as the already imposed sentence of 3 years imprisonment which the accused is currently serving.

JUDGMENT ON SENTENCE

MAMOSEBO J

[1] The accused was convicted of assault with intent to do grievous bodily harm and murder with dolus directus as the form of intent. I do not intend to repeat the details of the incident as they appear from the judgment on the merits.

[2] This Court has a discretion to impose an appropriate sentence. I am mindful that the discretion must be exercised properly and reasonably. The often-quoted case of *S v Zinn*[1] enjoins the courts to consider the seriousness of the crime, the personal circumstances of the accused and the interests of the society. Beyond the triad of *Zinn*, the courts must consider the purposes of punishment that has to do with the interests of society, which are, deterrence, prevention,

rehabilitation and retribution.

[3] In *R v Karg*[2] Scheiner JA, writing for a unanimous court, made these salutary remarks:

‘While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. 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] Holmes JA declared the following in *S v Rabie*[3]:

‘Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.’

What it boils down to essentially is, in my view, a consideration of all the relevant facts, factors and circumstances, maintaining a fair balance where all the factors are afforded their due weight according to the facts of the case.

- [5] The following are the personal circumstances of the accused as presented by his counsel, Mr Steynberg, from the Bar. He was born on 1 September 1991, and is currently 32 years old. He is unmarried with one child aged 10 years. Before his incarceration he resided with his family in Warrenton. He worked at Aqua Farms for 14 years and earned R3 800 per month. His highest academic attainment is Grade 6. He was arrested on 26 October 2022 and has been in custody for an uninterrupted period of one year and nine months. Mr Steynberg submitted that the period that the accused spent in custody is a factor to be considered by the court in assessing an appropriate sentence.
- [6] The accused has previous convictions and is currently serving a sentence of three years direct imprisonment for assault with intent to do grievous bodily harm. On 28 June 2010 he was convicted of the following:
- (i) robbery, (ii) unlawful possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2000 and (iii) housebreaking with intent to steal and theft. Counts (i) and (ii) were taken together for purposes of sentence and he was sentenced to 18 months imprisonment, wholly suspended for a period of three years on specified conditions. In as far as (iii) is concerned, a sentence of 18 months imprisonment was imposed in terms of s 276(1)(i) of the Criminal Procedure Act.[4] On 18 November 2013 he was convicted of contravening s 4(b) of Act 140 of 1992 and was sentenced to R500 or 30 days imprisonment wholly suspended on specified conditions. On 29 May 2019 he was convicted of assault with intent to do grievous bodily harm and was sentenced in terms of s 276(1)(h) of the Criminal Procedure Act.[5]
- [7] Mr Steynberg presented the following in mitigation of his sentence:
- (a) that the accused was engaged in an argument with the deceased who was armed with a knife; (b) the deceased was aggressive towards him; and (c) even though the extent to which the alcohol affected the accused was not determined, it did play a role.
- [8] In as far as count 2 of murder is concerned, it was submitted on behalf of the accused that the accused's personal circumstances coupled with the fact that he was in an argument with the deceased who had a knife in his hand as well as the fact that he was in custody for a period of one year and nine months should serve as substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of fifteen years imprisonment for murder. Pertaining to count 1 of assault with intent to do grievous bodily harm, counsel submitted that the fact that there were no serious consequences as a result of the assault, in that, the complainant merely sustained an injury which resulted in a scar of less than 1 cm, a non-custodial sentence would be appropriate.

[9] Ms Mafunisa, counsel for the State, handed in by consent three Victim Impact Statements of Lerato Rosy Lukang, the deceased's elder sister, Lebogang Lukang, his elder brother and Nthabiseng Lukang, his younger sister. Four of the six siblings survive the deceased. Lerato was the most traumatised having lost their parents in a motor vehicle

accident in October 2020 which left them orphaned. The following year in 2021 their elder brother was shot and killed.

