

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HGH: CC 91/2018
DPP REF NO: 10/2/11/1-L58/2018

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

[10 JUNE 2020]


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SIGNATURE

In the matter between:

THE STATE

AND

MASHIANE, KABELO RAYMOND

MATHABATHA, JOHANNES KGAUGELO

ACCUSED 1

ACCUSED 2

J U D G M E N T

MUDAU, J:

- [1] The two accused appeared before this court on six charges, namely, murder read with the provisions of section 51 (1) of Act 105 of 1997 (count 1); two counts of robbery with aggravating circumstances read with section 51 (2) of Act 105 of 1997 (counts 2 and 3); the contravention of section 4 (1) (a) as well

section 90 and other relevant provisions of Act 60 of 2000 further read with section 250 of Act 51 of 1977 (possession of a prohibited fully automatic firearm and ammunition- counts 4 and 5 respectively); lastly, rape (count 6) in contravention of section 3 read with other relevant provisions of Act 32 of 2007 further read with section 51 (1) Act 105 of 1997. Accused 1, Kabelo Raymond Mashiane was found guilty in respect of all six charges (counts 1, 2, 3, 4, 5, and 6) as charged. Accused 2, Kgaugelo Johannes Mathabatha was found guilty on counts 1, 2, 3, and 6, as charged but was acquitted on the remaining charges. The doctrine of common purpose was found to be applicable. It remains to deal with the question of sentence, which is not an easy task.

- [2] It is trite that in the determination of an appropriate sentence, the personal circumstances of an accused, the nature of the offence or offences committed, and the interests of the community must be considered according to the well-established Zinn triad.¹ In the assessment of an appropriate sentence, regard must be had, *inter alia*, to the main purposes of punishment mentioned by Davis AJA in *R v Swanepoel*², namely, deterrent, preventive, reformatory and retributive.³
- [3] However, as Schreiner JA stated in *R v Karg*⁴: "*It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may*

¹ *S v Zinn* 1969 (2) SA 537 (A)

² 1945 AD 444 at 455

³ See also *S v Whitehead* 1970 (4) SA 424 (A) at 436E-F; *S v Rabie* 1975 (4) SA 855 (A) at 862

⁴ 1961 (1) SA 231 (A)

incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."⁵

- [4] In summary, punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.⁶ In the instant case the accused's sentencing is subject to the relevant provisions of the Criminal Law Amendment Act, 105 of 1997 ("the CLAA") which prescribes a variety of mandatory minimum sentences to be imposed by the courts in respect of a wide range of serious and violent crimes that include murder, rape and aggravated robbery cases. The accused were warned in this regard at the commencement of the trial.
- [5] Accordingly, the accused face a minimum sentence of life imprisonment in respect of count 1, 6 and a minimum of 15 years imprisonment in respect of the aggravated robbery charges (counts 2 and 3), unless I find there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentences. The accused face a mandatory life term of imprisonment in respect of count 1 because the death of the victim was caused by the accused in committing or after having committed robbery with aggravating circumstances in respect of count 2. Also, because the offence was committed by the accused acting in the execution or furtherance of a common purpose or conspiracy.
- [6] Concerning the rape charge, the accused face life imprisonment because the victim was raped more than once whether by the accused and as co-perpetrators. In terms of the Sexual Offences Act 32 of 2007, it matters not whether the accused use their fingers or penis in penetrating the surviving

⁵ At 236A-B

⁶ *Rabie* (fn 3 above)

victim's genitalia. In addition, they face life imprisonment because the victim was raped by the two accused under circumstances where they acted in the execution or furtherance of a common purpose or conspiracy.

- [7] Both accused testified in mitigation of sentence. Accused 1 (Mashiane) is 34 years of age. He was 31 years of age when the crimes were committed. He is a grade 11 dropout. He is not married, but a father of 2 minor children, aged 9 and 5 years respectively. The minor children are in the care and custody of his girlfriend, their biological mother. He also helped to maintain his nephews, born of his unemployed sister. His biological mother died at an early age but his father is alive.
- [8] On accused 1's version, he had a difficult upbringing. He expressed a view that life imprisonment would be disproportionate to the crimes. He expressed fear of the current corona virus, a pandemic that is gripping the country, but confirmed that prisoners are issued with new facial masks daily. He had nothing else to say with regard to the question of sentencing because of the reason that, on his account, he committed no offence.
- [9] Accused 1 was a truck driver at the time of his arrest from which he derived approximately R4000-00 per month. Accused 1 is a first offender. He has been in custody since the date of his arrest in 2016 a period of approximately three and half years. He admitted to some old previous convictions. In 2008, he was convicted of two counts of assault for which he was fined R500-00 or one-month imprisonment in respect of each count suspended for a period of three years on customary grounds.
- [10] In 2014, accused 1 was convicted of reckless or negligent driving as well as

inconsiderate driving in contravention of the relevant provisions of Act 93 of 1996. Both counts were taken as one for purposes of sentence. He was fined R10 000-00 or was to serve one year imprisonment wholly suspended on the usual grounds.

