THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 20572/2014

In the matter between:

THABISO PRINCE MONTSHO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Montsho v The State* (20572/2014) [2015] ZASCA 187 (27 November 2015)
Coram:	Ponnan, Shongwe, Petse and Mathopo JJA and Van der Merwe AJA
Heard:	4 November 2015
Delivered:	27 November 2015

Summary: Criminal Procedure ─ sentence ─ prescribed sentences ─ imposition of in terms of the Criminal Law Amendment Act 105 of 1997 read with Part I of Schedule 2 ─ gravity of offence coupled with lack of genuine contrition rendering life imprisonment an appropriate sentence.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Thulare AJ sitting as court of first instance):
The appeal is dismissed.

JUDGMENT

Petse JA (Ponnan, Shongwe and Mathopo JJA and Van der Merwe AJA concurring):

[1] The appellant, Mr Thabiso Prince Montsho, was indicted in the Gauteng Division of the High Court, Pretoria on one charge of murder and one charge of kidnapping. The first of these charges was subject to the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act), which prescribes a minimum sentence of life imprisonment unless substantial and compelling circumstances are found to exist. The two offences related to the kidnapping of a four year old boy (his girlfriend's nephew) at Polo Street, Wattville, Benoni and his subsequent murder at the Wattville dam on 11 August 2012.

[2] At the commencement of the trial the appellant tendered a plea of guilty to both counts. In his written statement in support of his guilty plea in terms of s 112(1) of the Criminal Procedure Act 51 of 1977 (the CPA), the appellant stated, inter alia, that 'prior to [his] arrival at [his] girlfriend's residence [he] did not plan to commit any of the offences stipulated in the indictment'. The State did not accept the plea and intimated to the trial court that it would present evidence to establish that the murder was premeditated.

[3] At the conclusion of the trial the appellant was convicted on both counts and was sentenced to life imprisonment on the murder charge — the trial court having found that substantial and compelling circumstances were not present — and eight years' imprisonment on the kidnapping charge. The present appeal, with the leave of the trial court, is solely directed against the sentence of life imprisonment.

[4] The evidence led at the trial revealed that the appellant had an intimate relationship with the deceased's aunt, Ms Tepiso Mghadi, who had terminated the relationship some weeks before the offences were committed because her parents had not approved of their relationship and the abuse that she had been subjected to at the appellant's hands. On the day of the murder the appellant had gone to Mghadi's home to plead with her to reconcile with him. When there was no response, after he had knocked on the door, he left. At that stage, estimated to have been about 17h00, three young children, one of whom was the deceased, were playing in the street. The appellant called the deceased to him and carried the deceased away with him. In the evening of the same day a search was conducted for the deceased. During that search a report was received from a certain Mr Albert Basie to the effect that the appellant was the last person seen with the deceased.

[5] As a result of this report, the appellant was arrested. Whilst admitting having taken the deceased away, the appellant denied any knowledge of the deceased's whereabouts. The police searched the premises where the appellant lived and discovered his blood-stained clothes contained in a plastic bag. But the search for the deceased proved fruitless. The next day the body of the deceased was discovered at the Wattville dam as were the deceased's clothes which were found some distance from the body entangled in the reeds. The appellant described the distance between the spot where he had picked up the deceased and the scene of the murder as 'very far away' and said that it had taken him 30 minutes to cover the distance on foot, walking past two residential areas 'before he could reach' the crime scene. The appellant further testified that he was en route to a traditional healers' thanksgiving ceremony when he encountered the deceased. And in keeping with their practices as traditional healers he was carrying his traditional healer's garb

which included a knife dangling from the beads that form part of his garb which were in a sports bag.

[6] After he had arrived at Wattville dam he put the deceased on the ground, undressed him and randomly stabbed him with his knife, inflicting twelve stab wounds. He then threw the blood-stained knife away and left the scene as the deceased lay helplessly on the ground crying. At this stage the appellant said that he was gripped by fear not knowing what would befall him as a consequence of what he had done to the deceased. Hence, on his arrival at his home, he denied, when confronted by the deceased's family members, that he had earlier taken the deceased away. The appellant professed not to have known what he was doing when: (a) he took the deceased away; (b) where he was going to with the deceased; (c) whether the deceased lay on the ground or was in a standing position when he stabbed him; (d) why he undressed the deceased before stabbing him; and (e) why he threw the deceased's clothes away. Nor could he recall whether he had repeatedly stabbed the deceased and the parts of the body to which his blows were directed.

[7] As a result of the suggestion by the appellant that he had killed the deceased after 'hearing noises in [his] ears' the trial court ordered that he be examined and evaluated at Weskoppies Hospital in terms of ss 77, 78 and 79 of the CPA. The purpose of that referral was to inquire into the question whether the appellant was, by reason of mental illness or mental defect, capable of understanding the court proceedings so as to make a proper defence and whether at the time of the commission of the offences charged he was capable of appreciating the wrongfulness of his act and acting in accordance with such appreciation.

