

SOUTH AFRICA / JUDGMENT

S v Ramodisa (CC89/2017) [2021] ZALMPTHC 4 (28 May 2021)

[2021] ZALMPTHC 4

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi

CASE / FILE NUMBER

CC89/2017

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INTHE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NUMBER:CC89/2017

THE STATE

versus

CARLTON MOLATELO RAMODISA

The Accused

JUDGEMENT

AML PHATUDI J

- [1] Carlton Molatelo Ramodisa is a convict following guilty verdict handed down for one count of murder read with the provision of section 51(1) of Criminal Law Amendment Act 105 of 1997 as amended (CLAA) and one of defeating or obstructing the administration of justice. Let me reiterate that at the commencement of the trial, I satisfied myself that the accused was fully aware of the application of the provisions of Section 51(1) of CLAA which is applicable in respect of the murder offence he is found guilty of. It must be remembered that the state relied on the said provisions on the basis that the offence was planned.
- [2] This court is empowered in terms of Section 51 (1) of CLAA to sentence a person who is convicted of murder as referred to in Part 1 of Schedule 2, notwithstanding any other law, but subject to subsection (3) and (6), to imprisonment for life when (a) “it was planned or premeditated”. During sentence proceedings, I enquired if the state is not as well relying on other provisions provided for in Part 1 of Schedule 2, to wit: ‘(b)

- (i) murder when the victim was a law enforcement officer performing his or her functions as such, whether on duty or not.’ Counsel for the state was left wanting. He reluctantly opined that the court may consider the said provision in that the deceased was a law enforcement officer at the time. Counsel for the accused submits in rebuttal that the state failed to stipulate the proviso in its indictment or at the time the charges were put to the accused. He opines that the state ought to have stipulated that in

its indictment to enable the accused to prepare for his trial. I cannot agree more.

- [3] This is perhaps an opportune time to indicate that Section 35 (3) (a) of the Constitution of the Republic of South Africa, 1996 guarantees that “every accused person has a right to fair trial, which includes the right to be informed of the charge with sufficient detail to answer it”. In *S v Legoa*[1] Cameron JA (as he then was) quoted with approval and translated the principle set by the Full Court in *S v Seleke* 1976(1) SA 675 (T) from Afrikaans where it was observed:

“To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State’s intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed.”

- [4] In *S v Ndlovu*, Mphati JA[2] (as he then was) echoed the principle set out in *Legoa* and stated that ‘the enquiry is whether on a vigilant examination of the relevant circumstances it can be said that an accused had had a fair trial’. Khampepe J sealed the principle in *Ndlovu v State*[3] that ‘at stake is the protection of a right guaranteed in the Bill of Rights – the right to a fair trial’. The principle set out in *Legoa*[4], *Makatu*[5] and *Ndlovu*[6] guarantees the right to a fair trial. Failure to stipulate in its indictment the provision of murder when the victim was a law enforcement officer performing his or her functions as such, whether on duty or not, bars the state from relying on it at this stage of proceedings. Even if the state would have relied on the said proviso, they would not have succeeded in that there is no evidence led that the deceased, when killed, was performing his function as law enforcement officer.

- [5] Section 51(3) (a) provides:

‘if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: ...’

- [6] This court is thus endowed with the discretion to impose a lesser sentence other than life imprisonment if satisfied that substantial and compelling circumstances do exist. This court is further empowered to determine if the existence of such substantial and compelling circumstances will justify the imposition of a lesser sentence. The onus is thus on the accused to prove existence of such substantial and compelling circumstances that may

persuade a court to enter those circumstances on the record of proceedings and to warrant imposition of a lesser sentence.

