

SOUTH AFRICA / JUDGMENT

S v Motaung and Another (SS54/2016) [2023] ZAGPJHC 1512 (20 November 2023)

[2023] ZAGPJHC 1512

COURT

South Gauteng High Court, Johannesburg

BEFORE

Siwendu

CASE / FILE NUMBER

SS54/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: SS54/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

In the matter between

THE STATE

versus

MOTAUNG LLOYD THATO

FIRST ACCUSED

And

MOKUBUNG MONKI DAVID

SECOND ACCUSED

JUDGMENT

[SENTENCE]

SIWENDU J

- [1] This judgment is in respect of the sentencing of the two accused. They were arraigned before this Court and convicted on 14 charges of
- (a) kidnapping; (b) two counts of robbery with aggravating circumstances; (c) house breaking with intent to rob, (d) two counts of murder; (e) attempted murder; (f) assault, (g) unlawful possession of fully automatic firearms; (h) unlawful possession of a 9mm parrabellum; (i) unlawful possession of 5.56 x45mm calibre Vector R4 Assault Rifle; (j) unlawful possession of ammunition and possession of explosives and (k) theft of a motor vehicle in respect of accused 1.
- [2] The court convicted the accused based on common purpose. It found that they were part of a group that hatched and participated in a deadly plan to rob Kariah Chemicals CC at Roodekop Industrial, Leondale. Two people died following a shooting of members of the South African Police Services (SAPS) by the armed robbers.
- [3] Their conviction is based on statements made by the accused to the police, accepted as admissible evidence following a trial within a trial. In addition, and independently of the statements, the court convicted them based on the DNA and ballistic evidence pointing to their presence, participation, and association with the fatal robbery incident at the scene. The ballistic test results of the R4 Rifle found inside the stolen BMW, driven by Accused 1 was linked to cartridges fired and found at the scene of the robbery. Moreover, despite a denial by Accused 1 that he knew Accused 2, and the denial by Accused 2 that he was with Accused 1 at the time of their arrest, DNA belonging to Accused 2, was found in a balaclava of the stolen BMW gathered at the time of their arrest. His presence inside the vehicle was confirmed by the arresting officers.
- [4] The security officer, Kabo John Letlotlo (Mr Letlotlo) employed to guard the premisses testified that he was kidnapped at the business premises and driven around in a white BMW. He was not assaulted or harmed. This evidence correlated with the statement by Accused 1. Accused 1 was part of the group responsible for kidnapping Mr Letlotlo from the gate of the premises and for driving him out of the way so the robbery could proceed unhindered. Accordingly, other than in respect of the stolen BMW, the accused were found guilty and convicted based on common purpose as aforesaid.
- [5] The Criminal Law Amendment Act 105 of 1997 (the Act) applies to the offences. At commencement of the trial, the State had expressed its intention to rely on the Act, if the accused were found guilty. They were warned of the consequences of the application of the provisions[1].

- [6] At the hearing of the proceedings on sentence, the accused did not testify in mitigation. It was submitted on behalf of Accused 1 that he regrets the loss of life caused by the incident. Accused 2, elected not testify in mitigation, instead applied for a reservation of certain questions of law, in terms of s 319 of the Criminal Procedure Act (CPA), a matter I return to later in the

judgment.

- [7] In considering a just and appropriate sentence, the applicable principles have been articulated in various decisions by the Courts. The starting point is the often-cited case and triad consisting of the crime, the offender, and the interests of society' in *S v Zinn*. [2] The court endeavours to strike a correct balance between the nature and seriousness of the offences, the personal circumstances of the accused and the interests of society. [3] In *S v Mhlakaza* [4], the Court nevertheless cautioned that sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed to appease a rightly indignant public.
- [8] In the present case, the court directed an investigation into the personal circumstances of the accused. It has the benefit of the pre-sentencing reports compiled by the probation officers, Mr Buthelezi and by Ms. Mabuyangwa in respect of accused 1 and 2 respectively. In addition, three victim impact reports were presented to the Court by Ms Budaza and Mr Ndobe in respect of Moswang's family and Mr Dlodlu, both of whom were killed at the scene. In addition, the court received a report from by Ms Thobejane in respect of Const Lerato Monyane who survived the shooting incident.

