

SOUTH AFRICA / JUDGMENT

Dladla and Another v S (A907/2015) [2019] ZAGPPHC 1063 (2 December 2019)

[2019] ZAGPPHC 1063**COURT**

North Gauteng High Court, Pretoria

BEFORE

Nkosi, Neukircher

CASE / FILE NUMBER

A907/2015

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**IN THE HIGH COURT OF SOUTH
AFRICA
(GAUTENG DIVISION, PRETORIA)
(1)**

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
Case no.: A907/2015
2/12/2019
In
the matter between: -
BHEKANI
LINDA DLADLA
1st
Appellant
WILGRET
NTSHINGILA
2nd
Appellant
And
THE
STATE
Respondent

JUDGMENT

NENKOSI AJ

[1] The 1st and 2nd Appellants appeared in the Regional Court for the Regional Division of Gauteng held at Benoni as 1st and 2nd accused respectively facing various charges and were found guilty and sentenced as follows:

1.1 1st Appellant

- a) count 3, assault GBH, 5 years imprisonment;
- b) count 4, unlawful possession of a firearm, Dash Prod Semi- Automatic Rifle, 15 years imprisonment; and
- c) count 6, unlawful possession of ammunition, 12 months' imprisonment.

All the counts are to run concurrently and effectively he will serve 15 years imprisonment.

1.2 2nd Appellant

- a) count 1, unlawful possession of a firearm, a 9mm Z88 semi- automatic pistol, 10 years imprisonment.
- [2] On petition, the 1st Appellant was granted leave to appeal against the sentence only and the 2nd Appellant was granted leave to appeal against the conviction and sentence. The 2nd Appellant did not pursue his appeal against the conviction and made no submissions in this regard notwithstanding the court's invitation

to do so. Similarly, as to the 1st Appellant, no argument was presented to substantiate his appeal against sentence on counts 3 and 6. In any event and having considered the trial record, the prospects of success in the appeal against the conviction and sentences in respect of counts 3 and 6 are poor.

- [3] At this stage I find it convenient to give a brief factual background of the facts without compromising any material evidence and I do so purely to avoid burdening the judgement with facts not relevant to the issue of sentencing appealed against by both appellants.
- [4] A vigilant Mr Nkosi, noticed a suspicious looking white Avanza vehicle with occupants driving pass his scrap yard several times until it parked near its premises in Etwatwa, Benoni. He alerted the police. Two police officers, a female Constable Maphalala and a male Constable Ndlangisa arrived in a police vehicle and parked next to and facing the Avanza. At that time there were three occupants in the Avanza. Constable Maphalala noticed the 1st Appellant seated on the driver's seat bending forward as if he was shoving something underneath his seat using his right hand.

- [5] The two police officers approached the Avanza and asked the occupants for permission to conduct a search. All the occupants stepped outside. The 1st Appellant remained with Ms. Maphalala and the other two went to Constable Ndlangisa. All three were searched and nothing incriminating was found on all three.
- [6] Ms. Maphalala proceeded to search the Avanza starting at the driver's seat. She found a Dash Prod semi-automatic rifle with seven rounds of ammunition concealed under the driver's seat. She immediately alerted constable Ndlangisa of her discovery. At that moment, 1st Appellant charged at her trying to gain possession of the rifle but she quickly placed it back underneath the seat. 1st Appellant started hitting her with clenched fists many times on her upper body. All the blows landed on her protective arms. A scuffle ensued but she was overpowered and thrown on the passenger seat and strangled with both hands. He tried to reach the firearm under the seat but was unable. He shouted at the other two suspects calling them to assist him to reach his firearm. In that process he bit Ms. Maphalala on her left cheek which later got swollen. She screamed until Mr. Ndlangisa approached to assist and 1st Appellant was eventually subdued and handcuffed.
- [7] Meanwhile, before Mr. Ndlangisa went to assist Ms. Maphalala, the two suspects who were standing next to him started to attack him. The one suspect, who subsequently fled the scene and remains at large, hit Mr. Ndlangisa with a clenched fist and at that moment 2nd Appellant managed to disarm Mr. Ndlangisa and remove the firearm from his holster. It is a 9mm 288 pistol and was fully loaded with fifteen rounds of ammunition. According to Mr. Ndlangisa, 2nd Appellant took a few steps backwards, pointed the firearm and cocked it. He fired one shot but Mr. Ndlangisa had already moved away and managed to grab 2nd Appellant. They started wrestling to gain control of the firearm and Mr. Nkosi arrived to assist. In the process, another shot went off and 2nd Appellant fell to the ground with a gunshot wound on his right thigh. It was only then that Mr. Ndlangisa managed to rush to Ms. Maphalala and assisted her.
- [8] Constable Mokoena testified that he arrived at the scene shortly after the incident and found Ms. Maphalala and Mr. Ntshingila with both Appellants handcuffed. The 2nd Appellant was bleeding from the gunshot wound on his right thigh. Photographers from the forensic police department arrived shortly thereafter.
- [9] Mr Sibiya, testified that he was the owner of the Avanza which operated as a taxi in Etwatwa, Benoni. He confirmed that 1st Appellant was employed by him as the Taxi driver operating the Avanza and that there was no other person employed to drive the said Avanza.

