

SOUTH AFRICA / JUDGMENT

S v Montsie [2023] ZAGPPHC 272; CC93/19 (28 April 2023)

[2023] ZAGPPHC 272

COURT

North Gauteng High Court, Pretoria

BEFORE

Msibi

CASE / FILE NUMBER

CC93/19

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: CC93/19

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

Date:

28 April 2023

THE STATE

versus

HERBERT

KGOPE MONTSIE Accused

JUDGMENT

MSIBI AJ

Introduction

[1] The accused, Herbert Kgope Montsie is indicted before this court on 10 charges. He is legally represented by Advocate F Joubert, while Advocate R Molokwane appears for the State. The charges were read out to him as follows:

[2] Count 1 Housebreaking with intent to commit robbery with aggravating circumstances, as intended in section 1 of Act 51 of 1977

Count 2 Robbery with aggravating circumstances as intended in Section 1 of Act 51 of 1977, read with the provisions of Section 51(2) and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997

Count 3 Murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997, in that the death of the deceased was caused by the accused after having committed robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 as well as the accused acting in the execution or furtherance of a common purpose.

Count 4 Attempted murder

Count 5 Attempted murder

Count 6 Attempted murder

Count 7 Attempted murder, was withdrawn by the State.

Count 8 Attempted murder

Count 9 Contravening Section 4(1)(iv), read with Sections 1, 103, 117, 120 and 121 and Schedule 4 of Act 60 of 2000 and further read with Sections 250 and 270 of the Criminal Procedure Act 51 of 1977 (unlawful possession of a prohibited firearm)

Count 10 Contravening Section 90(1), read with Sections 1, 103, 117, 120 and 121 and Schedule 4 of Act 60 of 2000 and further read with Section 250 of the Criminal Procedure Act 51 of 1977 (unlawful possession of ammunition)

LITIGATION HISTORY

[3] On 25 May 2021 before he could plead, the accused's attention was drawn to the provisions of Sections 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997 applicable to counts 2 and 3. regarding the prescribed minimum sentences and the fact that Count 7 was withdrawn by the state.

- [4] Upon such arraignment the accused pleaded not guilty to all 9 charges proffered against him. Advocate Joubert confirmed that the not guilty pleas were in accordance with his instructions.
- [5] The defence handed in written admissions which were received as formal admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977. The accused admitted the contents and correctness of these admissions, which were admitted by the court and marked Exhibit A, The admissions read as follows: -

“Count 1

That upon or about 19 October 2019 at 33 Reading Street , in the district of Evander , there was a housebreaking into the business premises of Telkom, and several items as per annexure A of the Indictment were taken at gun point.

Count 2

Upon or about the 19th of October 2019 at Reading Street in the district of Evander, one Themabela Tshotana was unlawfully and intentionally assaulted by a group of armed men and several items in his lawful possession and of Telkom were taken from him. The aggravating circumstance being that a firearm was used during the robbery.

That the deceased is Chester Mmakgoropedi Ramaila, who died on 19th of October 2019 as a result of injuries that he sustained at or near Solomon Mahlangu Drive in the district of Pretoria.

The deceased sustained no further injuries after sustaining the initial injuries until an autopsy was performed on 22 October 2019.

Dr Ryan Blumenthal, a senior specialist performed a post mortem examination on the body of the deceased on the 22nd of October 2019, his findings as recorded in the form GW7/15 were admitted by consent as Exhibit B. The facts and findings of the post-mortem report including the cause of death in Exhibit B are true and correct.

On 19 October 2019, Captain Thierry Werner Beheydt, a photographer, draughtsman, forensic field worker and finger print expert attached to the Criminal Record and Crime Scene Management in the local Criminal Record Centre Pretoria, attended the scene of crime.

Captain Beheydt condoned the scene, made scene observations, and took pictures, prepared sketch plan and collected forensic exhibits which he forwarded to the Forensic Laboratory for analysis.

