

SOUTH AFRICA / JUDGMENT

S v Qamba and Others (SS015/2016)

[2016] ZAGPJHC 226 (24 August 2016)

[2016] ZAGPJHC 226**COURT**

South Gauteng High Court, Johannesburg

BEFORE

M M Mabesele

CASE / FILE NUMBER

SS015/2016

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: SS015/2016****DATE:**

24 AUGUST 2016

In the

matter between:

THE STATE

And

QAMBA

NKOSINATHI & OTHERS

JUDGEMENT**ON SENTENCE****MABESELE, J:**

[1] The accused is guilty of murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997. He was a leader of a gang known as Mahlathika. Such a gang is described as a primary group whose members share some sense of belonging and have similar norms, values and expectations and are interacting with one another on a regular basis (for criminal purpose).[1]

[2] The Mahlathika gang is operating with other gangs at Bekkersdal in Westonaria.

- [3] On 19 October 2015 at about 16:00 the accused and his gang confronted a gang known as Tears of Pain. The deceased was a member of this gang.
- [4] The fight between the two gangs took place in Mandela section in full view of members of the public. The children were removed from the streets where they had been playing and put in their respective homes.
- [5] The deceased and his fellow gangster ran away from Mahlathika gang after they had realised that they were outnumbered. The deceased was chased and caught by Mahlathika gang as he ran into the premises of a house nearby. He was stabbed with knives several times on his body in full view of members of the public and was left on the premises of that house.
- [6] The accused was seen stabbing the deceased with an o’kapi knife on the fingers and ribs on the left side of the body.
- [7] A medico-legal autopsy examination, with death register no: 317/15, which was conducted on the body of the deceased revealed the following injuries:
- (i) 1cm wound to the left upper cheek bone.
 - (ii) 11cm wound to the right forearm above the right wrist at the back.
 - (iii) 8cm deep wound across the right hand dorsal surface across the index and middle fingers.
 - (iv) 2.5cm wound behind the small finger.
 - (v) 2.5cm wound below and behind the right knee on the side of the right lower leg.
 - (vi) 2cm wound 4cm below the left nipple.
 - (vii) 2cm wound 5cm behind the left nipple anterior axillary line
 - (viii) 5x2 cm wound to the left upper arm and 14cm below the left shoulder.
 - (ix) 2cm wound 10cm behind the left nipple.
 - (x) 1cm wound to the left upper chest mid axillary line 7cm below the nipple height.
 - (xi) 1.5cm wound behind the previous wound and 2cm wound 8cm below the previous wound.
 - (xii) Three stab small wounds to the left upper arm.
 - (xiii) Two stab wounds to the left arm.
 - (xiv) 2cm stab wounds to the left elbow.
 - (xv) Multiple superficial wounds to the left forearm.
 - (xvi) Skull fracture
 - (xvii) Stab wound between ribs 8 and 9 on the left lateral and two stab wounds between ribs 3 and 4 on the left chest anterior and a stab wound through rib left lateral.

[8] It is apparent from the injuries which were noted on the body of the deceased that the deceased was brutally murdered.

[9] The accused is a candidate for sentence to life imprisonment [2] unless substantial and compelling circumstances exist which justify a departure from the prescribed minimum sentence.

[10] In a well-known case of S V Malgas[3] it was said that if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render

the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. The court cautioned, however, that in doing so, 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.

[11] The accused is 22 years old. He was 21 years old at the time of the commission of the offence and was still attending school. He has previous conviction of theft, committed in 2013, and was sentenced to imprisonment for a period of 12 months which was suspended for 5 years on certain conditions.

[12] It was argued on his behalf that his age should be considered as a substantial and compelling factor which justify deviation from the prescribed minimum sentence. In this regard, I was referred to the matter of S V Nkomo[4] where the court considered youthfulness as one of the factors which should count in favour of the accused in mitigation of sentence.

[13] Counsel for the state argued, rightly, that the issue of age should be weighed against the crime committed and the interest of society.

[14] It is beyond dispute that the offence committed is serious in nature. The deceased was seriously wounded in full view of members of the public and was left bleeding to death on someone's premises.

[15] The investigating officer testified during trial that the acts of brutal murder, committed by gangs consisting of boys as young as 16 years old, are rife in the area of Bekkersdal. He said that the gangs are feared by the community of Bekkersdal and that boys belonging to these gangs are feared by their parents. It became clear from his testimony that the accused's gang consist of pupils.

[16] The investigation officer, assisted by other police officers, held several meetings with these gangs at the local police station and ordered them to desist from attacking and killing one another and instilling fear in the community and to disband. Their

orders

were ignored because the gangs, in my view, had already adopted a 'no retreat, no surrender' attitude.

