

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

**CASE NUMBER: 20/2017
DPP REF: 10/2/11/1-205/2016**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

20/02/2018
DATE

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SIGNATURE

In the matter between:

THE STATE

and

OBAKENG GRIIOUS SKHOSANA

ACCUSED

SENTENCE

MATSHITSE AJ

[1] Mr Obakeng Gracious Skhosana (Accused) have been convicted of six counts, being, robbery with aggravating circumstances, murder, two counts of attempted murder, unlawful possession of a firearm, and unlawful possession of ammunition, I must now impose sentence upon him. In determining an appropriate sentence, the court has regard to your personal circumstances, the nature of the crime, and the interests of society. In appropriate circumstances a court will also exercise a measure of mercy to the accused. S v Zinn¹

[3] I agree with the sentiment which were stated in an article entitled: Crime and Punishment in South Africa 1975 at page 150 where Nicholas stated as follows;-

“A criminal sentence cannot, in the nature of things, be a matter of precise calculation...There are no scales by which these matters can be measured and there is no relationship which makes it possible to express them in terms of punishment” You must understand that sentencing is an integral part of punishment system. Its purpose is not so much to please the community as it is to serve the interest of the society. The courts exist through the will of the people and are therefore merely instruments by which or through which society exerts punishment on offenders. So when this court imposes a sentence on you, know that it is the will of the people that is brought to bear on you. Gone are the days when, in exerting punishment on an offender, the victim, or his or the people on his behalf, took the law into their hands.

[4] It is commonly accepted that there are many purposes of sentencing. There is firstly, the desire to punish a person who is a wrongdoer who has offended against society and who has caused harm to the others. There is secondly, the intention to prevent the wrongdoer from committing such an offence again. This is the individual deterrence consideration that the wrongdoer, he or she will be deterred from engaging in actions which lead to or are themselves criminal. In the case of certain offences particularly those thought to be more frequently committed in society and more destructive of society there is the purpose of general deterrence. That is the purpose of sending a message to other persons that they should not engage in this

¹ 1969 (2) SA 537 (AD) and S v Rabie 1975 (4) SA 855 (AD)

kind of activity or wrongdoing and fourthly, there is the hope that whatever sentence is imposed can possibly lead to rehabilitation.

[5] In mitigation of sentence you did not testify or call any witnesses your counsel submitted your personal circumstances from the bar. You are 22 years old and at the time that you committed this offence you were 21 years old. You have no previous convictions, that is, you are a first offender, you went to school up to grade 10, you have been in custody for a period of about 1 year and 3 months. You are single and last born out of 4 siblings and currently you reside with your mother, and you depend upon her for your livelihood, your mother is not permanently employed but to get some income she does part-time work, like doing ironing in the community. You unemployed at the time of your arrest you had just completed a training in securities and you were waiting for the certificate. The area that you residing at is a squatter camp (informal settlement) which is very packed, it is not a properly lined up informal settlement /residence to such an extent that it is even impossible to can drive a motor vehicle there. The offences, with the exception of count 1, robbery with aggravating circumstance, of which your convicted of took place at a tavern and alcohol was consumed there.

[6] Among others your counsel submitted that in mitigation of sentence the court should regard the following as substantial and compelling circumstances in order for the court to deviate from imposing the minimum sentences: your age, that alcohol played a role at the time of the commission of the offence, that is you were under the influence of alcohol, your family back ground, you father is not residing with you and that has an impact upon yourself, that the area that you are leaving at is very pact and as such it does have an influence in commission of offences. In support of this submissions, she referred the court to and quoted several cases.

[7] In aggravation of sentence the State called the father of the deceased, being Mr Doubt Ndlovu, to testify, among others he testified that, at the time of death of Sibusiso Ndlovu, he was 24 years old and he was his only child, he has no other

children. The deceased was assisting at home, as he was employed, and he is doing odd jobs.

[8] His passing has a negative effect upon him and the family, his heart is broken, more so since they are neighbours with accused family and they stay a distance of about 500 meters and his family has never come to his house to come and apologies or say something regarding this incident.

