



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: A25/2017

In the appeal between:

MOEKETSI MAFABATHO

Appellant

and

THE STATE

Respondent

CORAM:

MBHELE J, MATHEBULA J et HEFER AJ

JUDGMENT BY:

MATHEBULA, J

HEARD ON:

28 AUGUST 2017

DELIVERED ON:

14 SEPTEMBER 2017

- [1] This is an appeal against sentence only on count 1 with leave of the learned judge in the court a quo. In this matter the appellant was sentenced to imprisonment for life on conviction of murder, two (2) years on conviction of assault with intent to do grievous bodily harm and in terms of Section 103 of Act 60 of 2000 declared unfit to possess a firearm.

- [2] The factual background is as follows. On the 5th July 2015 the deceased was attending a party at the house of one DJ Pezozo at K7, Kutlwanong, Odendaalsrus. Loud music was played and liquor was available and flowing freely. A tiff erupted between accused number 3 (in the court a quo) and the deceased inside the tent where the event was held. The other accused persons including the appellant (accused number 4 in the court a quo) joined in the fracas and pelted the deceased with beer bottles. This migrated outside in the street with the appellant and his co-accused in hot pursuit. It appears the deceased was running home few houses away but could not enter the erf because the gate was locked. His assailants caught up with him and the fighting began in earnest. The deceased fell and this gave his assailants an opportunity to stab him multiple times. The appellant was positively identified as one of the persons who inflicted stab wound(s) on the deceased. The State Pathologist recorded the cause of death as **“steekwonde aan die longe en hart”**. The intervention of his brother was quickly quelled when he was hit with a crate on the face by accused number 2.
- [3] I am satisfied that the learned judge did not err in finding the appellant guilty as charged in respect of count number 1. The pertinent aspect to be considered in this matter is the issue of sentence.
- [4] The respondent proved its case beyond reasonable doubt. On behalf of the appellant, Mr Nel argued that the appellant had shown remorse and had recanted from an earlier stance of extricating

himself from the murder of the deceased but to acknowledging his involvement in it. Further he went as far as pleading for forgiveness from the family of the deceased and the court to have mercy on him for wasting its valuable time. The State, represented by Mrs Liebenberg submitted that the court a quo was correct in imposing life imprisonment and that the appellant did not ask for mercy from the bottom of his heart but did so in order to escape a heavy sentence.

- [5] It must be borne in mind that sentencing is pre-eminently the domain of the trial court. In **S v Kumalo 1973 (3) SA 697 (A) on page 698 at B-C** the correct approach was set out as follows:-

“In every appeal against sentence the enquiry is whether there was an improper exercise of judicial discretion, i.e., whether the sentence is vitiated by irregularity or misdirection or is strikingly disparate from what the appellate tribunal considers appropriate”.

- [6] In this matter the deceased was stabbed by a group of persons acting in the execution or furtherance of a common purpose. Life imprisonment was the minimum sentence. Section 51 (1) of Act 105 of 1997 read with Part 1 (d) of Schedule 2 makes provision for the aforementioned sentence in such circumstances.
- [7] The learned judge did not find any substantial and compelling circumstances to deviate from imposing the ultimate sentence of life imprisonment. The test as outlined in order to deviate is whether or not the accumulative effect of mitigating circumstances on the gravity of the offence and the interest of the society rendered

the prescribed sentence unjust, see **S v Malgas 2001 (2) SA 1222 (SCA)**.

- [8] This was a senseless and brutal killing of another human being. The deceased sustained approximately thirty six (36) stab wounds. He was no match for the appellant and other members of his group. He was stabbed until he laid lifeless in the street. It was a ferocious attack. The preservation of human life is of utmost importance to all of us. The Constitution of the Republic provides freedom and security to all. All these other rights will be hollow rhetoric if the right to life is rendered unimportant. The court must deal decisively with those who wantonly maim or obliterate others. The learned judge was correct to conclude that long term imprisonment was the appropriate response from the courts.
- [9] The appellant was born on the 2nd January 1993. This means that he was 22 years, 6 months and 2 days old when he committed the offence. He is a father of two (2) minor children aged one (1) year and one and a half (1½) years from two (2) different women. Both those children are in the care and custody of their mothers. His scholastic achievement is N4. Prior to his incarceration he was a meat vendor earning about R500.00 per month.
- [10] It is trite that the court must blend its sentence with mercy where the accused person shows remorse. In this matter, it was submitted that the appellant did so and that the court a quo should have found as much and deviated from imposing life imprisonment.

- [11] The transcribed record on pages **38 lines 11 to 25 and 39 lines 1 to 8** reads as follows:-

“Now you are in the witness stand yourself, under oath. Do you see Mr Motlororo today in this courtroom? --- Yes, I saw him.

It is you speaking yourself. What do you say to him?

--- My Lady, from the bottom of my heart I say to Mr Motlororo he must forgive us for what we have done. I know that my asking for forgiveness will not bring back the deceased’ life, but wholeheartedly I am asking for his forgiveness. My Lady, what I did on that day, I did it being under the influence of liquor, and also under my peer pressure.