- [7] The accused may thus lead evidence to discharge the said onus. The evidence may be led in terms of the provisions of section 274 (1) of the Criminal Procedure Act 51 of 1977. The section provides, for ease of reference, that '[a] court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The evidence will thus bring to the fore, among others, (i) substantial and compelling circumstances; (ii) the seriousness of the offense; (iii) the personal circumstances of the offender and (iv) the public interest and/or the interest of the community, what the court must take into account when considering the appropriate sentence. It must, however, be born in mind that the State has a duty to begin in leading evidence in aggravation of sentence as provided for in terms of the section.
- [8] The accused enjoys legal representation. He places on record that he opts not to lead any evidence as envisaged in terms of section 274(1) of the CPA. The state takes the opportunity and calls one witness in leading evidence in aggravation of the sentence.
- [9] Madikana Kenneth Masia, an emeritus magistrate, who happens to be the uncle of the deceased, takes the witness stand. He testifies that the death of the deceased affected his extended family because the deceased was a bread winner. The deceased wife and two boys, both below the age of 12, are left destitute. He testifies that the slow grinding of the wheels of justice including the provisional withdrawal of the case exacerbated the family's ill feelings. He further says that the family will not accept any apology or a call for forgiveness from the accused because the accused had never accepted any responsibility for his actions to date. To show that the accused was never prepared to accept responsibility even from day one, he (the accused) went to a traditional healer for cleansing immediately after the occurrence of the incident. The police arrested him at the homestead of the traditional healer. Why forgive a person of such personality. He lastly says that the family will find closure if the sentence to be imposed be as prescribed by the law books.
- [10] The accused did not rebut the evidence led. He opted not to testify. His counsel places the accused personal circumstances on record from the bar and submits that this court must find that the accused is a first offender including his youthfulness as substantial and compelling circumstances. He opines that the court may deviate from the imposition of the minimum sentence prescribed and sentence the accused to 20 years direct imprisonment.
- [11] Counsel for the state rebuts. He opines that the factors relied on by the defence should not be recorded as substantial and compelling circumstances. He says that the principle set out by the Supreme Court of Appeal in *S v Malgas*, referred to as well by the defence, is that 'courts are required to approach the imposition of the sentence conscious that the legislature has ordained life imprisonment as the sentences that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances'. The court further held that the 'specified sentences are not to be departed

from lightly and for flimsy reasons’ on the one hand and that ‘all factors, traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is at the outset, excluded from consideration in the sentencing

process.’

- [12] It is trite law that when considering sentence, each case is to be determined on its own merits. Where the provisions of the CLAA are relied on, the court must satisfy itself that substantial and compelling circumstances do exist, which may justify the imposition of a lesser sentence than the sentence prescribed or that there are no such circumstances. In doing so, the court must consider cumulatively the evidence placed on record during mitigation and/or aggravation of sentence.
- [13] In *S v Malgas*[7] the supreme court of appeal held that the courts are required to approach the imposition of the sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification, be imposed for the listed crimes in the specified circumstances. I must emphasise that in *S v Vilakazi*, [8] the court held that: ‘It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo*, it is incumbent upon a court, in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of a particular case whether the prescribed minimum sentence is indeed proportionate to the particular offence committed by the convict.” It is worth mentioning the penned words of Nugent JA that “in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves immaterial to what that period should be, and those seems to me to be kind of “flimsy” grounds that *Malgas* said should be avoided.”
- [14] The court in *S v De Blasi* 1996 (1) SACR 1 (A) stated that ‘a callous murderer should not be punished too leniently lest the administration of justice be brought into disrepute.’[9] This was echoed in *Director of Public Prosecution, KwaZulu Natal v Ngcobo and other*[10] where the supreme court of appeal held that ‘Courts are expected to dispense justice. Courts are expected to send out clear messages that such behaviour will be met with the full force and effect of the law. The legislature is concerned and so too should we be.’[11] It is worth mentioning that in *Ngcobo*, the accused were young persons of the ages between 20 and 22. In setting aside the sentence of 18 years and replaced it with that of Life imprisonment, the court found that ‘speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously

not intended to qualify as substantial and compelling circumstances.’(emphasis added)

[15] It is common cause that the occurrence at JD, Roerfontein village, Morebeng District, Limpopo Province, where patrons had their convivial fun, ended up in a lethargic turmoil area. People dispersed and cooled off. The Jetta was first to leave the premises and later followed by the Taxi and Tazz. The female voices coming from the Taxi in which the accused was a passenger were heard saying “there it is- there he is”- referring to the Jetta and the deceased respectively, cannot be a justification for the accused actions of taking the life of the deceased in the manner he did. There is no evidence of any provocation whatsoever that led the accused to cause the death of the deceased in the manner he did including the utterance of the words “I have killed that dog”.

