



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 165/08

**THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL**

Appellant

and

WELCOME SIYABONGA NGCOBO

First Respondent

HAMILTON MONDLI ZACA

Second Respondent

LINDELANI LANDSLORD MAPHANGA

Third Respondent

Neutral citation: *Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and two others* (165/08) [2009] ZASCA 72 (1 June 2009)

CORAM: NAVSA, VAN HEERDEN and MHLANTLA JJA

HEARD: 26 May 2009

DELIVERED: 1 June 2009

CORRECTED:

SUMMARY: Minimum sentence regime — principles to be applied — absence of substantial and compelling circumstances — imposition of minimum sentences justified.

ORDER

On appeal from: High Court, Pietermaritzburg (Gcabashe AJ sitting as court of first instance).

In the result the appeal is upheld. The sentences imposed by the court below are set aside and substituted as follows:

- '1. In respect of the murder charge, each of the three accused is sentenced to life imprisonment.
2. In respect of the charge of robbery with aggravating circumstances, each of the three accused is sentenced to 15 years' imprisonment.'

JUDGMENT

NAVSA JA (VAN HEERDEN and MHLANTLA JJA concurring):

[1] During the morning of Tuesday 26 November 2002, three young men, each in possession of a knife, entered the home of Mr Andrew Scott Ferguson at 42 Rushmore Road, Hayfields, Pietermaritzburg. They stabbed Mr Ferguson at least 24 times in his chest and abdomen, causing his death. One of the young men was employed by Mr Ferguson (the deceased) as a gardener once a week.

[2] The walls of the deceased's home were blood-spattered. He sustained bruises and scratches on his left shin, extensive bruising and abrasions on his face and hands and had a knife wound on his third knuckle. The deceased also suffered a fractured sternum, multiple fractures of his right ribs anteriorly and multiple perforations of his lung, heart and liver. The post-mortem examination revealed that the ribs on the deceased's right side were all fractured, resulting in what was described as a 'flail chest'. According to the doctor who performed the post-mortem examination, the flail chest could have been caused by someone jumping on it with considerable force. Because of the flail chest the deceased would have been unable to breathe on the right side. Photographs of the body of the deceased show his face and clothes

covered in blood. The clothes of the three young men were stained with the deceased's blood. All of this indicates a fierce struggle for life by the deceased who was a 55-year old man who had taken early retirement from Telkom, a telecommunications company. His body was found later that day by his friend and neighbour, Mr John Wilson. The body was lying on its back in a passage in the house with something stuck in the mouth.

[3] After murdering the deceased, the three men took his cell phone as well as one left there the previous night by Mr Wilson. A video machine and compact discs containing financial information relating to a social club of which the deceased was the treasurer were also taken. The three men drove away in the deceased's Toyota motor vehicle which they left in the bush a short while after they murdered the deceased.

[4] The three murderers unashamedly walked through a residential area in a rural setting with their bloodstained clothes telling two acquaintances about their misdeeds. They used the cell phones they had taken to make telephone calls and allowed others to do so as well.

[5] The three men were eventually arrested and were indicted in the Pietermaritzburg High Court, charged with murder and robbery with aggravating circumstances. On 28 July 2005 they were each convicted on these charges (Gcabashe AJ). On 29 July 2005 they were each sentenced to 18 years' imprisonment on the murder charge and 12 years' imprisonment on the charge of robbery with aggravating circumstances. The court below ordered the sentences to run concurrently.

[6] Aggrieved by sentences regarded as too lenient, the appellant, the Director of Public Prosecutions, Kwazulu-Natal, applied for leave to appeal against them. Leave was erroneously granted to the Full Bench of the High Court. In terms of s 316B of the Criminal Procedure Act 51 of 1977, an appeal by the Director of Public Prosecutions against a sentence imposed by a high court lies directly to this court. When the matter came before the Full Bench of

the High Court, the error was detected and corrected. The appeal by the appellant against sentence is now properly before this court.

[7] The three men who perpetrated the offences referred to above are Messrs Welcome Ngcobo, Hamilton Zaca and Lindelani Maphanga, the three respondents in this matter.

[8] In passing sentence, Gcabashe AJ had regard to the material provisions of the Criminal Law Amendment Act 105 of 1997 (the CLA), in terms of which the legislature saw fit to prescribe minimum sentences for serious offences, unless a court is satisfied that there are substantial and compelling circumstances justifying the imposition of a lesser sentence. The minimum sentence for a murder that was (a) planned or premeditated, or (b) was caused by the accused in committing or attempting to commit or after having committed a robbery with aggravating circumstances, or (c) where the murder was committed by a group of persons acting in the execution or furtherance of a common purpose, is a life sentence.¹ The minimum sentence prescribed for a robbery with aggravating circumstances is 15 years.²

[9] In considering the appropriate sentences to be imposed, the court below stated that it had considered this court's judgment in *State v Malgas* 2001 (1) SACR 469 (SCA), which sets 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.

