

SOUTH AFRICA / JUDGMENT

Kgalegi v S (CAF 8/10) [2010] ZANWHC 37 (2 December 2010)

[2010] ZANWHC 37

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, Samkelo Gura, T C Gumbo

CASE / FILE NUMBER

CAF 8/10

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IN THE NORTH WEST HIGH

COURT, MAFIKENG

CASE NO: CAF 8/10

In the matter between:

LEVY

KGALEGI

.....Appellant

and

THE

STATE

.....Respondent

FULL

BENCH APPEAL

HENDRICKS

J; GURA J; GUMBO AJ

DATE

OF HEARING : 26 NOVEMBER 2010

DATE

OF JUDGMENT : 02 DECEMBER 2010

COUNSEL

FOR THE APPELLANT : ADV MOREMI

COUNSEL

FOR THE RESPONDENT : ADV MOGOENG

JUDGMENT**HENDRICKS J**

[A] Application to strike the Appeal off the roll:-

- [1] The Respondent on the 15th November 2010 filed and served a notice of intention to have the appeal struck from the roll due to non-compliance on the part of the Appellant with Practice Directive No 13 of the North West High Court.
- [2] In reply to this intended striking-off application, a notice of opposition was filed and served on the same day that the notice of intention to have the appeal struck from the roll was received. This notice reads:-

“Take Notice that the Appellant intent opposing the striking off the matter due to the following:

1. Save from the Appellant acknowledging the Rules of Court, it is submitted that Appellants Heads of Arguments were filed on the 26 May 2010 when Leave to Appeal was applied for as required by the Practice Directive No 28.
2. The Appellant does not intend supplementing those Heads of Arguments.”

[3] Rule 49 (A) (2) provides:-

“49A

- (2) The appeal shall be set down by the attorney-general on a date assigned by him with written notice to the registrar of the court where the appeal is to be heard and the accused or his legal representative.”

[4] Practice Directive No 13 states:-

“PRACTICE DIRECTION NO. 13

FILING AND SERVICE OF HEADS OF ARGUMENT IN CIVIL AND**CRIMINAL APPEALS****GENERAL:**

1. Criminal and civil appeals may be set down for hearing during term on a date allocated by the Registrar on a Friday.
2. (a) It is the responsibility of the appellant to ensure that the record is properly typed, both as to content, layout and spacing and as to numbering of the pages and lines and that it is properly indexed and bound. Where the pages of the record have already been numbered by the transcriber it shall not be necessary to renumber those pages. Any additional pages which are inserted at the beginning of the record before the already numbered pages may be numbered in roman numerals or alphabetically so as to obviate the need to renumber

those pages which have already been numbered.

- (b) Both counsel must exclude from the Court record all volumes and reading material that is unnecessary for the determination of the issues on appeal (e.g. where only a question of law falls to be determined).
3. Applications for the amendment of the grounds of appeal will not be considered unless adequate notice has been given to all parties concerned and to the presiding judicial officer in the Court a quo.
4. Where an appeal is set down for hearing and the appellant abandons the appeal or is unable to proceed with it, the appellant's attorney shall immediately notify the Registrar of the fact and the appeal will be removed from the roll. Should the respondent concede the appeal or be unable to oppose it, his/her attorney shall immediately advise the Registrar of the fact.
5. An attorney who wishes to withdraw as attorney of record must comply with the procedure prescribed by Uniform Rule 16 (4).
6. The heads of argument of each party must be accompanied by a brief typed note indicating:
 - the name and number of the matter;
 - the nature of the appeal;
 - the issues on appeal succinctly stated (for example 'negligence in MVA case', 'admissibility of a confession', 'interpretation of . . .');
 - an estimate of the duration of the argument;
 - if more than one day is required for argument, the reasons for the request;
 - if the appeal is said to be urgent or is entitled to some precedence on the roll, the reasons therefor;
 - a list reflecting those parts of the record that, in the opinion of counsel, are necessary for the determination of the appeal;
 - a summary of the argument, not exceeding two folios;
 - an indication of those authorities to which particular reference will be made during the course of argument.
7. Cross-appeals do not require a separate set of heads of argument. In all cases where there is an appeal and a cross-appeal, the appellant's main heads of argument must follow the same pattern.
8. The Registrar will not accept documents in relation to an appeal on the date of the hearing of that appeal.

9. The use of plastic ring binders (not files) for heads of argument and in applications would be appreciated.

1. CIVIL APPEALS:

Heads of argument in all civil appeals to the Full Bench of this Division and all civil appeals from the Magistrates' Courts shall be delivered in accordance with the provisions of Rules of Court 49 (15), 50 (9) and 50 (10).

(a) Civil Appeals to the Full Bench:

49(15) Not later than fifteen (15) days before the appeal is heard the appellant shall deliver a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not later than ten (10) days before the appeal is heard the respondent shall deliver a similar statement. Three (3) additional copies shall in each case be filed with the Registrar.

