



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
22/3/2019	
DATE	SIGNATURE

CASE NUMBER: CC 142/2017

THE STATE

Versus

THAKATSO MASHEGO

SENTENCE JUDGMENT

Sardiwalla J,

[1] The accused in this matter has been found guilty of one count of culpable homicide.

[2] It now remains for me to sentence him. To reach an appropriate sentence, this court is duty-bound to consider the nature and the seriousness of the offence that the accused has been found guilty of, the personal

circumstances of the accused as well as the interests of society. I am also duty-bound to take into consideration the main purposes of punishment; namely retribution, deterrence, prevention and rehabilitation. All these must be accorded due weight in any sentence.

[3] In *S v RO and Another* 2000 (2) SACR 248 (SCA), Heher JA said the following at paragraph 30:

"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions."

Finding an appropriate sentence is a challenge faced by criminal courts daily as sentencing is not a perfect exercise. What complicates this even more is that there may be more than one appropriate sentence in a particular case. SS *Terreblanche* Guide to Sentencing in South Africa, second edition, states that an appropriate sentence as determined by a trial judge need not be the only appropriate sentence. On page 146, paragraph 3.1, line 5, the learned author states the following:

"In the light of the fact that the presiding officer is endowed with a wide discretion in the imposition of the sentence, appropriateness tends to be subjective judgment according to the views of the sentencing officer."

In footnote 110 the author cites *S v Martin* 1996 (2) SACR 378 (W) at 380A-B in this regard. Also cited in the footnote is *Smith v Queen* 1987 (34) CCC (3d) 97 at 109.

"Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences."

This was cited in *S v Vries* 1996 (2) SACR 638 (Nm) at 643F-G.

[4] I now deal with the evidence in mitigation and in aggravation.

MITIGATION OF SENTENCE AND AGGRAVATING CIRCUMSTANCES

Personal circumstances

[5] The accused is 27 years old and was a member of the Metro Police Tswane. He is currently unemployed. He has no previous convictions.

The seriousness of the offence

[6] The accused was found guilty of culpable homicide which is a very serious offence. Counsel for the state incorrectly referred to negligence in this matter as gross negligence that bordered on *dolus eventualis*.

[7] On his version the accused correctly carried out the scope of his duties which on the day in question was to conduct stop and approach duties. His attention was drawn to the deceased's vehicle by Constable Baloyi indicating that the vehicle did not display a back registration number plate. He therefore approached the deceased and requested him to produce his licence but the deceased refused to comply. He thereafter proceeded to the front of the vehicle

demonstrating to the deceased to stop and pull over to the painted island. The deceased still did not comply but instead after making yet another rude gesture to the accused, bumped the accused twice and on persistence of the third occasion, the accused was under the lawful belief that his life was in imminent danger from being driven over by the deceased's vehicle. In this instance the evidence shows that he thought there was a reasonable possibility that his life was in danger. Using a lethal weapon, a loaded firearm, the accused fired one shot at the deceased.

[8] In his evidence the accused confirmed that a reasonable person would have fired at the tyres but that as the deceased was manoeuvring his vehicle during his attempt to injure the accused it was impossible for him to do so. It was never his intention to kill the deceased and this court accepted that. However, that does not change the fact that the deceased died of his inflicted wounds and that the accused had been trained in the use of and in the handling of firearms. In my view, though this may be aggravating, the accused who testified to his state of mind indicated that he was only trained in shooting at stationary targets and that he reacted to the imminent threat on his life given that this was the third attempt by the deceased to run him over or injure him. The Court found that the accused's version on the evidence presented was reasonably possibly true.

[9] Mitigating factors are inter alia the following:

- The accused is a first offender and is remorseful.
- This court accepts as a mitigating factor the conduct of the accused after the incident by trying to assist the deceased which indicated that the

accused wanted the deceased to live.

The interests of society

[10] The interests of society demand that those who commit crimes must be punished and, in deserving cases, that they be punished severely. As counsel for the defence correctly submitted, we ought to differentiate between what is in the public interest and what society wants. Members of society cannot always get what they want as courts do not exist to win popularity contests, but exist solely to dispense justice. What may appear to be justice to the uninformed general public, however, may not necessarily be justice. The general public may not even know the difference between punishment and vengeance – a distinction which is very important when a court is exercising its sentencing function.

[11] Fortunately, regardless of the level of understanding among the general public, South Africa has a Constitution which applies to everyone and which protects everyone, including those who transgress the laws. As a country we have advanced to a modern era of balancing all the relevant factors. Retribution, which, however, from the legal point of view is not the same as vengeance, has, inter alia, yielded ground to other purposes of punishment.

[12] In *R v Karg* 1961 (1) SA 231 (A), Schreiner JA stated the following at 236A-C:

"While the deterrent effect of punishment has remained as

important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing, but the element of retribution, historically important, is by no means absent from the modern approach.

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 incline to take the law into their own hands.

Naturally, righteous anger should not becloud judgment."

It is impossible to deal with the interests of society without reference to the deceased and his family.

CONCLUSION

[13] There is a delicate balance between the crime, the criminal and the interests of society. The extent of the negligence in culpable homicide cases plays an important role in coming to an appropriate sentence which should neither be too severe, nor too light. In *S v Nxumalo* 1982 (3) SA 856 (A) at 861G-H, Corbett JA stated the following:

"It seems to me that in determining an appropriate sentence in such cases, the basic criterion to which the court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act.

Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable

conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded."

Counsel for the defence referred this court to a number of cases where the accused were found guilty of culpable homicide. The accused's version in this case was that he was hoping to prevent the deceased's vehicle from injuring or killing him.