[10] The learned judge in the trial court took into account, in favour of the respondents, their youthfulness at the time that the offences were committed, that they were first offenders and that 'there had not been any proof of premeditated plans to kill the deceased or rob him'. Furthermore, the court considered, once again in favour of the respondents, 'the difficulties of remaining a motivated and focused young person in today's very materialistic world, and the possibilities for rehabilitation if the accused make something of

¹ See s 51(1) of the CLA read with Part I of Schedule 2.

² See s 51(2) of the CLA read with Part II of Schedule 2.

themselves whilst in prison'. In respect of the first respondent, Mr Ngcobo, the court considered in his favour that, during his arrest, he cooperated fully with the police.

[11] The court below considered all the factors referred to in the preceding paragraph as constituting substantial and compelling circumstances, justifying a departure from the prescribed minimum. In counter-balance the court expressed the following:

'I have also considered the viciousness of the crime and the fact that others who are of like-mind should be deterred, and very firmly so.'

It went on to impose the sentences referred to in para 5 above.

[12] *Malgas* is not only a good starting point but the principles stated therein are enduring and uncomplicated. In *Malgas*, this court, whilst recording judicial hostility to legislative intrusions upon sentencing, rightly nevertheless stated that a court was now required to approach sentencing conscious of the fact that the legislature has ordained life imprisonment or a particular prescribed period of imprisonment as the sentence which should 'ordinarily' be imposed for the commission of the listed crime in the specified circumstances.³ This court noted the statutory requirement that, in the event of a finding of substantial and compelling circumstances, such circumstances should be entered on the record of proceedings. The following passage is of importance:

'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 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.'⁴

[13] The following passage is equally deserving of consideration:

'But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.'⁵

³ Paras 1 to 3 at 472b-473b and para 8 at 476g-h.

⁴ Para 9 at 477d-e.

⁵ Para 9 at 477e-g.

[14] In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), a later judgment of this court, it was thought fit to re-emphasise what was stated in *Malgas*, namely, that a departure from the prescribed minimum sentence is justified if, in imposing it, an injustice would result. The imposition of a prescribed sentence need not amount to 'a shocking injustice'.⁶ If imposing the minimum sentence would be an injustice it *should* be departed from.

[15] It is necessary, at this stage, to record the ages of the three respondents as they were at the time of the commission of the offences in 2002, and to note their respective personal circumstances. The first respondent, Mr Ngcobo, was 20 years old at the time. When he was arrested he lived with his mother at Inadi, a rural area in Kwazulu-Natal. He is unmarried but has one child who was three years old at the time of the trial. He had passed Grade 11 at school and did part-time jobs (including working as a gardener for the deceased) up until the time of his arrest. The second respondent, Mr Zaca, was also 20 years old. When he was arrested he was unemployed and living with his parents. He has no children. The third respondent, Mr Maphanga, was almost 22 years old at the time of the commission of the offence. He has no children. When he was arrested he was pursuing his high school studies. All of the respondents were first offenders.

[16] The court below misdirected itself in a number of respects. First, it is clear that the murder and the robbery were premeditated. The first respondent, Mr Ngcobo, had worked for the deceased one day per week for approximately a year before the latter was murdered. He must have used his position of trust to gain entry to the deceased's house. The first respondent's co-perpetrators did not just spontaneously appear on the fateful day and with him decide on the spur of the moment to rob the deceased. Furthermore, Mr Ngcobo was known to the deceased and the former was therefore at risk. Hence it would have been necessary, from the perspective of the three perpetrators, to murder him. The respondents' legal representative, from the

⁶ See *Malgas* para 23 at 481d-e and *Rammoko* para 4 at 202h-j.

Legal Aid Board, to whom we are indebted for rendering them representation at short notice, was rightly unable to argue the contrary.

[17] Second, the court below appears to have justified the departure from the prescribed minimum sentence on the basis of the difficulty that young people have in resisting the temptations of a materialistic world. These are exactly the kind of values that detract from those set out in the Constitution and which we as a nation should be discouraging. Put simply, the value of life should not be degraded by the lure of materialism. It is also at odds with the stated deterrent effect the court below thought the sentence it imposed might have.

[18] Third, the court below took into account the youthfulness of the offenders. None of the respondents demonstrated immaturity, nor was it evident that any one of them was subjected to peer or undue pressure by one or both of the others. On the contrary, the manner in which entry was gained to the deceased's house, the brutal nature of the murder, the brazen manner in which they walked through a residential area, and the callousness displayed after the murder, as well as the fact that they each maintained their innocence right up to the end showed a complete lack of remorse, and are all indicative of a calculated bloody-mindedness, belying their relative youthfulness.