Personal Circumstance

- [9] Accused 1 has no previous convictions. He was born is the first born of three children and is 39 years of age. He was predominantly raised by his mother. His father worked in the mines and was the only source of support. He matriculated in 2003 and has had a checkered employment history post matric. He worked as a teller, an assistant driver and later as a driver, a merchandiser, a vehicle car parts salesman until he became self- employed in 2012, buying and selling cars. He took up gambling and could earn an estimated R20 000 from winnings per week.
- [10] Accused 1 has three children born in 2007, 2014 and 2016 from different mothers. He had been married by customary law, but the marriage ended in 2016. His last child was born of a different mother while he and the mother of the child were incarcerated. She has since been released from prison but left this child in the care of the deceased's mother. She has not returned.

- [11] The probation officer reported that his mother and brother were ‘shocked by the offences’ committed by Accused 1. They do not correlate them with his general behaviour. They described him as a person of a ‘good character’ who was responsible and had a good relationship with his family.
- [12] Accused 2, he is 47 years old and the first born amongst three children. His father died in 1989 when he was 14 years old. He had a good upbringing by his mother as a single parent. Even though he did not recall when he matriculated, Accused 2 reported that he enrolled for N6 in Marketing Management while detained at Leeuwkop Prison between 2007 and 2008. He is not a stranger to a life of crime and prison. Even though he grew up in Tokoza Township at the height of political unrest and violence, there was no correlation found between that exposure and his behaviour. He was not exposed to abuse. His parents moved him to Limpopo to protect him.
- [13] He has been married but divorced in February 2017. He and his ex-wife bought a house in Vosloorus where they lived until his arrest. There were two children from the marriage. A dispute emerged about the paternity of the other in the throes of the divorce. One of the children is deceased. He has one grandchild. He has had an unstable employment history between 2009 and 2010 as a packager, a taxi driver and later a taxi owner. He is survived by his brother as his mother, daughter, cousin, and maternal aunt have since deceased. The loss of immediate and significant family members significantly impacted him. He was diagnosed with depression and anxiety and insomnia, and at some point, received counselling and is reported to be on and off medication.
- [14] The State proved the previous convictions against Accused 2, namely - (a) robbery in terms of 51(2)(a) of Act 105 of 1997 (b) kidnapping and (3) possession of dangerous weapons committed in January 2003 in Vosloorus. He was sentenced to a term of imprisonment of 15 years for the robbery, 5 years for kidnapping and 1 year for the possession of dangerous weapon and was declared unfit to possess a firearm. He appealed against the conviction and the sentence. His conviction was confirmed on appeal, but the sentence was reduced from 15 years to 13 years, with all sentences ordered to run concurrently. On 24 April 2009, he was released on parole supervision which endured until 21 July 2017. On 27 April 2012, he was released on special remission of sentence 21 January 2015. He confirmed these convictions. The offences for which he is now convicted were committed either while the parole supervision conditions were applicable, alternatively within a few months after the special remission.
- [15] The report by the probation officer refers to other incidents of robbery in 2011 where he was involved. The State contends that he has tried to mislead the court about these incidents. The SAP69 states that the cases are pending against him. However, since there are no convictions, they are disregarded for the purposes of the sentence.

