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SOUTH AFRICA / JUDGMENT

## S v Nkomo (158/2016) [2018] ZAGPJHC 47 (22 March 2018) [2018] ZAGPJHC 47

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COURT

South Gauteng High Court, Johannesburg

BEFORE

C K Matshitse

CASE / FILE NUMBER

158/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NUMBER:158/2016

DPP REF: JPV /16

Not reportable

Not of interest to other judges

Revised

22/3/2018

In the matter between:

THE STATE

and

MZIKAWUPHELI SENZI NKOMO ACCUSED

SENTENCE

MATSHITSE AJ

- [1] Mr Mzikawupheli Senzo Nkomo (Accused) have been convicted of three counts, count 1 being murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act 107 of 1997 (‘The Act), that is, it was planned, count 2 unlawful possession of a firearm also read with the provisions of Section 52(1) of the Act, and count 3 unlawful possession of ammunition. I must now impose sentence upon him.
- [2] After accused was convicted his attorney/counsel requested that the matter be remanded to enable the defence to obtain the Probation Officers report, the court then acceded to the said request. Upon resumption of the matter Counsel informed that court that the Probation Officer was unable to can compile the required report due to the fact that accused had refused to be interviewed, saying that he was wrongfully convicted and as such he wants the matter to be retried de novo before another Judge and also that accused did not want to give him instructions with regard to mitigation of sentence.
- [3] The Court made it clear to accused that, that it is his constitutional right not to speak to any person, and the Court cannot force him to give his legal representative instructions when it comes to mitigation of sentence, however the matter will be reminded for him to reconsider his position, more so he is facing a possible sentence of life imprisonment, and on the next appearance the matter will be proceeded upon with or without his mitigation on sentence
- [4] On resumption of the matter he again submitted a letter, which was read by his counsel into record and made Exhibit “J”, on the said letter he is still addressing the issues which the court had dealt with before his conviction, it had nothing to do with the sentencing stage.
- [5] After reading the said Exhibit “J” into the record accused came to testify in mitigation of his sentence, you testified to the affect that you are 28 years old, born at Graskop in the province Kwa Zulu-Natal, at school you went up to Grade 12, unmarried, but have one child, a boy, and at the time of your arrest the said child was only two months old and is residing with his mother. At the time of your arrest you were unemployed but you were selling cooked meat of cow head and you earned about R600,00 per week. You are a first offender
- [6] In aggravation of sentence the State submitted the Victim’s impact report which made Exhibit “K” it was compiled on behalf of the deceases sister Ms Xolile Ngema, of which among others it stated that, she was shocked after hearing of the news of the passing of his brother. They are unable to can attend court because they fear accused as they have been informed that accused is a dangerous man.
- [7] Deceased was a good person and a breadwinner at their home. Since his passing they are suffering, her mother suffered a heart attack as a result of the deceased passing, she is still not well. The deceased left five minor children and he was supporting them. I wish to refer to the case of *S v MATYITYI*[1] when it comes to consideration of the victim which states that
- [8] “By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully

a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. As Muller & Van der Merwe put it:

'It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of...violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse'.

[9] The Court, in imposing sentence, must have due regard to the facts of the case, and in addition thereto, must apply certain

well-established legal principles relating to the extent and magnitude of punishment. An awesome responsibility is thereby vested in the Court[2].

[10] The brief facts of this matter are that: -

[10.1] Messrs Phumlani Norman Majola (Majola), Muzi Magwaza (Magwaza) and Mthokozisi Mkhize (Mkhize), testified that they were all seated together with Mandla Mavela Mduli (deceased) and Mbuso Ntuli (who also has since passed on), at Majola's Shop number 2, situated at corner Plein and Bunket Streets Johannesburg.

[10.2] At around 18h30 and 19h00 two gentlemen entered the shop. One of them was accused, and he was in the company of one person who was light in complexion.

[10.3] Upon entering Magwaza greeted accused, since he knew him, and he wanted to give him space where he was seated on a bench together with Mr Mkize.

[10.4] That person, who was in the company of accused, pointed at the deceased and said "he is the one" accused then replied by saying "oohh I know this man, how can a beautiful man like you do such things?". All the witnesses spoke simultaneously and ask "what did he do?" The person who pointed out the deceased exited the shop immediately after pointing out the deceased

[10.5] At the same time accused then pulled out a firearm from his waist in the front of his pants and ordered them not to move. He then shot the deceased three to four times, the deceased tried jumping over the counter and he fell on to the other side wherein Majola was seated.

[10.6] Accused then retreated backwards, and exited the shop, at the same time, Magwaza tried following him and he ask accused what he was doing, accused raised a hand gesturing him to go away he then disappeared.

[10.7] Mr Ntuli was then rushed to hospital wherein he passed away.