(b) Civil Appeals from Magistrates' Courts:

50(9) Not less than fifteen (15) days before the appeal is heard the appellant shall deliver one (1) copy of a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not less than ten (10) days before the appeal is heard the respondent shall deliver a similar statement. Three (3) additional copies shall be lodged with the Registrar in each case.

50(10) Notwithstanding the provisions of this rule the Judge President may, in consultation with the parties concerned direct that a contemplated appeal be dealt with as an urgent matter and order that it be disposed of, and the appeal be prosecuted, at such time and in such manner as to him/her seems meet.

2. CRIMINAL APPEALS:

Heads of argument in all criminal appeals to the Full Bench of this Division and all criminal appeals from the Magistrates' Courts shall be delivered in terms of the provisions of Rules 49A(3) and (4) as well as Rule 51(4) respectively.

(a) Criminal Appeals to the Full Bench

49A(3) Not later than 20 days before the appeal is heard the appellant shall deliver one copy of a concise and succinct statement of the main points (without elaboration) which he/she intends to argue on appeal as well as a list of the authorities to be tendered in support of each point to the Director of Public Prosecutions and four copies to the Registrar.

49A(4) Not later than five days before the appeal is heard the Director of Public Prosecutions shall deliver one copy of his/her heads of argument as well as a list of the authorities to be tendered in support of each point to the appellant and four copies to the Registrar.

(b) Criminal Appeals from Magistrates' Courts:

51(4) Before the appeal is heard the appellant shall deliver a concise statement of the main points (without elaboration) which he/she intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and before the appeal is heard the respondent shall deliver a similar statement. The periods, within which the aforesaid heads of argument and list of authorities shall be delivered, are those which the Judge President of this High Court determines from time to time. Three

(3) additional copies shall in each case be filed with the Registrar.

Pursuant to this Rule the Judge President of this Division has determined as follows:

(aa) The appellant's heads of argument and list of authorities together with three copies thereof shall be delivered not less than 15 days before the date on which the appeal is set down for hearing and the respondent's not less than 10 days before such date.

(bb) In criminal appeals from Magistrates' Courts delivery by the appellant of heads of argument in terms of Rule of Court 51(4) read with Rule of Court 1, shall include service on the Director of Public Prosecutions of such heads of argument in accordance with the time-periods provided for in Rule of Court 51(4) set out immediately under (b) above.

(cc) Not less than thirty (30) days prior to the date on which a criminal appeal from the Magistrates' Court is set down for hearing, the attorney of record for the appellant (or the appellant) shall confirm in writing to the Director of Public Prosecutions and the Registrar that the appeal is to proceed on the date allocated in the notice of set-down for the hearing thereof. Failing timeous receipt by the Director of Public Prosecutions and the Registrar of such confirmation, the appeal will not be heard on the allocated date and will be struck from the roll.

(dd) 'Heads of argument' shall mean, in addition to or in lieu of the 'concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal' as provided for in Rules of Court 49(15), 49A(3), 50(9) and 51(4), full heads of arguments with, where appropriate, references to the record and to the authorities relied upon, together with a list of such authorities. Appellant or his or her legal representative shall, when delivering the heads of argument and after consultation with the other parties' legal representative(s), file a statement setting out which portions of the record, if any, they regard as irrelevant to the appeal and to which they do not intend to refer.

(ee) 'Delivered' in respect of both civil and criminal appeals shall include the handing in of heads of argument at the Records' Office and the entering of the required particulars in the register for heads of argument by the person handing in same.

(ff) The Judge President may, in any particular instance when he/she deems it expedient to do so, determine earlier dates than those provided for in this Practice Direction."

[5] Due notice was given in terms of the provisions of Rule 49 (A) (2). It goes without saying that the Appellant did not comply with Practice Directive No 13 of the North West High Court.

- [6] Mr Moremi on behalf of the Appellant mistakenly believed that when heads of argument is filed in an application for leave to appeal, the same heads serves as heads of argument for the subsequent appeal.
- [7] However, the Respondent's so called application to strike the appeal from the roll is defective. No accompanying affidavit is filed by either the Director of Public Prosecutions or his delegate. Strictly speaking there is no substantive application before court for striking the appeal off the roll save for the notice.
- [8] Mrs Mogoeng, on behalf of the Respondent (State) addressed the court from the bar in support of the intended application to strike the appeal from the roll. This is however not proper. No explanation was forthcoming as to why a substantive application supported by an affidavit was not timeously made. The court however is entitled to mero moto strike a matter from the roll due to non-compliance with the Rules of Court.
- [9] Be that as it may, this Court will in the interest of justice and in particular having regard to the interest of the Appellant and his prospects of success on appeal, condone the non-compliance with the Rules of Court by both the Appellant, as well as the Respondent for failing to file heads of argument.
- [10] Having condoned such non-compliance, I now deal with the appeal. The Appellant was convicted in the High Court of murder on the 15th February 2000 and sentenced to thirty-five (35) years imprisonment. He applied for leave to appeal in the court a quo against the sentence imposed, which leave was granted to this Court on 14 July

2010. Hence this appeal.

[B] The Facts:-

- [11] The facts can be succinctly summarized as follows.
- [12] On the evening in question, 14 May 1998, at approximately eight o'clock (20H00), Dintwe was in the company of two ladies namely Shadi and Fransina (the deceased).
- [13] After paying a visit to a shebeen in the neighbourhood, they visited the shanty in which the Appellant and his companions were. Upon leaving, the Appellant grabbed the deceased and pulled her, and uttered some words of affection. The deceased responded negatively to the proposition and pushed the Appellant away. He fell to the ground. The Appellant then went back to the shanty.
- [14] Whilst on their way, the Appellant came following them. He caught up with them and at a certain stage the deceased screamed that she was stabbed. She fell to the ground, bleeding from her chest.