Victim Impact

- [16] Mr Ndobe filed a report after investigating circumstance of Mr Dlodlu, the security officer who died at the scene while responding to an alarm signal triggered by the robbery at the business premises. Mr Ndobe obtained an account from Mr Bongani Dlodlu. The deceased was his uncle. The rest of the family members refused to talk about the incident, indication that they were confused and hurt. The deceased was the sole breadwinner for his family and is survived by his mother and 5 children. The family lives in poverty and has been left destitute and traumatized by the death. They had to obtain support from the surrounding community to bury the deceased.
- [17] Ms Budaza presented the report in respect of Constable Moswang, the police officer who died in hospital approximately two months after the shooting incident. His customary law wife with whom he had two children is no longer in contact with the family. He is survived by his mother, three children, two sisters, a brother, and a cousin. His eldest son is in matric. The family did not want him disturbed by an interviewed, understandably as that would trigger him. Here too, the family had to borrow money from family members to cover some of the funeral costs. None of them are employed. They relied on the deceased for support. The deceased's mother lives off the social grant and support from one of the siblings. The deceased was "a leader, provider, supporter and protector" of his family. The family has been left with unresolved questions about the death and expressed a wish to engage the perpetrators. They expressed appreciation at being engaged by the courts.
- [18] Mrs Thobejane interviewed Constable Lerato Monyane who survived the shooting directed at the police vehicle by the assailants. She was on duty with Constable Moswang and had called for backup. The aggression of the accused towards the police officers left a lasting impression on her. The incident has had an emotionally devastating and lasting impact on her life and family. She had to receive treatment causing shortfall on her financial resources. She has become withdrawn, is less trusting of others and exhibits a disturbance which often impacts her ability to work. She resigned her employment and was unemployed for 18 months before she secured employment with the Ekurhuleni Metro Police.
- [19] At the trial. Mr Mosikatsana, the owner of the BMW stolen months earlier had informed the Court of the consequence arising from the high jacking of his vehicle when he was driven around in the boot of the car. That evidence still stands. Understandably, the victims and their families have been traumatised by what occurred.

The Law

- [20] There are two schedules to the Act which are applicable in this case. The first is Part I of Schedule 2 under section 51(1), and the second, Part II of Schedule 2 under section 51(2). Part I of Schedule 2 prescribes a minimum sentence of life imprisonment in respect of a murder conviction in certain circumstances. It reads as follows:

"The obligatory life sentence is to be imposed for murder when

- (a) it was planned or premeditated.

- (b) the victim was–
- (i) a law enforcement officer performing his/her functions as such, whether on duty or not; or
 - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977, at criminal proceedings in any court.
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
- (i) rape; or
 - (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977); or
- (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy."

[21] Part II of Schedule 2 prescribes, in the case of first offender, a minimum sentence of 15 years' imprisonment for, the offence of robbery where there are 'aggravating circumstances' Section 1 of the Criminal Procedure Act 51 of 1977 defines 'aggravating circumstances' in relation to robbery to mean–

- "(i) the wielding of a firearm or any other dangerous weapon;
- (ii) the infliction of grievous bodily harm; or
- (iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence."

[22] The offences for which the accused were convicted were a preplanned, well organised crime of a violent nature. The accused had access to dangerous explosives which they used to cause damage to property. They deployed the use guns and an assault rifle generally reserved for armed conflict. The actions fall squarely into the provisions of the Act.

[23] My assessment is that the attack was gratuitous and disproportionate to any disturbance or threat Mr Dlodlu's arrival at the premises may have posed. He was alone when the first shots were fired. It was before Constables Moswang and Lerato arrived. These police officers were not spared.