[10.8] We do not know the reason why you had to shot and kill the deceased it is clear that it was a planned assassination.

[11] In determining an appropriate sentence, the court has regard to the personal circumstances of the accused, the nature of the crime, and the interests of society. In appropriate circumstances a court will also exercise a measure of mercy to the accused[3].

[12] In Hiemstra-Criminal Procedure book Services issue 2 at page 28-5 the following is said about sentencing “Now it is the judicial officer’s difficult task to determine fairly the accused’s

fate. While it is still part of the trial and consequently subject to the general provisions there anent, the process of sentencing is of a different nature: (a) it is not a clinical exercise as that of determining the merits; (b) there are no demarcated points in dispute and formal satisfaction of burdens of proof; (c) impressions are central, not fact; (d) it is possible to have regard to considerations which were irrelevant to the merits (such as, for instance, motive); (e) the person of the accused is specifically

considered, including his or her character and general conduct in life, not only the act in question; (f) it is mainly a probe in to the future, while in respect of the merits the court considered past conduct; and (g) a complex value-judgement must be made in which the four aims of punishment must be considered in conjunction with each other and with regard to the Zinn triad”

[13] It is commonly accepted that there are many purposes of sentencing. There is firstly, the desire to punish a person who is a wrongdoer who has offended against society and who has caused harm to the others. There is secondly, the intention to prevent the wrongdoer from committing such an offence again. This is the individual deterrence consideration that the wrongdoer, he or she will be deterred from engaging in actions which lead to or are themselves criminal. In the case of certain offences particularly those thought to be more frequently committed in society and more destructive of society there is the purpose of general deterrence. That is the purpose of sending a message to other persons that they should not engage in this kind of activity or wrongdoing and fourthly, there is the hope that whatever sentence is imposed can possibly lead to rehabilitation.

[14] The right to life is entrenched in the Bill of Rights of our Constitution. In terms thereof every individual, which includes you, is entitled to this right. Yet you showed no respect for the deceased’s right to life. You shoot him several times, you carried out a vicious and callous assault without regard to the consequences thereof and specifically you wanted to make sure that he is died. The post mortem, being Exhibit “B”, examination reveals multiple gunshot wounds: a perforating gunshot wound across the right side of the neck and left upper chest through the carotid and internal jugular veins on either side, a perforating gunshot wound across the left forearm, a perforating gunshot wound across the right thigh and a superficial gunshot wound across the left thigh.

- [15] Though the said firearm that you used was not recovered however you were seen by the witnesses when you shot the deceased. The other people who were in the company of the deceased were lucky that none of them were hit by any of the bullets that you fired.
- [16] It has become apparent that there is an increasing disrespect for the law. On top of this violent crime remains a serious and vexing problem in our society. The news media reports constantly and prominently on crimes of a violent nature. Often the public's reaction to such crimes is highlighted with calls for Courts to deal more harshly with the perpetrators of such crimes. Courts are alive to the interests of society and recognise they have a duty to protect the right of law-abiding members of society not to live in constant fear of violence whether against their person or property.
- [17] There is no serious crimes than the ones of which you have been found guilty of. Among others you have taken the life of another person and there is no possibility that any sentence imposed by this or any court can match the loss of Mr Mandla Mvela Ntuli of his continuing life.
- [18] In *S v C*[4] it was held that "society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes".
- [19] The community requires that serious offences must be punished in a suitable manner, it also acknowledges human frailties and in view thereof, that punishment must be meted out with mercy where it is deserved. "A judicial officer should not approach punishment in a spirit of anger because, being human, will make it difficult for him to achieve that delicate balance between the crime, the criminal, and the interest of the society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and pressure of society which contribute to criminality" See *S v Rabie*[5]
- [20] It is stating the obvious but it bears repeating that murder is the most serious of crimes. In wrongfully taking the life of the deceased your actions have impacted on the lives of the deceased's family, relatives and friends. They must now deal with the emotional trauma that his violent and premature death has thrust on them
- [21] The Act prescribes specific periods of imprisonment for certain crimes. In respect of murder that is premeditated or planned, count 1 in this matter, a sentence of life imprisonment is prescribed and with regard to count 2, that is, the unlawful possession of a firearm the provisions of section 51(2) of the Act prescribes a minimum sentence of 15 years imprisonment. A Court may however depart from the prescribed sentence if there are substantial and compelling circumstances that justify the imposition of a lesser sentence.