Captain Beheydt compiled a photo album, computer sketch plan and key to forensic exhibits.

The correctness of the contents of the affidavits, photo album, computer sketch plan and key to forensic exhibits compiled by Captain Beheydt is not disputed”.

- [6] The document was admitted into the record by consent as Exhibit C.

BACKGROUND OF THE STATE'S CASE:

- [7] In proving its case, the State called 6 witnesses who testified under oath in relation to count 1, 2, 3, 4, 5, 6, 7 and 8 and were subsequently cross-examined by the defence. After the evidence of the sixth witness the matter was postponed for further trial.
- [8] On 26 May 2021 the matter could not proceed since the accused was in default. A warrant was authorised for his arrest. He was rearrested in October 2022. On 4 April 2023, the matter was again on the roll for further trial. The accused through his legal representative changed his plea of not guilty in respect of counts number 2, 3, 9 and 10 to one of guilty. The change of plea was confirmed by the accused. Counsel handed up a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, which set out the plea explanation amplifying the guilty plea of the accused. He read into the record the statement, which was duly translated to the accused in the Sepedi language, being the language in which the accused elected to conduct the proceedings.
- [9] The accused confirmed the correctness of the contents of the statement and that it was indeed his statement. He also confirmed that the signature appearing on the statement was his own. The statement was admitted as Exhibit E.
- [10] Counsel for the State, confirmed that the statement of the accused was indeed in accordance with the State's case as far as counts number 2, 3, 9 and 10 were concerned and on that basis the State accepted the accused's plea explanation.
- [11] I have considered the statement myself in relation to the plea that the accused has entered, the elements of the crimes and the alleged facts in the indictment. As it was held in *S v Brown* 2015
- (1) SACR 211 (SCA) the evidence already led by the state in this matter up to this stage is relevant to these proceedings. As such it has also been considered. Having done so, I am satisfied that the accused is admitting all the elements of the offences preferred against him on counts 2, 3, 9 and 10. Accordingly the accused is therefore and in accordance with his plea, found guilty as charged on counts 2, 3, 9 and 10 as charged.
- [12] The state closed its case in respect of the rest of the counts. Counsel for the defence called the accused to the witness stand to testify in his defence regarding the rest of the counts.
- [13] Mr Herbert Montsie testified under oath that on 19 October 2021 he was in the company of the deceased. After they had robbed the Telkom office they drove from the scene in the Telkom company car. He was the driver, while the deceased was a passenger. Members of the SAPS pursued them and fired shots at them. The motor vehicle capsized, they got out and fled. He was arrested and he learnt thereafter that his accomplice had passed as a result of a gunshot wound.
- [14] Under cross-examination by the State the accused maintained the fact that neither himself nor the deceased fired shots while being chased by the police. The defence closed its case.

