

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

17/11/2015

CASE NO:A 246/2015

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~

19/11/2015

*[Signature]*

In the matter between:

THABISO KERNEELS MOKOENA

APPELANT

AND

THE STATE

RESPONDENT

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JUDGMENT

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MADIBA AJ

## **INTRODUCTION**

- [1] The appellant is a 26 year old man and a co-accused were convicted of murder after pleading guilty and sentenced to 20 years imprisonment. Appellant and co-accused were declared unfit to possess a firearm in terms of Section 103 of Act 60 of 2000.
- [2] Leave to appeal against sentence was refused by the court a quo. Appellant filed a petition application against the refusal of his leave to appeal against sentence.
- [3] His petition was successful and appellant was granted leave to appeal against the sentence imposed by the court a quo. The appeal is against sentence only.

## **FACTUAL BACKGROUND**

- [4] The deceased was an elderly man aged 70 years staying at a plot. Appellant and co-accused broke into deceased's house during the early hours of the morning on the 5<sup>th</sup> March 2010. Appellant and co-accused were from a tavern where they had consumed liquor. They demanded keys to the safe and the deceased gave them the keys. A firearm was taken from the safe and appellant fired a shot at the deceased.
- [5] The deceased died as a result of being shot with a firearm by the appellant. The appellant and his co-accused were subsequently arrested.

### **ISSUES ON APPEAL IN RESPECT OF SENTENCE**

- [6] The aspects placed in dispute by the appellant are the following;
- [6.1] that trial court misdirected itself by imposing a sentence of 20 (twenty) years imprisonment and has over emphasized the need of the society to those of the appellant and the crime itself.
- [6.2] That the sentence imposed by the trial court is disproportionate to the crime , the criminal and the needs of society.
- [7] The following factors were put before the court by the appellant in mitigating sentence.
- [7.1] That he is a first offender;
- [7.2] that he shows contrition and remorse as he pleaded guilty;
- [7.3] Appellant was 26 years old at the time of the offence;
- [7.4] Appellant was unmarried;
- [7.5] he passed grade 7 at school and was employed;
- [7.6] Appellant is a breadwinner and has three minor children to maintain.

### AGGRAVATING CIRCUMSTANCES

[8] The court a quo took into consideration the following aggravating circumstances when imposing sentence;

- a) The fact that the appellant and his accused committed a very serious offence and that a person has lost his life.
- b) That the victim was an elderly man of 70 years who was struggling to even get on his feet unassisted.
- c) The circumstances under which the offence was committed are very scary. It was committed at night and the appellant and his co-accused were armed as per Exhibit "A".

### ISSUE ON APPEAL

- [9] The prescribed sentence is applicable in this matter in terms of the provisions of Section 51 (1) of Act 105 of 1997, unless substantial and compelling circumstances were found to exist.
- [10] Since the state failed to prove that the murder was premeditated, part 1 schedule 2 (a) of Act 105 of 1997 providing that murder which was planned attracts a life imprisonment sentence, is not applicable in this matter
- [11] Appellant's conviction fell squarely within the provision of section 51(2) (a) (i) of Act 105 of 1997 which prescribed a minimum sentence of 15 years imprisonment for a first offender.

- [12] In view of the seriousness of the circumstances under which the offence was committed, the trial court increased the prescribed sentence of 15 years imprisonment to 20 years imprisonment
- [13] For the appellant to succeed on this appeal against sentence, the court must find that there are substantial and compelling circumstances to deviate from the mandatory minimum sentence or that the court misdirected itself. The phrase substantial and compelling circumstances is not defined and it is left to the court to determine.
- [14] The prescribed minimum sentence are not to be departed from lightly and for flimsy reasons. All factors are to be taken into account in sentencing process whether or not they diminish. Moral guilt **See S v Malgas 2001 SCA.**
- [15] Appellant has been found guilty of a serious offence which falls within the ambit of the prescribed minimum sentences.
- [16] In considering the aggravating factors the court a quo remarked as follows:
- “Die omstandighede waaronder julle twee hierdie misdaad gepleeg het is skrikwekkend. Julle twee gaan in die nag hierdie spesifieke huis toe on in te breek en in die inhoud van dit bewysstuk A blyk die duidelik dat julle vuurwapens aan was”***
- [17] The thorough reading of the record shows that the appellant and his co-accused were not in possession of the firearm when they broke into the deceased house. The firearm used to kill the deceased is the one that belongs to the deceased and was taken from the deceased safe.

