

SOUTH AFRICA / JUDGMENT

S v Seilane (Ref 09/2018) [2018] ZANWHC 72 (23 November 2018)

[2018] ZANWHC 72

COURT

North West High Court, Mafikeng

BEFORE

A.M. Kgoele, D.I. Matlapeng

CASE / FILE NUMBER

Ref 09/2018

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST HIGH COURT, MAFIKENG

High Court Ref 09/2018

In the matter between:-

THE STATE

AND

THAPELO GREGORY SEILANE

REVIEW

JUDGMENT

KGOELE J.

- [1] This matter was sent for a special review of the proceedings in terms of Section 304(4) of the Criminal Procedure Act 51 of 1977 (CPA), by the Regional Magistrate, T. J. Melodi, Klerksdorp. The accused, Mr Seilane, was accused no. 2 in the trial before Magistrate Melodi. He was convicted of one count of Murder together with his friend, former accused no. 1 in the trial. He was sentenced to thirteen (13) years imprisonment in accordance with Section 77(5) of Act 75 of 2008 (the Child Justice Act), and the sentence was antedated by two hundred and twenty (220) days from the 9 February 2017, which was the date of sentence which was meted out at the Regional Court.
- [2] The Presiding Magistrate, when forwarding the record, requested this Court to review and reduce the sentence of the accused, as accused 1's fifteen (15) years imprisonment term was reduced to ten

- [10] years imprisonment on Appeal by the Full Bench of the Gauteng High Court Division. (appellant in the appeal of Mbuzeni Freddie Motaung, case number: A313/2017 North Gauteng High Court) The presiding Magistrate indicated further that a reduction of the accused's sentence would be in the interest of fairness as accused has a Constitutional right to equality before the law and equal treatment.
- [3] The matter first served before Matlapeng AJ who sent a query to the Presiding Magistrate regarding the proper application of Section 77 (1)(b) of the Child Justice Act. In his reply, the Presiding Magistrate indicated that he did take the Section into consideration, when sentencing the accused, but was of the opinion that the sentence meted out was just, and also cited reasons for that. The opinion of the Director of Public Prosecution was sought in this matter before a judgment could be made. The opinion was received by this office without any delay. It contained valuable comments and opinion for which this Court wish to express its sincere gratitude and appreciation.
- [4] As a background, the accused in this review proceeding was 17 years old when he committed the offence and 18 years old when he was sentenced. The evidence before the trial Court reveals that on 9 August 2014, the main state witness, Mr Lebogang Legatisho was in the company of accused 1, the accused and two other friends. As they were standing at the corner of the street, relaxing and chatting to one another, they were approached by the deceased who was clearly intoxicated. The deceased started swearing at them and made enquiries as to why they were all standing in an area which he regarded as his. He referred to himself as the "Shaela". They understood him to mean he was the boss of the tsotsi's of the street.
- [5] The deceased then became more aggressive by grabbing accused 1 by his clothes around his chest and refused to let him free. In retaliation, the two accused took out their knives which they were carrying and stabbed the deceased. The State witness was unable to say how many times the deceased was stabbed. The group then decided to walk away and in the process of doing so, the two accused ran back towards the deceased where he was standing at a gate and stabbed him again. The deceased tried to run away and accused 1 followed and tripped him whereupon the deceased fell to the ground. The post mortem report reflects that he sustained six stab wounds with one incision being inflicted on his chest area from which he bled to death.
- [6] It is apparent from the record of the proceedings that prior to sentencing the accused, the Presiding Magistrate considered the pre-sentencing report in respect of the accused, which was handed in into the record as Exhibit G. The Presiding Magistrate also took into account the mitigating factors placed before the Court during the address on sentence by the legal representative of the accused. However, the record reveals that the Presiding Magistrate failed to afford the State an opportunity to address the Court in aggravation or mitigation of sentence.

- [7] The record further reveals that the Presiding Magistrate found that the fact that accused was a member of one of the gangs called “Money Lovers”, and that he was carrying a knife which he was prepared to use at the slightest of provocation, amounted to aggravating circumstances in this matter. The Presiding Magistrate further remarked that both accused persons returned to the deceased after having stabbed him initially to finish him off.
- [8] The provision of the Child Justice Act are clearly applicable to the accused as he was 17 years of age when he committed the offence. The sentencing options available to a Child Justice Court are set out in part 2 of Chapter 10, Sections 72-79 of the Child Justice Act, and include a sentence of imprisonment which may be imposed in terms of the provisions of Section 77 of the same Act.
- [9] In addition to the above Sections, Section 69 stipulates that in applying the Child Justice Act a Court must adhere to ordinary theories relating to sentencing which are, deterrence, rehabilitation, prevention and retribution. The well known principles as laid down in the case of Zinn should also be taken into consideration. Further that, a Court should during sentencing stage, consider and address each of these objectives as set out in Section 68(1) of the Child Justice Act. Lastly and importantly in my view, the Court should use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.
- [10] In *S v N* 2008(2) SACR 135 (SCA), the Court held that:
- “Prison must therefore be a last resort. This bears not only on whether we choose prison as a sentencing option, but on the sort of prison sentence we impose, if we must. So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative”.*
- [11] Section 28(1)(g) of the Constitution states that, every child has the right ‘not to be detained except as a measure of last resort’.
- [12] I fully agree with the comments from the DPP’s office that in addition to the request made by the Presiding Magistrate that it will be in the interest of justice and fairness that the sentence of the accused should be reduced as well, there are more reasons which justify this Court in the circumstances of this matter to intervene. Amongst others the following can be cited:-
- The Presiding Magistrate did not state whether the Court did consider other options as set out in Section 69;
 - There is also no indication as to whether the Court considered or not other sentencing option as set out in chapter 10 and if not, the reasons for that;
 - The Court also failed to indicate in the record why, given the seriousness of the offence, a sentence of direct imprisonment was a measure of last resort and that it was the only appropriate sentence. The Presiding Magistrate only indicated this in the reply to the query by Matlapeng AJ;

- The Court also failed to give reasons why the sentence of thirteen (13) years imprisonment antedated to the time of arrest, was considered to be the shortest appropriate sentence;
- As already indicated above, the Court failed to afford the State the opportunity to address the Court on sentence;
- It also appears that the Court treated the two accused equally if regard is had to the fact that he dealt in length with the substantial and compelling circumstances, which in law were applicable to accused 1 only.

[13] It is no doubt that accused was convicted of a serious crime, a heinous crime of which the legislature has singled it out for severe punishment. This should however not outweigh the fact that he was still young when he was convicted; that the Child Justice Act is applicable to him in terms of sentencing; that he schooled up to Std 8, he was in custody since he was arrested; he did not have previous convictions and could still be rehabilitated and change his life inside prison where he will get a chance to attend therapeutic life skills and programs. An imprisonment of a shortest period of time would in my view be a more reasonable, balanced and justifiable term of imprisonment if regard is had to the triad of Zinn. I fully agree with the office of the DPP that his sentence should be reduced with five (5) years accordingly.

[14] The following Order is thus made:

14.1 The sentence imposed on accused 2 (Thapelo Gregory Seilane) is hereby reviewed and set aside;

14.2 The sentence imposed is replaced with the following:-

“Eight

(8) years imprisonment in terms of Section 77 (5) of Act 75 of 2008”

14.3 The sentence is antedated to the 4 July 2016.

A.M. KGOELE

JUDGE OF THE HIGH COURT

I agree

D.I. MATLAPENG

ACTING JUDGE OF THE HIGH COURT

DATED: 23 NOVEMBER 2018

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