[15] The police was summoned. It was established by the police that the deceased had already passed away. There was no quarrel or struggle between the Appellant and the deceased when the Appellant stabbed her. The post-mortem report indicated an open stab wound injury on the chest of the deceased.

[C] Sentence:-

[16] It is trite law that sentence is within the discretion of the trial court and a court of appeal will not lightly interfere with the exercise of its discretion by the trial court. A court of appeal will only interfere if the trial court failed to exercise its discretion judiciously, properly or reasonably and thereby committed an irregularity by imposing a sentence that is either shockingly severe or disproportionate to the offence committed.

See:- S v Kgosimore 1999 (2) SACR 238 (SCA);

S v Matlala 2003 (1) SACR 80 (SCA).

[17] In imposing sentence, the court a quo remarked as follows:-

“The minimum sentence here would be life imprisonment but I am of the opinion that there are substantial and compelling circumstances and also of the opinion that you can be rehabilitated and come back to the society to be a useful citizen of this country.

In the circumstances the appropriate sentence for you would be THIRTY FIVE (35) YEARS’ IMPRISONMENT, IN GAOL.”

[18] By referring to the minimum sentence of life imprisonment, the court a quo had in mind the provisions of Section 51 of the Criminal Law Amendment Act, Act 105 of 1997 (as amended) which deals with prescribed minimum sentences (“the minimum sentence Act”).

[19] The facts of this case indicate that the offence falls under Schedule 2 Part II of the minimum sentence Act. The minimum sentence prescribed is fifteen

(15) years imprisonment unless substantial and compelling circumstances are found to be present which justify the impositioning of a lesser sentence in terms of the provisions of Subsection (3)(a) of the said Act.

[20] The following facts and circumstances constitute in my view substantial and compelling circumstances:-

the offence was not planned or premeditated;

the Appellant was a first offender;

he has a minor child as dependant;

he was a farmer and had people in his employ;

he was twenty-seven (27) years old at the time of the commission of this offence;

his irrational behaviour was as a result of the liquor that he consumed;

he was convicted of murder on the basis of *dolus eventualis* as a form of intention.

See:- *S v Malgas* 2001 (1) SACR 469 (SCA)

S v Fatyi 2001 (1) SACR 485 (SCA)

S v Dodo

[2001] ZACC 16; 2001 (1) SACR 594 (CC)

[21] Having found that there exists the aforementioned substantial and compelling circumstances, the court a quo should have departed from imposing the prescribed minimum sentence. However, despite finding that there are substantial and compelling circumstances present which warrants a deviation from imposing the prescribed minimum sentence, the court a quo imposed a sentence of more than double the prescribed minimum sentence. In my view, this was a misdirection by the court a quo.

[22] It was pointed out by the court a quo that the possibility exists that the Appellant may be rehabilitated. The element of rehabilitation is of paramount importance in imposing a suitable sentence upon an offender.

[23] Similarly, it is important to consider mercy as a factor in imposing a suitable sentence as correctly alluded to by the court a quo.

See:- *S v Kwenamore* 2004 (1) SACR 385 (SCA)

S v Silvale en Andere 1999 (2) SACR 102 (SCA)

S v Bull and Another; S v Chavulla and Others 2001 (2) SACR 681 (SCA)

S v Monyane and Others 2008 (1) SACR 543 (SCA)

S v Mokwena 2009 (2) SACR 308 (SCA).

[D] Conclusion:-

[24] Having regard to all the factors relevant for the impositioning of an appropriate sentence, I am of the view that a sentence of twelve (12) years imprisonment will be appropriate under the circumstances of this case.

[25] As already indicated, more than ten (10) years had passed since the impositioning of sentence by the trial court. Under the circumstances it will be appropriate that the sentence be antedated to 15 February 2000, the date of sentence by the trial court.

[E] Order:-

[26] Consequently, the following order is made:-

[i] The appeal against sentence is upheld.

[ii] The sentence imposed by the trial court is set aside and is substituted by the following sentence:-

“The accused is sentenced to twelve (12) years imprisonment.”

[iii] The sentence is antedated to 15 February 2000.

R D HENDRICKS

JUDGE OF THE HIGH COURT

I agree.

SAMKELO GURA

T C GUMBO

ACTING JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPELLANT: MAFIKENG JUSTICE CENTRE

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