[18] The appellant in his plea explanation stated that he and his co-accused intended to commit theft and that they did not pre-arrange that any force will be used against the deceased. It was conceded that it was foreseen that force would be used if they could get hold of firearm and of deceased resist them.

[19] The trial court has in my view misdirected itself and therefore its finding on facts and law is not correct.

[20] In sentencing the appellant and his co accused the learned Magistrate said;

***“Teen julle persoonlike omstandighede dan ek vandag sonder vrees vir teenspraak verklaar dat die twee van julle aan n ernstige misdaad skuldig bevind is.”***

[21] Referring to the appellant the trial court said;

***“Nommer 2 Mnr Mokwena ek staan nie vandag om simpatie teenoor jou jong kinders nie, maar die misdaad wat u gepleeg het, erns van dit weeg swaarder as die feit dat jy n broodwinner is”***

[22] It is apparent from the record that the appellant personal circumstances were not properly considered but overlooked by the court a quo.

[23] The trial court over emphasised the seriousness of the offence and the interest of society and under emphasised the mitigatory factors of the appellant.

[24] The cumulative effect of the factors raised in mitigation by appellant, were not taken into account as the trial court only paid lip service to those factors.

I am of the considered view that the court *a quo* misdirected itself in this regard.

- [25] The Honourable Justice Nicholas JA in **S. v. Kenya 1983 (3) 51 (A) at 541** said:-

*"My personal view is that public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrence effect of a prison sentence is always proportionate to its length."*

I agree with the view as expressed above.

- [26] The court hearing an appeal on sentence should be guided by the principle that punishment is a matter for the discretion of the trial court.

The sentence should only be altered if the trial court did not exercise its discretion properly and judicially.

- [27] The test is whether the sentence is vilated by irregularity or misdirection or is disturbingly inappropriate. **See S v Rabie (4) SA 455 A.**

- [28] The court has to apply its mind to the question as to whether the sentence to be imposed was proportionate to the crime.

- [29] The court should guard against imposing sentences merely on the basis that they fall within the category of the prescribed minimum sentences. **See S v Vilakazi 2009 (1) SACR 552 SCA.**

[30] It is trite law that punishment should fit the criminal as well as the crime, be fair to the accused and to the society and be blended with a measure of mercy. The element of mercy a hallmark of a civilized and enlighten administration should not be overlooked lest the court be in danger of reducing itself to the plane of a criminal. **See S.v. Sparks and another 1972 (3) AD 396.**

[31] The court held in **S.v. 1972 (3) AD 611 at page 614** that "True mercy has nothing in common with soft weakness or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself" the trial court overlooked the element of mercy in this matter and only paid lip service thereto as it is apparent from the record.

[32] In assessing all the mitigating and aggravating circumstances I am of the view that the sentence induces a sense of shock.

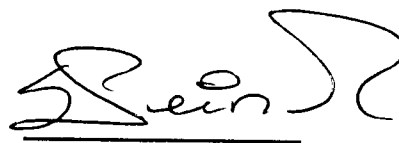
[33] It is startlingly inappropriate and I hold the view that the learned magistrate misdirected himself in this regard. The sentence imposed by the trial court should be set aside.

[34] Consequently, I make the following order;

[34.1] The appeal against sentence succeeds and the sentence imposed by the court *a quo* is set aside and replaced with the following:

[34.2] The sentence of 15 years imprisonment is imposed and ante dated to the date of sentence of the trial court being 8 September 2011.

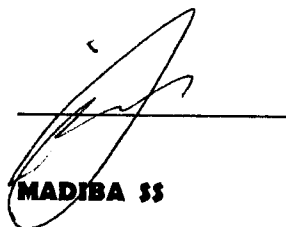


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WEINER J

**JUDGE OF THE HIGH COURT**

I concur

A handwritten signature in black ink, appearing to read 'Madiba SS', written over a horizontal line.

**MADIBA SS**

**(ACTING) JUDGE OF THE HIGH COURT**