Substantial and compelling circumstances

- [24] The question then, is whether there are substantial and compelling circumstances warranting a departure from the prescribed minimum sentence and what those are. The starting point is court's decision and injunction in *S v Malgas*[5] that the specified sentences were not to be departed from lightly and for flimsy reasons is apposite in this case. With the same breath, as held by the court in *Director of Public Prosecutions, KwaZulu-Natal v P*[6], the court must also have regard to the main purposes of punishment, namely, 'it's deterrent, preventive, reformatory and retributive aspects.'
- [25] There is nothing compelling and substantial in the personal circumstances of the accused which would persuade the court to depart from the sentence. There aggravating factors have not `been mitigated by any plausible explanation from them. They have instead been met by silence, and as is evident from the record, persistence attempts to gridlock and stymie the consequences of the law. Over and above the death of innocent lives, police officers on duty, and who are responsible for safeguarding the whole community against lawlessness and crime, were attacked in the manner described at the trial.
- [26] Their life conditions are not unique and cannot be singled out as the reason for their behaviour. The probation officer found Accused 1's upbringing has no correlation with the current offence. Both accused have had children who have grown up with their guidance. The court was informed in so far as Accused 1 that the arrest will have a negative effect on his children. That is hardly a compelling circumstance nor a reason not to impose a custodial sentence[7]. Although Accused 1 'acknowledged' of the actions on the lives of the survivors of the deceased through his legal representative, he showed no remorse or a genuine consideration for the impact of the offences, and in fact failed to take responsibility for his actions. I agree with the findings by the probation officer that the prognosis for rehabilitation for Accused 1 is poor and, a sentence of direct imprisonment in terms of s 276 (1)
- (b) of the CPA necessary. Nevertheless, the court considers that he is a first offender.
- [27] The circumstances relating to Accused 2 stand on a different footing. The report from the probation officer indicates that Accused 2 anticipated the offences could attract what was referred to as a 'double life sentence'. He has a previous conviction involving robbery with aggravating circumstances, and a use of a firearm, which apart from the absence of murder is not too dissimilar to the current case. What is more is that from the observation of the court throughout the proceedings, Accused 2 lacks the ability to introspect and take responsibility for his actions. These qualities are in any event a foundational hallmark for capacity for remorse, which he wholly lacks. A second impression Accused 2 made on the court, is that he is hardened, lacks integrity, has no interest in the truth and is adept at creating confusion to exploit consequent loopholes for personal gain.

[28] The record of proceedings bears testimony to his (a) penchant to impugn all his legal representatives whenever it appeared from the evidence or the proceedings the shoe would pinch (b) change legal representation often (c) misrepresent the truth of his financial position and (d) impugn the court to engineer further delays or perception of irregularities.

[29] There are multiple offences arising from the same incident, which gave rise to separate convictions involving separate victims. The dicta in *Muller and Another v S*

[8] about the aggregate penalty in such a case is apposite that:

‘When dealing with multiple offences, a sentencing court must have regard to the totality of the offender’s criminal conduct and moral blameworthiness in determining what effective sentence should be imposed in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy and not a sledgehammer is the concomitant of justice.² And while a judicial officer must not hesitate to be firm when necessary “he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality”.³ In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence.’

[30] In addition, given the cumulative effect of the sentences, it is fitting that they be served concurrently to prevent the accused from undergoing an unjustifiably lengthy effective term of imprisonment. Section 280(2) grants me the discretion to direct that such sentences run concurrently. The accused were also found guilty of unlawful possession of fully automatic firearms, an assault rifle used in the robbery as well as live ammunition, the risk of a disproportionate sentence is apparent. Accused 2 is a second offender in this regard. On this score, I have had regard to the helpful analysis by the court in *S v Delport*.^[9] Although I do not depart from the prescribed minimum sentence given the use of the unlawful arms, I am of the view that the severity of the sentences will be ameliorated by an order that they be served concurrently, and where appropriate, considered together.

[31] Lastly, the time spent in custody awaiting trial enunciated in *Radebe and Another v S*^[10] is but a factor going ‘into the basket’ for consideration. The accused were arrested in September 2015, they pleaded in February 2018. Even though a substantial part of the delay was occasioned by Accused 2 and what in the view of the court was designed to frustrate the proceedings (dealt with in the conviction judgment), the Covid – pandemic which prevented the case from proceedings, contributed to part of the delay and must go into the reckoning of the period. For this reason, a period of 5 years will be taken into the reckoning for the purpose of computing the sentences imposed.

