

SOUTH AFRICA / JUDGMENT

S v Shabalala (SS004/2023) [2024] ZAGPJHC 88 (5 February 2024) [2024] ZAGPJHC 88

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

SS004/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: SS004/2023

1. Reportable: No
2. Of interest to other judges: No
3. Revised: No

5 February 2024

In the matter between:

THE STATE

And

SHABALALA SIFISO

ACCUSED

SENTENCE

DOSIO J:

Sentence

[1] The accused has been found guilty of murder read with the provisions of s51(1) of the

Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997') on count one, assault with intention to do grievous bodily harm on count two, attempted murder on count three, robbery with aggravating circumstances in respect to count 4, possession of an unlicensed firearm and ammunition on count five and six respectively and possession of a dangerous weapon, to wit a knife on count seven.

[2] For purposes of sentence, this Court has taken into consideration the personal circumstances of the accused, the seriousness of the offence for which he has been found guilty and the interests of the community.

The personal circumstances of the accused

- [3] The personal circumstances of the accused are that he is 28 years old. Both his parents have passed on. His highest level of education is grade ten, He left school when he was 17 years old. He then started doing odd jobs collecting plastic. At the time of his arrest he was staying with his girlfriend. The accused has a three-year old child. At the time of his arrest he was also receiving a rental income from rooms he let out. The accused is a first offender.
- [4] Although the accused did not testify in mitigation of sentence, his legal representative placed on record that the accused is remorseful about being in possession of a firearm on the day of the incident and that it was not his intention to kill anyone.

The seriousness of the offence

- [5] The deceased was killed in the early morning in a house where people were playing dice. It is clear to this Court that there was planning involved in this matter as the accused came to the shack earlier to ascertain how many people were in the shack and then returned 15 to 30 minutes later. Many cell phones were stolen and there is no evidence placed before this Court that any of the cell phones were returned.
- [6] Murder is the most serious of crimes. Not only does it end the life of a loved family member, but it leaves much hardship and pain for the remaining family members.
- [7] The crimes of attempted murder, assault with intention to do grievous bodily harm and robbery with aggravating circumstances are equally serious.
- [8] The State called the following witnesses in aggravation of sentence, namely, Beckam Leeuw and the deceased's mother, namely Josephine Busisiwe Mazibuko.
- [9] Beckam Leeuw, who is the complainant in respect to count three and four, stated that prior to this incident he used to play professional soccer, however, due to the gunshot wound, a metal sheet was fitted

where the bone of his thigh broke in two. As a result, he is no longer able to run or play soccer professionally. This has deprived

him of an income of R5500. This witness stated that the events of 31 July 2022 continue to haunt him because whenever he hears fireworks or load shedding occurs, it reminds him of the events that transpired on 31 July 2022.

[10] The witness Josephine Mazibuko testified that the deceased was her son. His death has left a terrible void in her life as he used to do a lot of things to help her which she cannot do on her own. She stated that the deceased was 25 years old when he was killed on 31 July 2022.

Interests of the community

[11] In respect to the interests of the community, this court has taken note of the fact that the community observes the sentences that courts impose and the community expects that the criminal law be enforced and that offenders be punished. The community must receive some recognition in the sentences the courts impose, otherwise the community will take the law into their own hands. If a proper sentence is imposed it may deter others from committing these crimes. Due to the fact that murder of helpless and innocent victims have reached high levels, the community craves the assistance of the courts.

[12] In *S v Msimanga and Another*,^[1] the Appellate Division, as it then was, held that violence in any form is no longer tolerated and our Courts, by imposing heavier

sentences, must send out a message both to prospective criminals that their conduct is not to be endured, and to the public that Courts are seriously concerned with the restoration and maintenance of safe living conditions and that the administration of justice must be protected.

[13] Section 51 (1) of Act 105 of 1997 dictates that if an accused has been convicted of an offence referred to in part 1 of schedule 2, he shall be sentenced to life imprisonment.

[14] Count four falls under the provisions of schedule 2 part 11 of Act 105 of 1997 and the minimum prescribed sentence is 15 years imprisonment applicable for a first offender of robbery with aggravating circumstances.

[15] Section 51 (3) of Act 105 of 1997 states that if any court referred to in subsection

(1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[16] The legal representative for the accused stated that the following are substantial and compelling circumstances not to impose the minimum prescribed sentences in respect to count one and four, namely;

- (a) the accused is remorseful and accepts his actions were wrongful;
- (b) he grew up in a disjointed family and his schooling was interrupted;
- (c) he is a first offender and spent 17 months in custody.

- [17] As stated in the case of *S v Malgas*,^[2] the Supreme Court of Appeal held 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.’^[3]
- [18] The accused had an opportunity to plead guilty at the inception of the trial, yet he maintained his innocence. Had he pleaded guilty to being in possession of a firearm at the inception of this case it would have saved much time to finalise this trial. The other aspects referred to in paragraph [16] *supra* are not substantial and compelling circumstances.
- [19] Notwithstanding the application of the prescribed minimum sentences this court has considered other sentencing options, however, direct imprisonment is the only suitable sentence as the accused acted with sheer brutality, together with his co-perpetrators, when he entered the shack of Jabu on 31 July 2022 in the early morning hours. Violence against innocent victims is a serious concern in this country.
- [20] This court cannot only consider the accused’s personal circumstances, but must also consider the interests of the community as well as prevention and deterrence. To focus on the well-being of the accused to the detriment of the interests of the community would result in a distorted sentence.
- [21] In the matter of *S v Matyityi*,^[4] the Supreme Court of Appeal held that:
- ‘Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming...one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons... As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences...Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s notion of fairness.’^[5]
- [22] In the case of *S v Matyityi*^[6] the Supreme Court of Appeal held that:
- ‘at the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor’.^[7]
- [23] The accused has been in custody for 17 months. In the case of *DPP v Gcwala*,^[8] the Supreme Court of Appeal held that the period in detention pre-sentencing is but one of the factors that should be taken into

account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the crimes committed. It was further stated in this case that the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crimes and whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence is a just one.

[24] This Court finds the sentence of life imprisonment on count one is a just sentence in the circumstances of this case, as well as the sentence of fifteen years imprisonment on count four. There are no substantial and compelling circumstances to depart for the minimum prescribed sentences on count one and count four.

[25] In respect to count one the accused is sentenced to life imprisonment. In respect to count two the accused is sentenced to five years imprisonment. In respect to count three the accused is sentenced to ten years imprisonment. In respect to count four the accused is sentenced to fifteen years imprisonment. In respect to count five the accused is sentenced to ten years imprisonment. In respect to count six the accused is sentenced to five years imprisonment and in respect to count seven the accused is sentenced to three years imprisonment.

[26] Due to the fact that the accused is sentenced to life imprisonment on count one, the remaining sentences on count two, three, four, five, six and seven will run concurrently with the sentence of life imprisonment on count one. In terms of section 103 of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date Heard:

2 February 2024

Sentence handed down: 5 February 2024

Appearances:

On behalf of the State:

Adv E. Moseki

On behalf of the Accused: Mr T. Mosea (Attorney with right of appearance)

[1] S v Msimanga and Another 2005 (1) SACR 377 (A).

[2] S v Malgas 2001 (1) SACR 469 SCA.

- [3] Ibid para i.
- [4] S v Matyityi 2011 (1) SACR 40 SCA.
- [5] Ibid para 24.
- [6] Ibid.
- [7] Ibid para 14.
- [8] DPP v Gwala (295/13) [2014] ZASCA 44 (31 March 2014).
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