[9] Counsel for the State submitted among others that accused has not shown any remorse for what he has done, he has failed to come and testify and to take Court in its confidence, alcohol did not have any influence on him, because during his testimony he testified that he was able to can distinguish between right and wrong. He has so much ego and he is also arrogant, because only few days ago at the time he robbed the complainant of his firearm he spared him his life, only few days later he did not care of any persons live he decided to shot at innocent people. The reasons or points that have been advanced by the defence as being substantial and compelling circumstances the court should regard them as not substantial and compelling circumstances and as a result there no reason the court should deviate from the minimum sentences.

[10] In short the facts of this case are that on the 20 March 2016 you and another person robbed the complainant, Victor Albert Edwards, of his firearm, and the following weekend, on the 26 March 2016, at David's tavern, when one of the complainants, Tumelo Olifant greeted yourself, and because you allegedly said he does not know you, without any provocation you said you can smash his head, you shoot at him and fortunately the bullet hit him on his shoulder, you then chased him, when the deceased tried to intervene you shoot at him in the stomach and he died, same bullet also hit Mr Thando Mfono on his thigh.

[11] It has become apparent that there is an increasing disrespect for the law. On top of this violent crime remains a serious and vexing problem in our society. The

news media reports constantly and prominently on crimes of a violent nature. Often the public's reaction to such crimes is highlighted with calls for Courts to deal more harshly with the perpetrators of such crimes. Courts are alive to the interests of society and recognise they have a duty to protect the right of law-abiding members of society not to live in constant fear of violence whether against their person or property.

[12] There is no serious crimes than the ones of which you have been found guilty of. Among others you have taken the life of another person and there is no possibility that any sentence imposed by this or any court can match the loss of Mr Sibusiso Ndlovu of his continuing life. In *S v C*² it was held that “society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes”

[13] In consideration of the victim it was stated in the case of *S v MATYITYI*³ that:- “An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power

[14] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will

² 1996(2) SACR 181 (C)

³ 2011 (1) SACR 40 (SCA)

contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportion

[15] It is stating the obvious but it bears repeating that murder is the most serious of crimes. In wrongfully taking the life of the deceased your actions have impacted on the lives of the deceased's family, relatives and friends. They must now deal with the emotional trauma that his violent and premature death has thrust on them. I agree with the State that so far you have not shown sign of being remorseful, even your family have not gone to the deceased family to apologies to show that really you have made a mistake,

[16] However, I take caution from the decided case of *S v Banda*⁴ when it says: "merely to find that a crime is by itself serious without regard to its setting and its factual context, and thereby concluding that the crime committed by the offender is therefore also serious, is not appropriate, and may result in a serious misdirection. The court does not and cannot rely on a catalogue of crimes. To do so would result in a purely mechanistic approach, whereby the Court in its judicial discretion, would fail to pay regard to the facts and circumstances of the particular criminality, rather than harshness".

[17] Criminal Law Amendment Act⁵ ('CLA Act') prescribes specific periods of imprisonment for certain crimes. Like the offences that you have been convicted off being, robbery with aggravating circumstances, murder and unlawful possession of a semi-automatic pistol a sentence of 15 years imprisonment is prescribed in respect of each offence. A Court may however depart from the prescribed sentence if there are substantial and compelling circumstances that justify the imposition of a lesser sentence. In assessing whether such sentence is justified the Court will take into account of any aggravating factors and the nature and extent thereof.

⁴ 1991(2) SA 352(B)

⁵ 105 of 1997

[18] When it comes to substantial and compelling circumstances It was stated in *S v Malgas*⁶ that:

In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided. It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which could rank as substantial and compelling or those which could not. The best one can do is to acknowledge that one is obliged to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence which must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling.

[19] I do consider what have been submitted by your counsel, more so when she submitted that you made a wrong “judgement” and as a result you made a mistake. I will say further as submitted by the State the firearm made you arrogant and think that and since you where in possession of it, and felt like a man, you wanted to show it off, there was no one who was going to stand in front of you. I belief that when a person is still young, like yourself, and having pear pressure and with that kind of social back ground as stated by your counsel, sometimes in his life he is bound to make a wrong or “stupid” mistakes and I will take that you also made that mistake during the commission of the offence at David’s tavern

[20] In *S v Mabuza*⁷ par 23 it was held that the legislature has clearly intended youthfulness no longer to be regarded as per se mitigating factor. However, that a court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an accused offender in deciding on an appropriate sentence in so doing, it would deny the youthful offender the human dignity to be considered capable of redemption” Like in your case at the time that you committed these

⁶ 2001(1) SACR 469 (SCA)

⁷ 2009(2) SACR 435 (SCA)

offences you were 21 years old and you are still young, you fall under the category of youth.