- [22] Are there any substantial and compelling circumstances from your personal circumstances or any other factor that this court can take as substantial and compelling in order that it can deviate from imposing the prescribed sentences one has to take guidance from the classic case of *S v Malgas*[6] which has stated that:

*“In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided. It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which could rank as substantial and compelling or those which could not. The best one can do is to acknowledge that one is obliged to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence which must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling. When justifying a departure, a court is to guard against lapses, conscious or unconscious, into sophistry or spurious rationalisations or the drawing of distinctions so subtle that they can hardly be seen to exist”. Therefore, after careful consideration of your personal circumstances I do not consider them to be substantial and compelling circumstances.*

- [23] When considering the factors relevant in each case, the court will seek circumstances to establish the measure of mercy the court must intermingle into the sentence. Remorse is important when the court must decide as to the degree of mercy to be applied when sentencing. True penitence is not mere expression that the accused is remorseful; but is an acceptance of his guilt and willingness to accept responsibility for his action and be punished. The Supreme Court of Appeal has recognised that remorse or the lack thereof may be taken into account in determining sentence. *S v Makhudu*[7] at para [7] where the Court stated: ‘[7] ..... the behaviour of an accused during the trial may be indicative of a lack of repentance or intended future defiance of the laws by which society lives and therefore be a relevant factor in considering

sentence .....’[8]

- [24] Throughout the trial you have not shown any remorse, instate you have caused delays, like after being convicted you requested the matter to be remanded in order that you can get the pre-sentencing reports, however when the Probation Officer came to you to interview you in order that he/she can compile the said report you bluntly refused to be interviewed, also being impossible when it was not necessary to do so, however this court was very patient with yourself and by making sure that you get a fair trial throughout the trial, however in this regard I have taken caution from the decided case of *S v Banda*[9] when it says:

"It is true, as Cicero says in his work on Duties bk 1 ch 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is true also that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity.

[25] However as much as the court has found that there are no substantial and compelling circumstances to deviate from the prescribed sentence but following upon what was further stated in the case of Malgas which said "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"

[26] And offering you a measure of mercy and hoping that you can still be rehabilitated, and not to close the door on your future or life, as it has been stated in several decided cases that even a harsh sentence, on a young person, cannot on its own rehabilitate him, I believe it is upon a person to show that he really wants to be rehabilitated. I have come to the conclusion that there are

justifiable reasons for imposing a lesser sentence of imprisonment as prescribed by the Act

[27] And further as it was stated in S v Banda that "merely to find that a crime is by itself serious without regard to its setting and its factual context, and thereby concluding that the crime committed by the offender is therefore also serious, is not appropriate, and may result in a serious misdirection. The court does not and cannot rely on a catalogue of crimes. To do so would result in a purely mechanistic approach, whereby the Court. In its judicial discretion, would fail to pay regard to the facts and circumstances of the particular crime"

[28] However the accused still need to be punished and the sentence that is to be imposed, that is by deviating from the prescribed minimum sentence of the Act, should not be too lenient, a fruit does not fall far away from the tree that is falling from, that is, one should not shy away from firmness when firmness is expected, or called for. The sentence still need to pass a message that this kind of offence shall not be tolerated and would scare away the would-be offenders, as it was stated in the case of S v WV[10] that

*"It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system. The sentences that our court impose when offenses of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would-be offenders"*

[29] In the result, after weighing up your personal circumstances, seeing that you are young 28 years of old and you are a first offender, and that you can still be rehabilitated and you can come back into the community being a better person and also after weighing the seriousness of the offence and the interest of society and all the relevant factors I find that the appropriate sentence that I can impose upon yourself is the following:

Sentence

Mr Nkomo is sentenced as follows: -

Count 1 – Murder planned - is sentenced to 20 years imprisonment

Count 2 – Unlawful possession of a firearm - is sentenced to 10 years imprisonment

Count 3 - Unlawful possession of ammunition- is sentenced to 6 years imprisonment

In terms of the provisions of section 280 of the Criminal Procedure Act 55 of 1977 it is ordered that sentences imposed on counts 2 and 3 are to run concurrently with sentence imposed on count 1.

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C K MATSHITSE

ACTING JUDGE OF THE HIGH COURT,

On behalf of the State: Adv Bayker

Instructed by: DPP

On behalf of the Accused: Mr Khumalo

Instructed by: Legal Aid South Africa

Date of Judgment: 22 March 2018

[1] 2011

(1) SACR 40 (SCA)

[2] S v BANDA AND OTHERS 1991 (2) SA 352 (BG)

[3] S v Zinn 1969 (2) SA 537 (AD) and S v Rabie 1975 (4) SA 855 (AD)

[4] 1996(2) SACR 181 (C)

[5] 1975

(4) SA 855 (A) on 866A-B

[6] 2001(1) SACR 469 (SCA)

[7] 2003

- (1) SACR 500 (SCA)
- [8] See further *S v Magoro and Others* 1996 (2) SACR 359 (A).
- [9] 1991(2) SA 352(B)
- [10] 2013 SACR 204 GNP
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