- [10] In his defence, 1st Appellant testified that he was approached by Ms. Maphalala who never searched him but only asked to search the vehicle. The other two passengers alighted and went to Ndlangisa towards the back of the Avanza. He then felt being hit on the side of his head and was thereafter assaulted by unknown people. He did not see who and how many people assaulted him. He lost consciousness and regained same in hospital.
- [11] 2nd Appellant testified that he was a fee paying passenger in the Avanza driven by 1st Appellant. There were three other passengers. The Avanza stopped and two of the three other passengers alighted and left to fetch their taxi fare. The Avanza remained stationery and approximately ten minutes later a police vehicle arrived with two police officers. The police officers drew their firearms pointing at all of them. He and the other occupants got out of the Avanza with their hands held up. The other passenger pushed him forward towards the male police officer and a shot went off. He was hit on the leg and fell to the ground hitting an object with his head which rendered him unconscious and he regained consciousness when the paramedics were attending to him at the scene. He conceded that the scene of the incident is at a gravel road near Nkosi's scrap yard and the gravel road is not a taxi route.
- [12] He denied disarming the police officer and taking his firearm. He also denied that the Avanza drove past Nkosi's scrap yard several times on the day in question. He further denied knowing 1st Appellant.
- [13] The Appellants challenged their sentence on the basis that it was strikingly inappropriate, too harsh and placed more emphasis on the gravity of the offence without according sufficient weight to their personal circumstances.
- [14] The 1st Appellant's personal circumstances in mitigation of the sentence appear in the trial record and were reiterated by his Counsel as follows:
- a) he was 33 years old at the commission of the offence;
 - b) he was relatively young and not above rehabilitation;
 - c) he was employed as a taxi driver earning R 500.00 per week;
 - d) he was single but living with, his unemployed girlfriend;
 - e) he had four minor children to maintain all the children were staying with his mother in KwaZulu Natal Province;
 - f) he went as far as grade 9 at school;
 - g) he has no formal training for a vocation;
 - h) he was a first offender; and
 - i) he has been in custody awaiting trial for 6 months and 8 days.

[15] The 2nd Appellant's personal circumstances were also placed on record and are the following:

- a) he was 43 years old when he was sentenced;
- b) he was not beyond rehabilitation;
- c) he was a gainfully self-employed hawker with a monthly income of R 1 500.00;
- d) he was married and his wife earned R 4 000.00 monthly;
- e) he had 3 minor children attending school and whose ages were 7, 10 and 16 years;
- f) he went as far as grade 11 at school and did not received training in any career;
- g) he was not a first offender and his previous conviction dates back to 21 years ago; and
- h) the self-inflicted gunshot wound should be regarded as partial punishment.

[16] The Court of appeal will not be readily available to interfere with the decision of the court a quo on sentencing unless the said court exercised its discretion improperly or unreasonably to an extent that the sentence induces a sense of shock or is shockingly inappropriate[1].

[17] The discretion on sentencing vests with the trial Court. Such discretion must be exercised reasonably and judicially[2]. If the sentencing Court is satisfied that there are substantial and compelling circumstances justifying a deviation from a prescribed

minimum sentence, then a lesser sentence must be imposed[3]. The prescribed minimum sentence prescribed by Section 51(2) (A) should be a point of departure and be imposed where there are no substantial and compelling circumstances. However, the cumulative effect of the mitigating factors if weighty enough to amount to substantial and compelling circumstances, should warrant a departure from the prescribed minimum sentence to a lesser sentence. Such approach will promote the provisions of section 12 (1) (e) of the Constitution[4] which require that the sentence imposed must be proportionate to the seriousness of the offence.

[18] The 1st Appellant was relatively young at commission of the offence. He was employed, which indicates that, to some extent, that he is still a responsible person and therefore not beyond rehabilitation. He is a first offender and therefore a candidate for rehabilitation. An appropriate sentence should therefore not break but rather deter and rehabilitate him. He went as far as grade 9 at school and never pursued training in any trade. There is no explanation, at least by a probation officer, why he found himself in that situation. In my view the Appellants personal circumstances are substantial and compelling enough to warrant a deviation from the minimum sentence of 15 years imprisonment as provided for in section 51 (2) (A) of Act 105 of

1997. The interest of the society and the seriousness of the offence will not be undermined by the imposition of ten years' imprisonment which I consider appropriate having regard to all the circumstances relevant to sentencing.

[19] The same cannot be said about the 2nd Appellant. The Magistrate considered his personal circumstances and correctly took them into account when deciding an appropriate

sentence to impose. This is evidenced by the fact that she did not impose a minimum sentence but ten years' imprisonment. I am of the view, with respect, that there is no merit to the submission that the Magistrate over emphasized the gravity of the offence and that the sentence induces a sense of shock: I am satisfied that the Magistrate applied her discretion reasonably and judicially.

[20] I therefore order that:

- 1) The Appeal against sentences on Counts 3 and 6 in respect of the 1st Appellant is dismissed.
- 2) The Appeal against sentence on Count 4 in respect of the 1st Appellant is upheld.
- 3) The sentence of 15 years on Count 4 is set aside and replaced with the following:
 - a) The 1st Appellant is sentenced to 10 years' imprisonment ante dated to 12 April 2018
- 4) The Appeal against conviction and sentence in respect of the 2nd Appellant is dismissed.

N.E NKOSI

Acting Judge of the

Gauteng division of

the High Court

I agree

NEUKIRCHER, J

Judge of the

Gauteng division of the

High Court

Date of Hearing

: 28 October 2019

Date of Judgement

: 2 December 2019

For the Appellant

: Advocate Moeng

Instructed by

: Legal Aid South Africa

For the Respondent

: Advocate Pruis

Instructed by

: The Director of Public Prosecutions

[1] S v Pillay 1977 (4) SA 531 at 535 E-F and S v Pieters 1987 (3) SA 717 (A) at 728 B-C.

[2] S v Pillay 1977 (4) SA 531 at 535 E-F and S v Pieters 1987 (3) SA 717 (A) at 728 B-C.

[3] S v Malgas 2001(1) SACR 469 (SCA).

[4] Constitution of South Africa Act 108 of 1996.

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