[16] It is not clear as to what was going on in the accused mind at the time. The evidence as it stands, demonstrate that the accused is a callous murderer. The accused action of causing a motor vehicle to run over the deceased was savage and brutal to say the least. Can he be punished leniently? I doubt that leniency should be spelt out in these circumstances. Nugent JA stated that once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves immaterial to what that period should be, and those seems to me to be kind of “flimsy” grounds that Malgas said should be avoided.”[12]

[17] Will it be a flimsy reason to enter “first offender” as substantial and compelling circumstance? I am afraid it will be. In Malgas referred to above, the court emphasised that “the specified sentences which are not to be departed from lightly and for flimsy reasons which could not withstand scrutiny are, among others, aversion to imprisoning first offenders, which were equally obviously not intended to qualify as substantial and compelling circumstances”. The assertion and submission

that the accused is a first offender cannot stand as a substantial and compelling circumstantial to be placed on record as such.

[18] Can youthfulness be of assistance to the accused? In *S v Matyityi*[13], Ponnan JA penned that ‘a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor

unless it appears that the viciousness of his or her deeds rule out immaturity. It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness.

The court further stated that ‘the young accused must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. The accused opted not to testify even after he has been warned of the consequences of not testifying. There is no evidence led that the accused was so immature to affect his moral blameworthiness. Youthfulness can thus not be recorded as a substantial and compelling circumstance that may warrant deviation from imposition of a lesser sentence than the prescribed imprisonment for life.

[19] Is the accused a candidate for rehabilitation? Rehabilitation is best facilitated through a holistic sentence planning process that engages the offender at all levels. It is premised on the approach that every human being is capable of change and transformation if offered the opportunity and resources. The onus is on the accused to prove that he is a human being capable of change if offered the opportunity. The first step the accused must prove is that he is remorseful of what he did. The accused did not show any remorse let alone genuine remorse as defined by Ponnann JA in *S v Matyityi*[14] where the following was said:

‘There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: (i) what motivated the accused to commit the deed; (ii) what has since provoked his or her change of heart; (iii) whether he or she does indeed have a true appreciation of the consequences of those action’. There is no evidence led to satisfy any of the three elements stipulated in the case. The accused opted not to lead any evidence to that effect. In fact, the evidence led proves the opposite. The accused sought refuge and cleansing by the traditional healer. What he did, in my view, is an action of a person who did not show any regret on his part let alone remorseful. I am afraid to attribute to the accused as a candidate for rehabilitation.

[20] The deceased was also subjected to what appears to have been a painful, brutal and undignified death. To be run over by a motor

vehicle to such an extent that a number of people who gathered at the scene were unable to push off the vehicle from the deceased body that was lying underneath as brought to the fore by evidence is, in my view, savaged. The communities and societies at large watch courts of law with critical eyes the type of sentences that are imposed on convicted persons who perpetrated the offence in the manner the accused did. What is left is for this court to impose a sentence as prescribed because this court is obligated to do so.

[21] With regards to the offence in count 2, both counsel are ad idem that 3 years direct imprisonment will be proportionate to the offence committed. All that remains is to pronounce the sentence.

ORDER

21.1 Count 1: The accused is sentenced to imprisonment for life

21.2 Count 2: The accused is sentenced to 3 years of direct imprisonment.

The sentence in count 2 is ordered to run concurrently with the sentence in count 1.

AML PHATUDI

JUDGE OF THE HIGH COURT

Deputy Director of Public Prosecutions

Limpopo Local Division: Thohoyandou: Adv. M.P Mudau

Legal Aid South Africa

Thohoyandou:

: Mr. N.R Rasivhaga

Heard

: 13 May 2021

Judgment

: 28 May 2021

[1] 2003 (1) SACR 13 (SCA)

[2] S v Ndlovu 2003 (1) SACR 331 (SCA)

[3] Ndlovu v The State

[2017] ZACC 19(15 June 2017)

[4] 2003 (1) SACR 13 (SCA)

[5] S v Makatu [2006] ZASCA 72; 2006 (2) SACR 582 (SCA).

- [6] Ndlovu v The State [2014] ZASCA 149 (SCA)
- [7] 2001(1)SACR 469(SCA)
- [8] 2010 1 SACR SCA
- [9] SvBlasi 1996 1 SACR 1 A
- [10] 2009 2 SACR 361 SCA
- [11] Page 367 at paragraph [26]
- [12]S v Vilakazi, 2010 1 SACR SCA
- [13] S v Matyityi 2011 (1) SACR 40 (SCA)
- [14] S v Matyityi 2011 (1) SACR 40 (SCA) para 13
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