[19] Fourth, although it is true that Mr Ngcobo gave his consent to a police search, he maintained his innocence throughout and the detection of the perpetrators was as a result of police work and not his co-operation.

[20] The court below had regard to the prospect of the rehabilitation of the respondents. None testified in mitigation of sentence and each was content to have their personal circumstances stated by their legal representatives from the bar. None expressed remorse.

[21] In a White Paper on Corrections in South Africa (2005) at para 424 the following is stated:

'[R]ehabilitation is best facilitated through a holistic sentence planning process that engages the offenders at all levels – social, moral, spiritual, physical, work, educational/intellectual and mental. It is premised on the approach that every human being is capable of change and transformation if offered the opportunity and resources.'

The White Paper also states that rehabilitation is a result of a process taken by prison authorities to model the offender's life during his time in prison so that, when he is released, he has been reformed to such an extent that he is not likely to commit offences in the future. Section 37 of the Correctional Services Act 111 of 1998 requires sentenced prisoners to participate in various programmes and activities. It is a notorious fact that our prisons are overcrowded, often subjecting our prison population to undignified conditions of detention. It is optimistic in the extreme to assume that there are always effective rehabilitation programmes in place.⁷

[22] Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre and post *Malgas* the essential question is whether the sentence imposed is in all the circumstances, just.⁸

[23] Having regard to the misdirections referred to above, this court is at large to consider the question of sentence afresh.

⁷ See also in this regard an article entitled 'The prospect of rehabilitation as a "substantial and compelling" circumstance to avoid imposing life imprisonment in South Africa: A comment on *S v Nkomo* 2007 (2) SACR 198 (SCA) by Jamil Ddamulira Mujuzi 2008 *South African Criminal Justice* pp 1-21. The learned author states at pp 14 *et seq* that rehabilitation is influenced largely by speculation that the offender, after undergoing the various training programmes and attending the relevant courses in prison, will lead a crime free life. He states further that in the years preceding his article the Department of Correctional Services has failed to meet its rehabilitation targets and concludes that the prospect of rehabilitation in South Africa remains a speculative hypothesis.

⁸ Of course, post *Malgas* a court imposing a sentence must have regard to the prescribed minimum sentences and consider whether, in the circumstances, it is just to impose the prescribed minimum sentence.

[24] The legal representative for the respondents submitted that the period of two and a half years that they spent in custody awaiting the finalisation of the trial should count in their favour. The proceedings in the court below appear to have been conducted in fits and starts from November 2004 to July 2005. It should be borne in mind that the respondents maintained their innocence throughout the trial and sentencing proceedings. The State was required to present forensic evidence related to DNA testing and was put through the tribulations of a lengthy trial with many witnesses testifying.

[25] The murder was brutal and savage. Not only was the sanctity of the deceased's home breached and his trust betrayed, but he was also subjected to what appears to be a most painful and undignified death. It is the brazen manner and the brutality of the acts by the respondents that remain in the memory. The legal representative for the second respondent, without demur from his colleagues representing the other two respondents, conceded during the sentencing proceedings that offences of the kind currently under consideration are committed mostly by youthful persons such as the respondents.

[26] Courts are expected to dispense justice. This kind of brutality is regrettably too regularly a part of life in South Africa. Courts are expected to send out clear messages that such behaviour will be met with the full force and effect of the law. The legislature is concerned and so too should we be.

[27] There were no substantial and compelling circumstances justifying a departure from the statutory norm. An injustice would ensue only if there was a departure from the prescribed minimum. Had there been no statutory prescription in relation to sentences I have no doubt that any court having regard to the totality of circumstances would have regarded sentences equal to those statutorily prescribed as being just. In my view, even having regard to the time spent in custody pending finalisation of the trial, the prescribed minimum sentences are, in the totality of the circumstances described above, compellingly the only manner that justice can be dispensed.

[28] In the result the appeal is upheld. The sentences imposed by the court below are set aside and substituted as follows:

- '1. In respect of the murder charge, each of the three accused is sentenced to life imprisonment.
2. In respect of the charge of robbery with aggravating circumstances each of the three accused is sentenced to 15 years' imprisonment.'

M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: Me A Janse van Vuuren
Instructed by

The Director of Public Prosecutions Pietermaritzburg
Department of Justice Supreme Court of Appeal Bloemfontein

For Respondent: Me M A Oosthuizen (Attorney)

Instructed by
PMB Justice Centre Pietermaritzburg
Bloemfontein Justice Centre Bloemfontein