Reservations of Questions of Law

[32] As stated earlier, the second day of the proceedings on sentence, Accused 2 approached the court with an application for a reservation of certain questions of law in terms of s319 of the CPA. He informed the Court that he took advice from his inmates who advised him to make the application. The reason for the application is the court's refusal of a postponement during the trial proceedings, which refusal precipitated his application for the recusal of the Court. The grounds for the refusal are evident from the separate written judgment therein.

[34] Accused 2 also contended that the Court relied on hearsay evidence in dismissing his application for postponement. His constitutional rights as well as his rights to a fair trial were breached. I decline the application on the grounds that the application is not competent as such a question ought to have been raised during the trial or at conviction. I in addition found it misconceived. It is not based on a desire to vindicate legitimate Constitutional rights and must be considered in the light of his obstructive and dilatory conduct.

[35] In the result, the following order is made:

Accused 1 and Accused 2 are sentenced as follows:

- a. Kidnapping, being Count 1- 3 years imprisonment.
- b. Robbery with aggravating circumstances (Counts 2 and 4) and Housebreaking (Count 3) are considered as part of the same enterprise for the purpose of the sentence –
 - (i) Accused 1 is sentenced to 15 years.
 - (ii) Accused 2 is sentenced to 20 years.
- c. Murder in Count 5 and Count 7 (which shall include the assault in count 7)
 - (i) Accused 1 is sentenced to Life imprisonment in respect of each life in Counts 5 and 7
 - (ii) Accused 1 is sentenced to Life imprisonment in respect of each life in Counts 5 and 7
- d. Attempted murder in Count 6 - Both Accused are sentenced to 10 years' imprisonment.
- e. Unlawful Possession of fully automatic firearms R4 Assault Rifle in Count 8, the parrabellum Calibre CZ model 75 semi- automatic pistol, being Counts 8, 9 and 10 are considered together for the purpose of the sentence.
 - (i) Accused 1 is sentenced to 15 years' imprisonment.
 - (ii) Accused 2 is sentenced to 20 years imprisonment.
- f. Unlawful possession of ammunition being 5.56mm x 39 calibre ammunition (live rounds) and 9mm parabellum (live rounds) without a license in Count 10 as well as possession of 70 x 5.56 39 cartridges in Count 13 are considered together for the purpose of the sentence.
- g. Possession of explosives in Count 14

- (i) Accused 1 is sentenced to 5 years' imprisonment.
- (ii) Accused 2 is sentenced to 10 years' imprisonment.
- h. Sentences in (e), (f) and (g) above are ordered to run concurrently.
- i. Count 11 in respect of the theft of a motor vehicle from May 2015 to September Accused 1 is sentence to 5 years imprisonment.
- j. Sentences in (a), (b) and (d) are ordered to run concurrently with the sentence in (i) above.
- k. A period of 5 years in which the accused were awaiting trial which also takes account of the delays caused by the Covid Pandemic shall be considered for the purpose of computing sentence.

NTY SIWENDU

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing: 09 October 2023

Date judgment delivered: 30 November 2023

Appearances:

Accused 1 Mr Makhubela

Instructed by: Bongani Zulu Attorneys

Accused 2: In person.

[1] . S v Ndlovu 2003

(1) SACR 331 (SCA)

[2] 1969

(2) SA 537 (A) ([1969] 3 All SA 57) at 540G

[3] S v Tshefu 2014 JDR 2359 (ECG)

[4] 1997

(1) SACR 515 SCA at 519 g

[5] 2001 (1) SACR 469 (SCA); (2001 (2) SA 1222 (SCA)

[6]

[7] S v M (Centre for Child Law as Amicus Curiae)

[8] [2012] JOL 28276 (SCA) para 10

[9] 2016 JDR 0491 (WCC)

[10] (726/12)

[2013] ZASCA 31 (27 March 2013) para 14

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