- [15] As it was held *S v Brown* (supra) the court has to consider the evidence of the accused in the light of the evidence of State witnesses who testified in regard to the alleged shootout between the accused and the police.
- [16] Donovan Renier Blignaut, who is a sergeant in the SAPS, testified he was in the company of Sergeant Pretorius and Engelbrecht when they responded to the report concerning a stolen Telkom vehicle. He was the driver, while his colleagues were his passengers. While pursuing the motor vehicle, he used blue lights to alert the occupants of the motor vehicle to stop. The occupants of the motor vehicle fired shots at them. They also fired back. The driver of the motor vehicle lost control and the vehicle capsized. Two male persons ran out of the motor vehicle. They gave chase, and he managed to apprehend the accused, Mr Montsie. His accomplice passed on due to a gunshot wound.
- [17] The other witnesses Sergeant Pretorius and Sergeant Engelbrecht corroborated his evidence in all respects.
- [18] During arguments on the merits of the matter, the state conceded to the fact that the spent cartridges that were found at the scene were only those that were discharged from the police service pistols. A firearm was found at the scene close to the deceased, but no cartridges were found which were discharged from this firearm. There was also no gun powder residue on the accused but only on the deceased. As a result the state had no further address.
- [19] Counsel for the accused also addressed the court stating that the same way that spent cartridges that were fired by police, were found at the scene; cartridges that were fired by the accused or the deceased should have been found. The police vehicles would have been damaged to prove that there was exchange of fire.
- [20] In analysing the evidence of the state and the defence with regard to counts number 4, 5, 6 and 8, the court is mindful of the decision in *S v Trickett* 1973 (3) SA 526 (T) where it was held that the onus to prove the guilt of an accused beyond reasonable doubt rests on the State; if the accused's version is reasonably possibly true, the accused must be acquitted.
- [21] As correctly conceded to by the Prosecution and further argued by the defence, except for the oral evidence on record, there is no other evidence supporting the fact that the accused or the deceased fired shots at the police. Spent cartridges fired from the stolen motor vehicle during the chase, or damage to the police vehicles would have corroborated the version of the state witnesses. The accused's version is reasonably possibly true.
- [22] With regard to count 1 it was further conceded by the state that count 1 is actually a duplication of count 2. Count 2 which carries a minimum sentence of 15 years' imprisonment in respect of a first offender, in terms of section 51(2) of Act 105 of 1997.

- [23] It was further conceded by the state that the provisions of section 51(1) of Act 105 of 1997 are not applicable to count 3, since the accused has been convicted on the basis of *dolus eventualis*. The state argued that while acting in common purpose with the deceased, to commit the robbery, armed with a firearm the accused should have foreseen the consequences of his decision; which resulted in the death of his accomplice. Although the robbery was planned, the death of his accomplice was not planned by the accused.
- [24] Counsel for the accused was also in agreement with the submissions made by the state on counts 2 and 3. Counsel further argued that compelling and substantial and compelling circumstances exist with regard to count 2 which warrants a deviation from the prescribed minimum sentence, namely the fact that the accused is now remorseful, no-one was shot during the robbery, and no violence was perpetrated against any victim during the robbery.
- [25] As such the provisions of section 51(1) of Act 105 of 1997 are not applicable on count 3.
- [26] The court finds that the state has failed to prove its case beyond reasonable doubt in regard to counts 1, 4, 5, 6 and 8.

The accused is therefore acquitted on counts 1, 4, 5, 6, and 8.

SENTENCE PROCEEDINGS

- [27] Having been convicted on his plea of guilty, the state proved no previous convictions against the accused. Counsel for the accused addressed the court in mitigation of sentence from the bar. The State also addressed the court in aggravation of sentence.
- [28] In determining the appropriate sentence the court has to consider the personal circumstances of the accused, the nature of the crimes and the interests of society. The court has to impose a sentence incorporating the objectives of punishment, namely deterrence, prevention rehabilitation and retribution. As stated in *S v Holder* 1979 (2) SA 70 (A), an appropriate sentence entails that the demands of our times be taken into account, together with the mitigating and aggravating factors. In *S v Rabie* 1975 (4) SA 855 (A) at 862G it was stated that 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.
- [29] No sentence is appropriate in a particular case merely because it is customarily imposed in similar cases. Courts are expected to individualise sentences that are imposed so as to reflect the desired balance of the above mentioned factors.
- [30] The considerations mentioned above are affected by the provisions of Criminal Law Amendment Act 105 of 1997, which provides for the imposition of minimum sentences of imprisonment in respect count 2. The provisions of section 51 of this Act are peremptory. In *S v Malgas* 2001 (1) SACR 469 (SCA) at 481 the court remarked as follows:

“Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in specified circumstances.”

At para 476 the court further remarked as follows:

“... the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes, unless there were, and could be seen to be, truly convincing reasons for a different response.”