[21] When considering the factors relevant in each case, the court will seek circumstances to establish the measure of mercy the court must intermingle into the sentence. Remorse is important when the court must decide as to the degree of mercy to be applied when sentencing. True penitence is not mere expression that the accused is remorseful; but is an acceptance of his guilt and willingness to accept responsibility for his action and be punished, in this case you have shown known. The Supreme Court of Appeal has recognised that remorse or the lack thereof may be taken into account in determining sentence. *S v Makhudu*⁸ at para [7] where the Court stated: '[7] the behaviour of an accused during the trial may be indicative of a lack of repentance or intended future defiance of the laws by which society lives and therefore be a relevant factor in considering sentence'

[22] The right to life is entrenched in the Bill of Rights of the Constitution. In terms thereof every individual, which includes you, is entitled to this right. Yet you showed no respect for the deceased's right to life.

[23] No matter which sentence this court may impose upon you, it will never bring the deceased back to life. I do take into consideration what has been stated in *Malgas*⁹ case, that when justifying a departure, a court is to guard against lapses, conscious or unconscious, into sophistry or spurious rationalisations or the drawing of distinctions so subtle that they can hardly be seen to exist also when it talks of flimsy reasons.

[24] However, in offering you a measure of mercy and hoping that you can be rehabilitated, and after careful consideration of your personal circumstances, taking them cumulatively and not to close the door on your future, as it has been stated in

⁸ 2003 (1) SACR 500 (SCA) See further *S v Magoro and Others* 1996 (2) SACR 359 (A).

⁹ Referred to herein above

several decided cases that even a harsh sentence, on a young person, cannot on its own rehabilitate him, I believe it is upon a person to show that he really wants to be rehabilitated. I therefore regard them as they have been submitted by your counsel to be substantial and compelling circumstances. Which means that there is justifiable reason for imposing a lesser sentence than the prescribed one of imprisonment as prescribed by the CLA

[25] Lastly, I wish to end by what was stated by Logodi J in the case of **S v WV**¹⁰ when coming to sentence:

“It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system. The sentences that our court impose when offenses of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would-be offenders”

[26] The sentence imposed must therefore reflect the seriousness of offence. At the same time, it must not have the effect of destroying yourself unnecessarily. Your age, as well as the fact that you are first offender, and your social background is considered to indicate that you are capable of rehabilitation. You deserve to be given an opportunity to learn from mistakes and turn a new leaf so that you can be re-integrated back into the society.

[27] However, the offences of which you have been convicted of are deserving a severe punishment so as to convey the gravity of them and society's abhorrence thereof. In the result, I find that the appropriate sentences that I can impose is the following:-

Sentence

Mr Skhosana is sentenced to:-

¹⁰ 2013 SACR 204 GNP

1. Count 1- Robbery with Aggravating Circumstances is sentenced to 10 years
2. Count 2 – Murder read in accordance with the provisions of Section 51(2) of the Criminal Law Amendment act 107 of 1997 is sentenced to 15 years imprisonment
3. Count 3- Attempted Murder- is sentenced to 5 years imprisonment
4. Count 4- attempted Murder- is sentenced to 3 years imprisonment
5. Count 5 – Unlawful possession of a firearm - is sentenced to 10 years imprisonment
6. Count 6 - Unlawful possession of ammunition- is sentenced to 2 years imprisonment

In terms of the provisions of section 280 of the Criminal Procedure Act 55 of 1977 it is ordered that ten (10) years of sentence in Count 2 and sentences imposed on counts 3,4, 5 and 6 are to run concurrently with sentence imposed on count 1.

C K MATSHITSE
ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

On behalf of the State:	Adv Mahommed
Instructed by:	DPP
On behalf of the Accused:	Adv Qoqo
Instructed by:	Legal Aid South Africa
Date of Judgment:	20 February 2018 June