[17] The community has a right to live in a peaceful environment.[5] There is no doubt that the rights of the community of Bekkersdal are being violated by horrifying activities of gangs which were formed by young people and joined by learners. I may add that the 'senior citizens' in that community and other communities are no longer enjoying respect which they rightly deserve from the young people. The phrase "hlompha moriri o moputswa" seems to have disappeared in thin air. The 'hay days' seem to have past when the young people greeted their elders with outmost respect in the streets when they walk pass them. In other communities a young person would literally kneel or sit on the ground, paying his or her last respect to the dead, when a cortege went pass him or her to the graveyard. Young people were not allowed to visit the graveyard unless they were in the company of elderly people. They would never expose their romantic relationship in public, particularly to the elderly people who were regarded as parents of every child, or to fight on someone else's property. The 'hays days' seem to have paved the way, regrettably, for unpleasant days when the young people rape, insult, rob and murder their elders. For instance in S V Vananda[6] the full bench confirmed life imprisonment sentence for murder of a frail 74 year-old man, committed by the appellant who was 21 years old. In S V Nkala [7], the accused, age 30, was sentenced to life imprisonment for robbery and murder of elderly women, ages 64 and 84 and in S V Thusi & Others[8] the accused, age 20, was sentenced to life imprisonment for rape of an elderly woman who was 84 years old. These stiff sentences serve as demonstration by the courts that they are committed in protecting the dignity of elderly people while at the same time promoting culture of respect among the young people.

[18] Stiff sentences should be imposed also, on learners who belong to gangs which they consider as a career. The purpose is to send a clear message to them that their barbaric behaviour that disturb public peace and smooth running of schools, by creating social disorder, will be met with full force and effect of the law and further that youthfulness in such circumstances will not

automatically be considered as a mitigating factor. Such sentences will serve as a deterrent to learners who intend joining gangs

instead of concentrating on education which is not paid for in certain public schools because it is funded by the government despite

its limited financial resources which are not utilised fruitfully by such leaners, particularly those who come from the disadvantage

families. It would be appreciated if advocates for 'free education for all' and student organisations could address the tendency by learners who abandon same education, which is already being offered in their schools, and engage in criminal activities

which they consider as their career.

[19] The accused fearlessly took the lead by stabbing the deceased with a knife on the ribs, paving the way for his fellow gangsters to assault him with all kinds of dangerous weapons all over his body. He first stabbed the deceased with a knife inside someone's

shack. Thereafter he was joined by his fellow gangsters when he chased the deceased as he ran into the premises of another person where he was stabbed to death. The accused and his gang clearly showed no respect to the owners of those properties and their families. It is clear from the evidence of Tshepiso Fihla that the accused was influential and commanded 'respect'

among his fellow gangsters. He is feared in the community. His gang was part of the gangs that defied the orders to disband which were given to them by the police. He demonstrated maturity regardless his age[9]. He has previous conviction. Considering these factors cumulatively, they outweigh the personal circumstances of the

accused. Therefore I am at large to impose the prescribed minimum sentence. The accused is a danger to the society.

Therefore he should be removed from the society, permanently, for the sake of public peace.

[20] In view of the above the following order is made:

1. The accused is sentenced to life imprisonment.

M.M MABESELE

(Judge of Gauteng Local Division)

Appearance on behalf of the state : Adv. Makua, instructed by the DPP,

Johannesburg

Appearance on behalf of the defence : Adv. Xaba, instructed by Legal Aid

Board Johannesburg

[1] See Schaefer R.T, Sociology, 12 edition (Mc Graw-Hill, New York) at

120. In the mine compounds such gangs were referred to as

'marasheya' They were assaulting people randomly at night in the townships wherein mines were situated.

[2] Section 51(1) of Act 105 of 1997 read with Part 1(d) of Schedule 2 makes provision for sentence to life imprisonment where the offence was committed by group of persons acting in the execution or furtherance of a common purpose

[3] 2001(1) SACR 469 (SCA)

[4] 2007 (2) SACR 198(A)

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- [5] Section 12 of the Constitution makes provision for freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources.
- [6] 2016(1) SACR 592 (WCC)
- [7] 2016, Unreported, (GLD) See, also Director of Public Prosecutions, Kwazulu- Natal V Ngcobo & Others 2009(2) SACR 361(SCA) .
- [8] 2012(1) SACR 423(SCA) See, also, S V AU 2014(2) SACR 91(GD) at 94; paragraph 14, where Mabuse J emphasises that where elderly, defenceless, unarmed and frail people become victims of crime, courts should robustly punish offenders.
- [9] See Director of Public Prosecutions, Kwazulu-Natal, supra
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Prepared on 12 October 2026 · Esheria