- [11] In his address regarding mitigation of sentence, counsel for the accused 1, Mr Nonyane urged this court to find substantial and compelling factors from the above overall facts that justifies a departure from the mandatory minimum sentencing regime. Counsel was of the view that since accused number one did not rape the surviving victim with his penis, but merely used a finger, a lesser sentence is justified. In this regard, counsel submissions are unpersuasive for the reasons that I alluded to above.
- [12] Besides, this question was laid to rest in *Tshabalala v S; Ntuli v S*⁷ wherein Mathopo AJ, held aptly: *"The instrumentality argument has no place in our modern society founded upon the Bill of Rights. It is obsolete and must be discarded because its foundation is embedded in a system of patriarchy where women are treated as mere chattels. It ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room".*⁸
- [13] Regarding the murder charge, counsel was of the view that the state had failed to prove a direct intention to kill which therefore justifies a lesser sentence than life imprisonment. He urged this court to consider that accused

⁷ 2020 (3) BCLR 307 (CC)

⁸ At para 54

1 merely wanted to threaten the victims with the rifle for them to submit to the robbery that ensued without any direct intention to kill. Furthermore, that accused 1 was unlikely to reoffend since the murder weapon has already been returned to the lawful owners, in this case the SANDF. In his view, an effective sentence of 22 years imprisonment would be adequate.

- [14] Accused 2, Mathabatha is on his version 35 years old. He is a father of minor twins with his unmarried girlfriend that he helped to maintain. He also helped to maintain two nephews aged 18 and 15 years from his income at a mining company where he worked for approximately six months before his arrest. His minor children are in the care and custody of his girlfriend in Soshanguve, Gauteng. Accused 2 passed grade 7. Both his parents have since passed on. He has been in custody ever since his arrest for these charges, a period of over three years. He has no records of previous convictions. He maintained his innocence regarding the commission of the offences.
- [15] For his part, counsel for accused 2, Mr Mokoena also urged this court to find substantial and compelling reasons justifying a departure from the mandatory minimum sentences. He was of the view that an effective sentence of 20 years would be adequate under the circumstances.
- [16] In closing submissions, the state called for the mandatory minimum sentence of life imprisonment for each accused in respect of the murder and rape charges and 15 years imprisonment in respect of the aggravated robbery charges as well as 25 years' imprisonment in respect of possession of a fully automatic firearm. However, that said, this court is obliged of its own accord, to consider all the various aspects in relation to each accused.

- [17] In *S v Malgas*⁹ it is set out how a court is to approach the minimum sentence regime and in particular, how the enquiry into “substantial and compelling circumstances” is to be conducted. The following passage is of particular relevance:

*“The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to 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.”*¹⁰

- [18] Nugent JA stated in *S v Vilakazi*¹¹ 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 largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again”.*¹²

- [19] The deceased in this case was murdered in a callous and horrific manner, in circumstances where he stopped his motor vehicle on the side of the road to urinate. This was a mistake with fatal consequences. He was oblivious to the eminent danger that lurked in the immediate vicinity. He and his girlfriend, the surviving victim were stripped naked and marched into the nearby bushes. The result was horrific for anyone to endure. Not only was he tortured and

⁹ 2001 (1) SACR 469 (SCA)

¹⁰ At para 9

¹¹ 2009 (1) SACR 552 (SCA)

¹² At para 58

assaulted for the pin to his bankcard, all valuables in his motor vehicle and other personal belongings of both victims were stolen. That did not save him. He was shot with a fully automatic rifle and succumbed to his injuries shortly thereafter. His death was downright, unnecessary.