Anything else? --- I am asking for forgiveness to this Court of wasting the Court’s time until the Court on its own found me guilty. Also asking for forgiveness from Kutlwanong community for the deed what we have done. I would also ask the Court to be lenient when sentencing me. I further ask the Court to order that the sentence that the Court will impose runs concurrently with the sentence that I am currently serving. I believe that the sentence that the Court will impose on me will make me a changed man and stop doing wayward things that I have been doing before. It will turn me to be a role model to the youngsters of my township.

- [12] The issue of remorse was dealt with in **S v Matyityi 2011 (2) All SA 424 (SCA)**. On **page 431** at **B-D** the court said the following:-

“Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement 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”.

[13] The appellant demonstrated remorse after his guilt was pronounced by the learned judge. Mrs Liebenberg correctly conceded that the appellant had every right to plead not guilty and defend himself. The appellant made an impassioned plea for forgiveness to the family of the deceased, the community of Kutlwanong and the court from the bottom of his heart. He said it so himself not through his counsel. I cannot find any basis for the submission of the state that the appellant is not genuine in this regard. Furthermore, the appellant recanted his stance of maintaining his innocence to unequivocal acceptance of his direct role in the killing of the deceased. He explained that he denied complicity in the murder because he was frightened. He did so extensively at the available opportunity afforded to him. It is my considered opinion that given the surrounding circumstances, this is a genuine demonstrable act of remorse emanating from the appellant. The court a quo should have taken this into consideration and dealt with it in an appropriate manner,

[14] The appellant in this matter is a fairly young man. The court a quo erred that he was 27 years old. He is of the same age band with the other accused. Despite the economic hardship facing many in the country, he tried to earn a decent living as a vendor. Unfortunately he succumbed to peer pressure with disastrous consequences. He still has a lot of productive life ahead of him

and just need to refocus through reform and rehabilitation programmes. It is an undeniable fact that liquor was consumed in abundance at the party. I am prepared to accept in favour of the appellant that it played a significant role in the commission of the offence. Both counsel conceded that this was not a pre-meditated murder but occurred in the spur of the moment.

- [15] The court *a quo* should strike a healthy balance in order to achieve the equilibrium that is the cornerstone of the trial. Life imprisonment is a hard and lengthy term of imprisonment by its very nature. It is the type of sentence that must be reserved for hardened offenders and recidivists. It is the ultimate that a court can impose. It can easily break the offender. In **S v Sparks and Another 1972 (3) SA 396 (A) at 410 G-H** the court said the following:-

“On the other hand, the offences were, without doubt, very grave; and, in addition to the matter of punishment, the deterrent aspect calls for a measure of emphasis, lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishments to the point of being broken. Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.

- [16] I take the view that because of its burdensome effect and consequences on the offender, the court should explore every opportunity to circumvent such a sentence without over-emphasizing any aspect of the trial over another. In **S v GN 2010 (1) SACR 93 (T) on page 97 F-G** the court stated the following:-

“Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment”.

[17] In this matter the court made mention of the previous convictions of the accused. It appears that the learned judge concluded that the appellant had forfeited his opportunity to rehabilitate himself. It is startling to note the huge disparity between the sentences of his co-accused and that of the appellant. Some do have similar previous convictions as his. The two (2) co-accused were sentenced to thirteen (13) years imprisonment each while the appellant was sentenced to life imprisonment. Their participation in the commission of the offence belied their tender age. They took the lead and inflicted most wounds on the deceased. The appellant is only four (4) years older than his co-accused. In this matter, they all participated as peers.

[18] It is my opinion that in this matter the sentence to be imposed on the appellant must not only be about retribution but assist him to rehabilitate and afford him an opportunity to be on the straight path to reform. Taking into consideration all the circumstances cumulatively, I am of the view that the learned judge should have found that there were substantial and compelling circumstances

enabling deviation to impose a lesser sentence than the ultimate one. I conclude that I am at liberty to interfere with the sentence imposed by the learned judge.

[19] The appellant was also found guilty of the second count namely assault with intent to do grievous bodily harm. The learned judge ordered that the sentence imposed on that count run concurrently with the sentence that he is appealing against in this matter. I suppose the only reasoning was that the sentence imposed on the first count was life imprisonment. In changed circumstances, the reasoning will be that both offences arose out of the same set of facts and that sentences should run concurrently with each other.

[20] I accordingly make the following orders:

1. The appeal against sentence on count 1 is upheld.
2. The sentence of **life imprisonment** imposed is set aside and substituted with one of **sixteen (16) years imprisonment**.
3. The sentence imposed on count 1 should run concurrently with the sentence on count 2.
4. The sentence is ante-dated to the **11th November 2016**.
5. In terms of Section 103 of Act 60 of 2000 the appellant is declared unfit to possess a fire-arm.

M. A. MATHEBULA, J

I concur.

N.M. MBHELE, J

I concur.

J. J. F. HEFER, AJ

On behalf of the appellants:

Adv. P. Nel
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. E. Liebenberg
Instructed by:
Director: Public Prosecutions
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