[8] Mr Jacobus Coetzee, a clinical psychologist, who had observed and evaluated the appellant at Weskoppies Hospital, prepared a forensic psychological report which was admitted into evidence at the trial by agreement between the State and the defence. Mr Coetzee, who testified, expressed the view that the appellant

did not suffer from any clinical psychiatric disorders at the time of the commission of the offences or the trial. Mr Coetzee opined that the appellant was 'malingering some psychiatric symptoms, specifically those in the psychotic disorder spectrum'. Hence his conclusion that at the time of the commission of the offences the appellant could distinguish between right and wrong and act in accordance with such an appreciation. The psychiatric report of Drs K Naidu and PH De Wet, who did not testify, but whose joint report was also admitted into evidence by agreement, arrived at the same conclusion as that of Mr Coetzee.

[9] It appears from the doctor's report of the post-mortem examination conducted on the body of the deceased that the deceased died of multiple stab wounds. According to Dr Sarang who examined the body of the deceased the injuries sustained by the deceased were concentrated in the upper part of his body and that in consequence of the multiple stab wounds a part of the deceased's 'bowel was protruding through the left abdomen'. After the conviction of the appellant the deceased's mother, Ms Jabulile Moraswi testified in relation to the effect that the kidnapping and murder of the deceased had on her, the deceased's twin brother and the entire family. She told the court that before the incident the relationship between her and the appellant was good and for this reason they found it hard to come to terms with what the appellant had done. In short, she testified that the gruesome killing of the deceased had a devastating effect on the entire family. This was particularly so given that the deceased's twin brother could not fully comprehended the enormity of the incident and why the deceased was no longer with them. Ms Tepiso Mghadi also testified. She said that her intimate relationship with the appellant was characterised by incessant emotional and physical abuse that she suffered at the hands of the appellant. And that she suffered a miscarriage because the appellant assaulted her whenever they had disagreements.

[10] In his judgment on sentence the learned trial judge, consonant with his earlier finding that the murder had been premeditated, alluded to the fact that he was obliged to sentence the appellant to life imprisonment unless the court was satisfied that substantial and compelling circumstances as contemplated in s 51(3)*(a)* of the

Act exist which justify the imposition of a lesser sentence. The trial court referred to *S v Malgas* (117/2000) [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) and *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC) and having considered the gravity of the offence, the personal circumstances of the appellant and the interests of society concluded that substantial and compelling circumstances were not present. In consequence, as I have already stated, it sentenced the appellant to life imprisonment on the murder charge.

[11] Counsel for the appellant attacked the sentence of life imprisonment on two bases. First, he submitted that the trial court erred in its finding that the murder was premeditated. Second, he argued that even if the murder was premeditated and thus bringing the nature of the offence within the purview of s 51(1) of the Act, which prescribes life imprisonment, the trial court should have found that substantial and compelling circumstances were present. Accordingly, it was necessary, so counsel argued, for this court to address the question whether or not the word 'or' in the phrase 'planned or premeditated' in relation to murder contained in paragraph (a) of Part I of Schedule 2 ought to be interpreted as denoting a conjunctive or not. In this regard counsel for the appellant strongly relied on *S v Raath* 2009 (2) SACR 46 (C) (paras 12-14) for the proposition that the phrase 'planned or premeditated' should be interpreted as denoting a single concept.

[12] On the other hand counsel for the State argued that the evidence led at the trial admitted of no doubt that the murder of the deceased was premeditated. Consequently, she submitted that the finding of the trial court that no substantial and compelling circumstances were present could not be faulted.

[13] In the view I take of the matter, I do not consider that there is any benefit to be derived, on the facts of this case, in formulating a general definition of whether the phrase 'planned or premeditated' denotes a single concept. The inquiry as to whether or not any given facts would at the very least sustain an inference to be drawn from them as to whether or not an accused had manifested a plan or

premeditation to commit the offence in issue can properly be determined on a case by case basis. Thus the circumstances in which a crime was committed and the peculiar facts of each case will determine whether or not the commission of the crime was planned or premeditated.

[14] On the facts of this case, the appellant, having not found his former girlfriend at her home, decided to take the deceased away with him. From the spot where he had picked up the deceased, he calmly walked a considerable distance, taking him 30 minutes to reach a secluded spot at Wattville dam. Upon arrival at the dam he undressed the deceased, unzipped his sports bag to retrieve his knife from it and repeatedly stabbed the deceased in the upper and vulnerable parts of the body. All of this, in my view, is consistent only with a calculated plan to murder the deceased. In *S v Kekana* (692/2013) [2014] ZASCA 158 (1 October 2014) this court said the following (para 13):

'[I]t is not necessary that the [accused] should have thought or planned his action a long period of time in advance before carrying out his plan'.