[14] *State v Warren Vorster* (Case number 125/2009 in the South Gauteng High Court) on imposing sentence, the court found that:

"A court should strive for balance between the interests of society, the interests of the accused and the seriousness of the offence. A sentence which over-emphasises one element... cannot be balanced and it is likely to be a wrong sentence.

Finally, in imposing a sentence, a court should be merciful. This means that it should sentence the accused with a full appreciation for human frailties and for the accused's own particular circumstances at the time of the offence.

Where the offence is one of negligence, I believe this is particularly the case for ordinary everyday people who are not criminals are capable for the kind of negligence that has tragic and lifelong consequences.

A court should strive to keep such a person out of prison where this is possible. As I have said, the loss of an innocent life is almost always serious and society tends to be even more shocked when the victim is a child, as here. Members of the

child's family are particularly badly affected.

I have considered the needs of society and I believe that these would be best served by it knowing and seeing that Mr Vorster is donating some of his time to the service of other less privileged people."

The court further said the following:

"It is being done for two purposes: To try to show society and Kgopotso's family that Mr Vorster is being punished, albeit relatively lightly for what he has done and, secondly, to assist Mr Vorster to interact with needful people and to help him to find some form of emotional equilibrium while doing so.

I have decided that the appropriate sentence in this case is one of 3 years' imprisonment suspended completely for 5 years, on condition that, firstly, he is not again convicted of culpable homicide caused by an assault and committed during the period of imprisonment and, secondly, that he performs 300 hours of community service over one year which commences running on the date of the sentence...

He is to be placed under the supervision of Mr Phillip Hall of the Rotary Club of Blackheath. Mr Hall will decide upon the work which Mr Vorster is to do in assisting the Rotary Club in any of the various charitable undertakings which it engages in."

[15] It is clear that the facts in Vorster are dissimilar to the facts in the present case. However, like Vorster, the accused was reacting to a perceived threat and that immediately after the incident had occurred, like the accused in the Vorster

matter, the accused tried to resuscitate the deceased and that he was very emotional and clearly has suffered trauma from the incident.

[16] In the matter of the *State v Siyabonga Mdunge* (RC777/12 Regional Court Pietermaritzburg), the accused and the deceased were sleeping at their home when at about 00:30 the accused was awoken by a noise as if a window was being opened. He thought a burglar was trying to get into the house. Fearful for his life he grabbed his firearm from his bedside pedestal drawer and made his way to the entrance of the room. He could hear the noise coming from the bathroom. Slowly he made his way to the bathroom door to investigate. As he reached the bathroom door it suddenly opened. Startled and afraid for his life, he discharged his firearm thinking that the person who opened the door was a burglar. That person, however, was not an intruder, but his wife. He rushed her to hospital, but it was too late. The accused in Mdunge was arrested for murder, but entered a plea and sentence agreement with the National Prosecuting Authority (NPA) in terms of section 105A of the Criminal Procedure Act. In terms of the agreement, the National Prosecuting Authority accepted a plea of guilty to culpable homicide. The National Prosecuting Authority agreed to the following sentence in the plea and sentence agreement:

"It is agreed that a just sentence in all the circumstances shall be that the accused is sentenced to 8 years' imprisonment which is wholly suspended for a period of five years on the following conditions:

1. *The accused is not again convicted of murder or assault or any other offence of which assault is an element during the period of suspension."*

[17] Although in both cases there are striking differences to the facts of the

present matter, it remains that all accused were reacting to instances where they believed their lives to be threatened and in danger. The huge distinguishing feature in this case is that the accused is a trained police officer with an expectant level of skill in dealing with life threatening circumstances and situations. This fact as well as additional factors would ordinarily make the present case so serious that a suspended sentence would not be appropriate.

[18] However in my view I disagree for the following reasons. The accused although he was trained in the use of firearms is a young member starting out his career at the Metro police. I agree that in his position, a high degree of responsibility would be required from such a person. For that reason an appropriate sentence should neither be too light, nor too severe. The former might cause the public to lose confidence in the justice system and people might be tempted to take the law into their own hands. On the other hand, the latter might break the accused and the result might be just the opposite of what the punishment set out to do, which ultimately is to rehabilitate the accused and to give him an opportunity, where possible, to become a useful member of society once more.

[19] I have considered all the evidence placed before me and all the submissions and argument by counsel. I have weighed all the relevant factors, the purposes of punishment and all forms of punishment, including restorative justice principles. I have also taken into account the seriousness of the offence which led to the death of the deceased, the personal circumstances of the accused and the interests of society. I have also taken the particular circumstances of the accused at the time of the offence into account.

the accused and hope for his reformation. (See ***S v Mhlongo* 1994 (1) SACR 584 (A) at 588J-589B**) I am mindful, however, of the fact that true mercy is an element of justice. (See ***S v V* 1972 (3) SA 611 (A) at 614**)

[21] The following is what I consider to be a sentence that is fair and just, both to society and to the accused:

- 1. On the count of culpable homicide: The sentence imposed is 3 years' imprisonment, wholly suspended for 5 years on condition that within the period of suspension the accused is not found guilty of a crime where there is negligence involving the use of a firearm.**
- 2. That the accused perform 300 hours of community service over a period of one year to commence from the date of the running of the sentence.**
- 3. The Department of Correctional Services is directed to identify the appropriate official within or outside of its department to supervise compliance with the order.**



SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	: 19 March 2019
Date of judgment	: 22 March 2019
Counsel for the State	: Adv.: C Harmzen
Counsel for the Defendant	: Adv.: M E Phiyega