- [20] The deceased had no chance to flee or defend himself or for that matter, his girlfriend. They had been found in a compromising situation. The deceased died a cruel, horrific and lonely death, whilst naked in the bushes during the night. The deceased and his girlfriend were attacked viciously like preys by a pack of dangerous predators. The surviving victim was not spared. She was assaulted; insulted by being called slanderous names and was sexually abused. To top it all, she had to witness her boyfriend fighting for his last breath. She was forced to try and carry him, but to no avail as he laid dying which traumatized her to this day. As if that was not all, she was forced to make 'a run of shame' whilst naked, which she did for fear of her life. She had no choice, but to present herself in that belittling state to members of the public where she sought help.
- [21] The rape itself was no less humiliating as it was a painful exercise. She was forced to lie on the ground naked in the bush, covered with thorns during the rape ordeal. One of the thorns, from part of the *acacia specie*, was deeply embedded in her right buttock and was removed only in hospital, where she underwent gynaecological examination. The entire experience scarred her for life. Her rights to equality, human dignity and bodily integrity were violated beyond measure.

- [22] It has been approximately 23 years since Mohammed CJ uttered his famous statement in *S v Chapman*¹³: "*Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.*" Yet, the scourge has not been abated, but is in the increase, which is a source of serious concern for the entire administration of justice.
- [23] In this case, the surviving victim turned to alcohol and drugs to overcome the psychological pain of the rape and the loss of the deceased at the hands of the accused. Both accused left home for "work" that night armed to the teeth. Accused 1 was armed with a fully automatic assault weapon designed not only to kill in a war situation, but to cause maximum impact. It is evident from the post-mortem examination report. The entrance bullet wound, which was 5 x 5 mm went through the right upper front thigh, through the right lower abdomen and thereafter through the mesenteric tissues and exited the left side of the lower abdomen. Accused 2 was armed with a slasher. It suggests to me that they had wicked reasons for doing so.
- [24] Both accused are a danger to society. They showed no remorse; neither did they express any, for their despicable conduct. The incident of the crime of the

¹³ 1997 (3) SA 341 (SCA) at paras 3-4

robberies at least, was evidently planned. The deceased was murdered in the course of a robbery incident to prevent him from putting up resistance or quite possibly to stop him from identifying them in the future as one of them called the deceased by his names during the incident.

- [25] The death of the deceased was unnecessary and inhumane particularly in a country such as ours, which is encumbered by violent and serious crimes. The deceased too, had a right to life as enshrined in section 11 of our Constitution that was sadly, brutally taken away from him. The deceased is not just a mere statistic in our criminal justice records. The deceased left behind a still grieving family that consists of his ailing mother and siblings, as well as a minor child who is likely to grow up without a father figure.
- [26] When his brother testified in aggravation his death the pain was tangible. The brother was already on chronic medication. The death of the deceased affected him dearly in that he was prescribed a double dose of medication to cope. The death did not affect the elderly mother differently, since the deceased lived with her. The elderly mother also depended on the deceased for support. As Mathopo AJ recently stated in connection with rape offences: *"the high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women".*¹⁴
- [27] Accordingly, I find that the accused's ages, clean records, the period of internment pending trial, their respective social backgrounds and minimal educational achievements do neither, singularly, nor cumulatively constitute substantial or compelling circumstances that render the minimum sentences

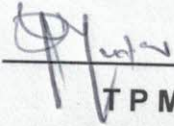
¹⁴ *Tshabalala v S* (fn 7 above)

unjust for each accused. These are the 'flimsy' reasons that Marais JA in *Malgas* warns us against. It is therefore imperative for the courts to remain steadfast by consistently sending out a clear message that crimes such as these shall not be tolerated but be met with attendant severe punishments in justifiable circumstances. This is such a case. The permanent removal of the accused from society is judicious. In the result, each of the accused is sentenced as follows:

- 27.1 On count 1 (murder): life imprisonment;
- 27.2 On count 2 and 3 (robbery with aggravating circumstances): 15 years imprisonment in respect of each count; and
- 27.3 On count 4, accused 1 only (Possession of a prohibited firearm): 25 years imprisonment.
- 27.4 On count 5, accused number 1 only (possession of ammunition): 5 years imprisonment.
- 27.5 On count 6 (rape): life imprisonment.

The sentences imposed in respect of counts 2 and 3 as well as counts 4 and 5 respectively (the latter sentences are in respect of accused 1) are to run concurrently with the sentence imposed in count 1 (life imprisonment).

Effectively therefore, each accused is sentenced to two life terms of imprisonment. In terms of section 103 of Act 60 of 2000, both accused are unfit to possess arms.


T P MUDAU
Judge of the High Court

APPEARANCES

For the State:

Adv Jacobs

Instructed by:

DPP –Limpopo Division

For Accused 1:

Adv Nonyane

For Accused 2:

Adv Mokwena

Instructed by:

Legal Aid