Despite the deceased not being permanently employed, he subsisted on scraps of diverse employment from which he could contribute

financially towards the welfare of his siblings. The deceased also assisted with household responsibilities like the general maintenance

of their parental home, fixing appliances, doing the garden, helping the young ones with their school work and administering their

father's financial affairs until his death in 2022. Since his passing the siblings have not received their father's financial contribution. Lerato's behaviour was evidently adversely affected by his passing and she had to receive medical treatment for it. Lebogang is experiencing loneliness as a result of the loss of his younger brother. Nthabiseng misses the deceased's peaceful and caring nature and wonders whether the tragic death could have been avoided had she accompanied him on the fateful day. It is evident from their statements that the deceased played a meaningful role in their lives.

[10] Ms Mafunisa submitted the following as aggravating circumstances: No argument between people should result in a loss of life. The area on the body where the deceased was stabbed is vulnerable and did not leave any room for survival. The complainant in the assault case fell victim whilst trying to intervene between the deceased and the accused as the accused was determined to get to the deceased. According to Dr Kanaomang, the medical pathologist who conducted the post mortem on the body of the deceased, states that the deceased must have struggled to breathe after the stabbing as he had sustained

internal bleeding. Counsel submitted that the personal circumstances of the accused ought to recede in the background as enunciated in Vilakazi.[6]

[11] The deceased was 25 years old when he met his death. His family must have had expectations of a bright future for him. He played a significant role in his family who were dependent on him for their functionality. The motive of the accused's killing is unknown. Despite intervention the accused aggressively pursued the deceased and stabbed him fatally and also injured the complainant, Neo Molatedi, who was in the process of intervening. The two offences of murder and assault with intent to do grievous bodily harm are rife in the province. Even though the accused's counsel submitted that

the previous convictions are old, Ms Mafunisa submitted that they infringed on the other person's bodily integrity, security and the right to life which is constitutionally entrenched. The previous convictions of robbery and assault with intent to do grievous bodily harm are illustrative of the violent nature of the accused when viewed against the current offences.

[12] Ms Mafunisa refuted the submission by the defence that this court must find the existence of substantial and compelling circumstances, maintaining that there was nothing in the submissions warranting a deviation from the prescribed minimum sentence. Counsel urged this court to consider a period not less than 20 years' imprisonment for the offence of murder and three years imprisonment for assault with intent to do grievous bodily harm.

[13] It is necessary to deal with the contentions that the deceased was aggressive and armed with a knife as factors in mitigation of sentence. Evidence before this court was that the deceased was holding a 200ml bottle of Old Buck Gin and a closed okapi knife pressed against the bottle during the argument but he never produced the knife nor placed the accused in any imminent danger. There is also no evidence of aggression on the part of the deceased. The claim by the accused that the deceased was aggressive is clutching at straws and fabricated. It can never serve as a mitigatory factor under these circumstances.

[14] Mr Steynberg further urged this court to consider that alcohol played a role in the commission of the offence. Counsel correctly submitted that the extent to which the alcohol had affected the accused was not determined. He, nevertheless pleaded with the court to consider the effect of the intake of alcohol when imposing sentence. In this regard the pronouncements by Holmes JA in *S v Ndlovu*[7] are relevant:

'Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness (see sec. 350 of the Code) as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design. In the result, in seeking a basic principle in regard to intoxication and extenuation in murder cases, it is neither necessary nor desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence one is weighing the frailties of the individual with the evil of his deed.'

[15] In the case before me, regard being had to the facts of this case, the consumption of alcohol coupled with the accused's utterances of the previous evening that he was going to kill someone, can only weigh as an aggravating factor because it enabled him to carry out the senseless killing.