It went on to state that '[t]ime is not the only consideration because *even a few minutes are enough to carry out a premeditated action*'. (My emphasis.)

[15] I now turn to deal with what I consider to be the real crux of this appeal, that is, whether, on the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances were not present. And, as Ponnan JA pertinently observed in *S v Matyityi* (695/09) {2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 11:

'*S v Malgas* [2001 (2)] SA 1222 (SCA)] is where one must start. It, according to Navsa JA, is 'not only a good starting point but the principles stated therein are enduring and uncomplicated' (*Director of Public Prosecutions, KwaZulu-Natal v Ngcobo*). *Malgas*, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached, and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from *Malgas*: The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer "business as usual". A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing,

conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.'

[16] Counsel for the appellant submitted that the trial court erred in concluding that substantial and compelling circumstances were not present. In elaboration, it was argued that the appellant's personal circumstances were sufficiently weighty to tip the scales in his favour. Counsel listed the following mitigating circumstances, namely, that the appellant: (a) was 25 years old when he committed the offences; (b) pleaded guilty to the charge thereby manifesting remorse; (c) he had one previous conviction of assault; (d) worked as a traditional healer; (e) was unmarried; and (f) was diagnosed with an antisocial personality disorder and was described as being narcissistic. As to the remorse said to have been manifested by his guilty plea, what this court said in *Matyityi* is instructive. It said (para 13):

'It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. . . There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. 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.' (Citations omitted.)

[17] At the trial the appellant did his best to minimise his moral culpability by feigning lack of knowledge or recollection of why he took the deceased away in the first place, walked 30 minutes with him to an isolated spot at the dam, removed all of

the deceased's clothes; why and where he threw them away; and what became of the blood stained knife used to inflict no less than 12 stab wounds to the upper body of the deceased. As against this the appellant gave what was by all accounts a rational account of his actions before he encountered the deceased and what he did after he had executed this gruesome deed. All of this can hardly be said to be conduct manifesting contrition.

[18] On the facts of this case the appellant, on his own version, said that after executing his deed he became scared as he feared that members of the community would attack him if they found out that he was responsible for the deceased's murder. Thus he was concerned more about his own well-being and was indifferent to the plight of the victims of his crime. Moreover, after the report made by Mr Basie and the subsequent discovery of the appellant's blood-stained clothes, the evidence pointing to him having perpetrated the murder was overwhelming. So far as his age is concerned there is nothing to suggest that he was immature. Counsel for the appellant was constrained to concede that the mitigating factors relied upon, when viewed individually, were neutral. He nonetheless argued that when taken cumulatively they constitute substantial and compelling circumstances. To my mind this submission is devoid of merit. Just how a multiplicity of neutral factors could somehow metamorphose into weighty factors constituting substantial and compelling circumstances is difficult to comprehend. And as William Shakespeare, in his usual inimitable style aptly put it in King Lear Act 1, scene 1 'nothing will come of nothing'. On this score it is as well to recall what this court said in *Malgas* (para 9):

'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 to 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. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them.'

[19] The crimes that the appellant committed are abhorrent and their enormity cannot be over-emphasised. The deceased, only four years old, it will be recalled,

was mercilessly stabbed whilst naked. His cries went unheeded by the appellant. He was left to die a painful and agonising death. The appellant must have been in no doubt that, left in a secluded spot far away from residential areas and severely injured, the deceased would eventually die. Why the appellant chose to exact revenge on a toddler in the manner he did was not explained by the appellant. After he had executed his heinous deed, the appellant heartlessly played on the emotions of the members of the deceased's family by not informing them where the deceased was thereby perpetuating their agony, mental anguish and emotional trauma. And all of this manifested a flagrant disregard for the sanctity of human life and disdain for the feelings of the victims of his crimes.

[20] As I have already stated, the trial court found that there were no substantial and compelling circumstances present to justify a lesser sentence than the one prescribed in terms of s 51(1) of the Act. Neither can we. On the contrary, I daresay, the objective facts bearing on the gravity of the offences of which the appellant was convicted are such that even without s 51(1) life imprisonment would have been justified. The murder of the deceased was a particularly appalling, horrific and heinous crime. In my view, any sentence, other than life imprisonment, would utterly fail to reflect the gravity of the crimes and, in the context of this case, to take into account both the prevalence and pervasive nature of violent crime against children.

[21] In all the circumstances I am satisfied that the conclusion reached by the trial court that substantial and compelling circumstances were not present cannot be faulted. Accordingly, there is no basis upon which this court would be justified in interfering with the sentence of life imprisonment.

[22] In the result the following order is made:

The appeal is dismissed.

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X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	F Van As Instructed by: Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein
For Respondent:	P Vorster Instructed by: The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein