

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG: PRETORIA

3/5/15

CASE NO.: A569/2014

(1) REPORTABLE YES / NO
(2) OF INTEREST TO OTHER JUDGES YES / NO
(3) REVISED. <i>OK</i>
<i>24/2/15</i> DATE
<i>[Signature]</i> SIGNATURE

In the matter between:

MR MOKOENA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

1. The present matter came on appeal before this court against the sentences imposed upon the accused on 1 August 2008 by Victor J sitting in the circuit division for the Vereniging district.
2. The accused was charged with four counts namely murder, robbery with aggravating circumstances, the unlawful possession of a firearm and the unlawful possession of ammunition. He was convicted in respect of all four counts and sentenced to life imprisonment in respect of the murder, 15 years imprisonment in respect of the

robbery and four years imprisonment in respect of each of the unlawful possession charges.

3. The events which led to the charges against the appellant are briefly the following:
at approximately 03:30 in the early hours of 4 March 2007 the deceased, Mr Donald Mona, and his friend Mr Tsepo Mofokeng, were on their way to a Tavern in Orange Farm in the district of Vereniging to buy liquor. They had attended a party and wanted to buy more liquor. On their way back to the party the appellant confronted them and told them to lie down on the ground. The appellant was armed with a pistol and pointed it at them. It is clear that he intended to rob the deceased and Mr Mofokeng. The appellant bent over Mr Mofokeng in order to search him. The next moment Mr Mofokeng kicked out at the appellant and struck him on the leg. This caused the appellant to fall down whereupon Mr Mofokeng grabbed him around the upper part of his body. A struggle ensued with both of them still on the ground. At this point the appellant started to get up from where he was laying. The next moment the appellant discharged a shot from his firearm which struck the deceased which was some 4 m away. The deceased managed to move away from the scene.
4. When the shot was discharged Mr Mofokeng let go of the appellant. The appellant asked him what he had in his pockets whereupon Mr Mofokeng responded that he had a cellphone and money with him. The appellant then took Mr Mofokeng's cellphone and money and moved away. Mr Mofokeng then moved in the direction of where the party was and on his way found the deceased lying on the ground. He was in a bad state and his upper body on the left side was covered in blood. The deceased died a short while later as a result of a gunshot wound in his chest.

5. The state proved one previous conviction for theft for which the appellant was convicted during may 2001. The sentence for that conviction was postponed for a period of three years. The appellant was never called upon to appear again to receive a sentence.
6. The appellant was 22 years of age when he committed the present crimes. He was unmarried and had one child, a boy who was 3 years old at the time of the trial. He worked as a builder earning approximately R1 500 per month which he used to support his mother and his child. He never knew his father and left school when he was in grade 10. The appellant was incarcerated as an awaiting triallist for one year and four months.
7. The appellant's evidence that he was not sober at the time of the incident was not challenged by the state. In aggravation of sentence the State presented the evidence of the deceased's wife. She and the deceased had one child and she was struggling to make ends meet.
8. As the murder of the deceased was committed by the appellant whilst he was committing the offence of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977, the prescribed sentence, unless substantial and compelling circumstances are present, is life imprisonment. The trial court found no such circumstances to be present.
9. In order to find whether substantial and compelling circumstances are present, the factors traditionally relevant to sentence must be considered. These are the legitimate needs and interests of the accused as well as of the society and the

nature of the crimes and the circumstances attending its commission. The court must consider all these factors and all the facts of the particular case, in conjunction. These factors must also be considered in light of the fact that the legislature indicated that the sentence which should normally be regarded as appropriate for offences of this nature, if no substantial and compelling circumstances are present, is one of life imprisonment. It is only when the cumulative effect of the circumstances to which I have referred above, are such that it would be unjustifiable to impose such a sentence or, to put it differently, if the prescribed sentence would be disproportionate to the cumulative effect of the crime, the accused and the lawful interests of the community, that a lesser sentence should be imposed.

10. The murder of a fellow human being is an offence of the most serious kind. Robberies of the kind that was committed in this case are daily occurrences in our country and it often ends with a victim being killed. Communities live in fear and cannot move about freely, especially after dark. The loss caused by the death of the deceased in the present matter was described by his widow and what makes this act even more deplorable is the fact that it was done for a mere R40 and a cellphone worth a few hundred rand.
11. On the other hand, there are mitigating circumstances present. Firstly, the appellant was a young person of 22 years of age. The circumstances relating to his previous conviction are not known but it could not have been serious if regard is had to the fact that no sentence was imposed. Furthermore, the appellant was intoxicated when he robbed the deceased and Mr Mofokeng. Also of importance is the fact that

the appellant was suddenly grabbed by Mr Mofokeng and that they wrestled whilst on the ground. It was during this process that the shot was fired at the deceased.

12. The firearm was loaded, presumably only with one bullet, but the clear impression created by the facts of the case is that the sudden attack on the appellant and the wrestling with him on the ground, together with his intoxicated state and the fact that he acted alone, contributed to him discharging the shot in the direction of the deceased. This is not in the least to say that any blame is attributable to the actions of Mr Mofokeng, quite the contrary, but it does, in my view, to some degree diminish the moral reprehensibility of the appellant's deed. There is furthermore nothing to indicate that the appellant is not a good candidate for rehabilitation. For such to occur a sentence must be imposed which allows for the appellant to have hope of one day entering society as a reformed person. These factors, in conjunction with his young age and the fact that he was for all practical purposes a first offender and the fact that he had been incarcerated as an awaiting trial prisoner for one year and 4 months, in my view constitute substantial and compelling circumstances allowing for a lesser sentence to be imposed than the sentence of life imprisonment. In my view the aforesaid factors are such that even if weighed with the aggravating circumstances, it would not be just and justifiable to impose upon the appellant the most severe sentence which can possibly be imposed in our country. It is in this regard that I find that the trial court had erred and which allows for this court to interfere with the sentences imposed.

13. Having come to this decision all the aforesaid factors must again be considered in order to decide what a just and justifiable sentence would be. Having regard to the

nature of the crimes, the interests of the accused and of society, and the circumstances of this particular case, I propose that the appeal succeeds and that the following order be made:

1. The appeal against sentence succeeds and the sentences imposed are set aside and replaced with the following:

1.1 in respect of count 1 the accused is sentenced to 15 years imprisonment;

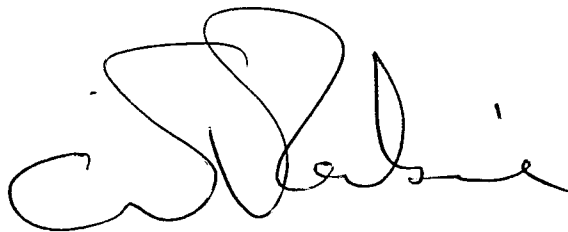
1.2 in respect of count 2 the accused is sentenced to 10 years imprisonment;

1.3 in respect of count 3 the accused is sentenced to 4 years imprisonment;

1.4 in respect of count ⁴ ~~for~~ the accused is sentenced to 4 years imprisonment.

2. The sentences in respect of counts 2, 3 and 4 shall be served concurrently with the sentence in respect of Count 1.

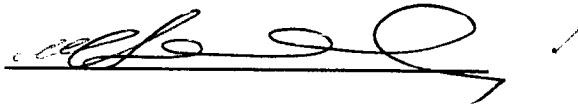
3. The sentences imposed above is backdated to the date on which the trial court imposed the original sentences.



C.P. RABIE

JUDGE OF THE HIGH COURT

I concur

A handwritten signature in black ink, appearing to read 'M.F. Legodi', written over a horizontal line.

M.F. LEGODI

JUDGE OF THE HIGH COURT

I concur

A handwritten signature in black ink, appearing to read 'R.G. Tolmay', written over a horizontal line.

R.G. TOLMAY

JUDGE OF THE HIGH COURT