[16] The crimes for which the accused was convicted arose at a tavern which is a public environment and to which everyone above the age of eighteen years has access. Unfortunately, in this instance, there were minors who were exposed to the commission of

these crimes because they are used to loitering around outside the tavern. This is a social ill that bedevils our society and damages young minds. For the accused to have uttered as he did, in the presence of the minor witnesses, that he was going to kill someone the following day, shows that a probability of a repetition of murder and or any other crime for that matter, was highly probable. In settings of this nature, to consider other forms of punishment other than deterrence and retribution as a purpose of sentence, would be fanciful. In any event, the accused has already benefitted from the other forms of punishment like correctional supervision and suspended sentences.

- [17] As to rehabilitation, the accused has already had his fair chance of a second bite to many cherries. As correctly pointed out by his counsel he has not felt the deterrent effect of a relatively long term of imprisonment and for this court to impose a non-custodial sentence will, in my view, overemphasise the accused's personal circumstances and under-emphasise the heinousness and moral reprehensibility of the crime of murder and violent crimes in general. I am further mindful of the primary focus of individualising the sentence of the accused despite the prevalence of the serious crimes that he has committed. The accused's personal circumstances pales into insignificance when weighed against the fact that he is facing a substantial term of imprisonment.
- [18] The Supreme Court of Appeal in *S v Matyityi*[8] cautioned that the sentencing options considered needs to be victim-centred. With the information of both the accused and the victim at hand, one is able to have a balanced approach to sentencing which would enhance proportionality rather than harshness when sentencing the accused.[9] The death of the deceased left his family traumatised. The complainant, Neo, also deserves justice. There was no ground of justification for the murder and the assault on Neo.
- [19] In as far as the offence of murder is concerned, the factors raised by the accused's counsel are but personal and mitigating circumstances. I could not find any substantial or compelling circumstances to deviate from the prescribed minimum sentences. In striving to achieve the right balance or a more proportional sentence which meets the societal demands, the seriousness of the offence and is not unfair to the accused, my consideration is predicated on the fact that 15 years imprisonment is a prescribed minimum sentence and does not limit this court's sentencing jurisdiction of life imprisonment irrespective of the prescribed minimum sentences.
- [20] The accused has been incarcerated for an uninterrupted period of one year and nine months. On the murder count, if 20 years imprisonment was the appropriate sentence then the terms of my order are adapted to take into account the period of incarceration awaiting trial. It would therefore mean that the appropriate sentence for murder would be 18 years imprisonment.

- [21] In as far as the offence of assault with intent to do grievous bodily harm is concerned, it is not about the injury sustained or that the complainant deemed it unnecessary to lay charges against the accused, but the object used, the area of the body aimed at and the intention that the accused had when causing that injury. It is about the interests of justice and respect for the law. Neo was actually fortunate that he lived to tell the tale. The duty remains with the courts to dispense justice and promote public confidence and respect for the rule of law.
- [22] On a conspectus of all the evidence, the submissions and all the authorities considered, the accused is sentenced as follows:
- (a) In respect of count 1: assault with intent to do grievous bodily harm, the accused is sentenced to 12 months imprisonment.
 - (b) In respect of count 2: murder, the accused is sentenced to 18 years' imprisonment.
 - (c) The sentence in respect of count 1 is ordered to run concurrently with the sentence in count 2 as well as the already imposed sentence of 3 years which the accused is currently serving.

MAMOSEBO J

THE HIGH COURT

For the State Adv E Mafunisa Instructed by: The Director Public Prosecutions For Accused: Mr H Steynberg Instructed by: Justice Centre, Kimberley

- [1] S v Zinn 1969
- (2) SA 537 (A)
- [2] R v Karg 1961 (1) SA 231 (A) at 236A-C
- [3] S v Rabie 1975
- (4) SA 855 (A) at 862G-H
- [4] S 276(1)(i)- imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.
- [5] S 276(1)(h) – correctional supervision
- [6] S v Vilakazi 2009 (1) SACR 552 (SCA) para 58
- [7] 1965
- (4) SA 692 (A) at 695C-E
- [8] S v Matyityi 2011
- (1) SACR 40 (SCA) at 48g
- [9] Matyityi para 17

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