

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A213/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 6/6/2023

In the matter between:

HLALEFANG MOGADI

Appellant

And

THE STATE

Respondent

JUDGMENT

MOKOSE J

[1] The appellant, who was represented in the court *a quo*, was charged in the Regional Court sitting at Pretoria of one count of murder read with Section 51(1) of the Criminal Law Amendment Act 105 of 1997.

[2] The appellant pleaded not guilty on the charge of murder. He was subsequently found guilty as charged and was sentenced to life imprisonment. He was also declared unfit to possess a firearm. On an automatic right of appeal in terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant appealed against sentence only.

[3] The charge had arisen from an incident which took place on 2

December 2019 at the corner of Folonga and Malenga Streets in Mamelodi where the accused unlawfully and intentionally killed Thabo Mahao by stabbing him. There had been an altercation between the two as the appellant alleged that the deceased had taken their betting money from a game of snooker. The appellant had followed the deceased out of the premises of the tavern and stabbed him. The deceased died as a result of being stabbed with a sharp object or object resembling a knife.

[4] The appellant appeals against the sentence imposed by the Regional Magistrate on the basis that the court *a quo* had failed to find substantial and compelling circumstances to deviate from the mandatory sentence of life imprisonment. Furthermore, the appellant contends that the sentence was shockingly inappropriate, that it induced a sense of shock and that the court *a quo* had over- emphasized the seriousness of the offence and interests of the society and under-emphasized the personal circumstances of the appellant.

[5] It is trite law that sentence is pre-eminently at the discretion of the trial court. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was violated by misdirection. The court of appeal may interfere with the sentencing discretion of the court of first instance if such discretion had not been judicially exercised. Marais AJ in the matter of *S v Malgas*¹ observed that:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In so doing, it assesses sentence as if it were a court

¹ (2001) 3 All SA 220 (SCA) para 12

of the first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appropriate court may yet be justified in interfering with the sentence imposed by the court. It may do so only where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasized that in the latter situation the appellate court is large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned."

[6] When imposing sentence, a court must try to balance the nature and circumstances of the offence, the circumstances of the offender and the impact that the crime had on the community. It must ensure that all the purposes of punishment are furthered. It will take into consideration the established main aims of punishment being deterrence, prevention, reformation and retribution.

S v Zinn 1969 (2) SA 537 (A)

[7] This approach was followed by the court in the matter of *S v Rabie*² where Holmes JA said:

"Punishment should fit the criminal as well as the crime, and be fair to society, and be blended with a measure of mercy according to the circumstances."

² 1975 (4) SA 855 at 862 G - H

[8] The trial court considers for the purposes of sentence, the following:

- (i) The seriousness of the case;
- (ii) The personal circumstances of the Appellant; and
- (iii) The interests of society.

[9] The provisions of Section 51(1) of Act 105 of 1997 (read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977) and also read with Section 256, 257 and 258 of the Criminal Procedure Act 51 of 1977 were explained to the Appellant prior to him pleading to the charge.

[10] There is no definition of what constitutes substantial and compelling reasons. The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. To arrive at an equitable sentence, this court is enjoined to weigh the personal circumstances of the accused against the aggravating factors, in particular, the interests of the society, the prevalence of the crime, and its nature and seriousness.

[11] The appellant's personal circumstances were placed before the court. They are that the appellant was thirty-five (35) years old at the time of the commission of the offence, grew up without a father figure, had had a tough up-bringing, was unmarried and had one child of seven (7) years of age. Furthermore, he was unemployed and made a living from herding livestock. He had also been held in custody for a period of approximately three (3) years awaiting the finalisation of his trial matter as bail was denied.

[12] In his submissions, counsel for the appellant contended that the appellant was remorseful and that he regretted the commission of the offence. As such, the court *a quo* should have taken this into account in sentencing the appellant.

[13] Counsel for the respondent was of the view that there was no misdirection on the part of the court *a quo* in that it had taken all relevant factors into consideration in sentencing the appellant and that the sentence imposed was fair in the circumstances. Evidence was led that the deceased was a breadwinner to both his minor child and his mother. Since his passing, they were both struggling financially.

[14] In the matter of *S v Matyityi*³ the Court held:

"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 acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself 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, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

³ 2011(1) SACR 40 (SCA) at 47 A - D

[15] I am not convinced that the appellant is remorseful. I say this considering the appellant's persistence of his innocence. He persists that he did not commit the offence and indicated that he is a suspect only because he spoke out against the deceased and because he held him by his clothes at the time when they had the altercation. His persistence of his innocence was also confirmed by the social worker who prepared the pre-sentencing report.

[16] The appellant also appeals against the sentence on the basis that the trial court erred in not considering the fact that he had been in custody for a cumulative period of 3 years. The appellant contends that had this period of time been considered, the court would have deviated from the prescribed minimum sentence.

[17] The court held in the matter of *Ngcobo v S*⁴ that a pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust. The test is not whether on its own that period of detention constituted a "substantial and compelling circumstance", but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to the conviction and sentencing as a just one.

[18] Counsel for the appellants failed to explain to the court what the circumstances were which led to the delay in the finalisation of the matter. The submission was merely that the appellant was in custody for a period of over three years which constituted substantial and compelling circumstances which should have been taken into consideration in sentencing. In view of the test as set out in the matter of *Ngcobo v S (supra)* this court cannot make a finding that the *court a quo* erred in sentencing the appellant to life

⁴ 2018 (1) SACR 479 (SCA) at para 14

imprisonment.

[19] It is accepted by this Court that the crime the appellant has been convicted of is a serious one. Section 51(3) of Act 105 of 1997 provides that the court must impose the prescribed sentence unless there are substantial and compelling circumstances to deviate from such prescribed sentence.

[20] Given the seriousness of the crime as well as the mitigating circumstances and aggravating circumstances which were taken into consideration by the Regional Magistrate in the court *a quo*, I am of the view that the Magistrate did not err in sentencing the Appellant. There were no substantial and compelling reasons to sentence the appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

[21] Accordingly, the following order is granted:

The appeal against sentence is dismissed.

MOKOSE J

**Judge of the High Court of South Africa
Gauteng Division, Pretoria**

I agree and is so ordered

MOSOPA J

**Judge of the High Court of South Africa
Gauteng Division, Pretoria**

For the Appellant:

Mr S Moeng

Instructed by

Pretoria Justice Centre

For the State:	Adv S Lalane
Instructed by	The Office of the Director of Public Prosecutions Pretoria

Date of hearing:	9 May 2023
Date of judgement:	6 June 2023