- [31] Section 51(3) allows the court to enquire into the existence or otherwise of substantial and compelling circumstances which would justify the imposition of a lesser sentence than the prescribed minimum sentence.
- [32] The accused did not testify in mitigation of sentence, Advocate Joubert addressed the court on his behalf on sentence from the bar. He stated among others that the accused is 40 years of age, married with four minor children. His wife is currently suffering from a mental condition that renders her unfit to single-handedly care for the children. His parents are involved in taking care of his children. At the time of his arrest he was running a small business, selling roasted chicken generating about R9 000 per month. As a sole breadwinner, he used this income to cater for the needs of his parents, wife and children.
- [33] In addition to these personal circumstances counsel submitted that the following constitute substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. Namely: that the accused has decided to change his plea of guilty to one of guilty out of remorse. He has decided to take the court into his confidence and accept responsibility for his wrongful conduct. On count 2 there is no victim that was traumatised, injured or shot at.
- [34] In aggravation of sentence counsel for the State submitted that the accused has been convicted on serious offences that attract minimum prescribed sentences. Not only are the offences serious in nature but also prevalent in this Division and country-wide. Violent crime is currently a cancer to our society. Housebreaking with intent to rob and robbery is a violent crime; same applies to the charges of attempted murder. Any offence that gives the impression that human life is cheap calls for harsh punishment. After committing the offence on count 2, the accused and his accomplice were chased by the police. Instead of surrendering to the law, they continued to flee until their motor vehicle capsized. The accused's accomplice Mr Makgoropedi Ramaila, died during the alleged exchange of fire between them and the police.
- [35] Count 2 is an offence that requires a certain measure of planning as it is not an offence that can be committed at a spur of a moment. The fact that a firearm was used confirms this fact.

[36] The recovery of the vehicle was as a direct result of the diligence of the members of the SAPS in responding to the crime committed. The other properties were never recovered, since some of the accused's accomplices, were never arrested. After the commission of the offence on count 2, when the accused and his accomplices were chased by police they did not stop or surrender to the police, they opted to lead a police chase that ended in fatal consequences. It was further argued by Counsel for the state the circumstances presented to the court on behalf of the accused do not amount to substantial and compelling circumstances but are ordinary circumstances.

[37] The court found that the circumstances presented on behalf of the accused do not amount to compelling and substantial circumstances that would justify a departure from the prescribed minimum sentence.

[38] As stated in *S v Matthee* 1971 (3) SA 769 (A), the purpose of the sentence is to deter offenders and other potential offenders from committing similar offences or crime in general. The sentence is also aimed at rehabilitating or reforming the accused. It was submitted on his behalf that he is already on the

road to rehabilitation, which is evidenced by the fact that accused decided to take the court into his confidence and enter a plea of guilty in respect of the four counts. It was further submitted by Counsel for the accused that this comes from a repentant heart, which is a sign of remorse.

[39] The sentence is also aimed at expressing the moral outrage of society against these particular types of offenses.

[40] Accordingly, the accused is sentenced as follows:

1. On Count (2) - 15 (fifteen) years imprisonment
2. On Count (3) - 10 (ten) years imprisonment.
3. On count (9) - 10 (ten) years imprisonment.
4. On count (10) - 2 (two) years imprisonment.

In terms of section 280 (2) of the Criminal Procedure Act 51 of 1977, the sentences on counts 3, 9 and 10 are ordered to run concurrently with the sentence on count 2.

The effective sentence is therefore 15 (fifteen) years imprisonment. The accused is declared unfit to possess a firearm. In terms of section 301(1) of Act 60 of 2000 no order is made to the contrary.

S. MSIBI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA.

Dates of hearing: 25 October 2021, 3, 4, and 6 April 2023

Delivery of judgment in court: 6 April 2023

Date of distribution of signed judgment: 28 April 2023

Appearances:

Counsel for the State: Adv. R. Molokoane

Counsel for the accused: Adv F. Joubert

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