

SOUTH AFRICA / JUDGMENT

Khanyile v S (A841/2014) [2015] ZAGPPHC 711 (11 September 2015) [2015] ZAGPPHC 711

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi V V, Moshidi D S S, A A Louw

CASE / FILE NUMBER

A841/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: A841/2014

DATE:

11/9/2015

In

the matter between:

ZAKHELE

ERNEST

KHANYILE

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellant appeals against sentence with leave of the court trial court. He appeared before the above court facing twelve counts relating to the following:

Malicious damage to property;(count 1)

Murder read with s 51(1) of Act 105 of 1997; (count 2)

Six counts of attempted murder (counts 3, 4,5,6, 7 and 8);

Theft of a Volkswagen Polo; (count 9)

Possession of an unlicensed firearm; (count 10)

Possession of a fully automatic firearm; (count 11)

Possession of ammunition; (count 12)

[2] He was convicted on counts 2, 3, 7, 8, 11, 12. The trial court found that there were no substantial and compelling circumstances

justifying a departure from the prescribed minimum sentence and sentenced him to life imprisonment in respect of count 2. Furthermore, he was sentenced to the following terms of imprisonment: Count 3, eight (8) years; Counts 7 and 8 taken together for purpose of sentence, eight (8) years; Count 11, fifteen (15) years; Count 12, two (2) years; and it was ordered that the sentences

in 3, 7, 8, 11 and 12, were to run concurrently with the sentence in count 2.

BACKGROUND

[3] Since this is an appeal on sentence, only a brief exposition of the facts isnecessary. In the early hours of 16 May 2008 Messrs Maleka and Hlako, both members of the South African Police Force responded to a call for back-up in an attempted ATM bombing in progress, at the Spar Shopping complex, Block FF, Soshanguve. The police were travelling in a marked Nissan Hard Body van, driven by Hlako. They stopped at a stop sign near the complex, and noticed three men emerge fleeing from the complex in their direction. All three men had firearms in their possession. Two of the men ran ahead of the third one and they ran past the police vehicle. The third man began shooting in their direction when he was about 7 to 8 metres from them and several bullets struck their vehicle. Maleka testified that he noticed that Hlako had been shot. He hid himself beneath the dashboard and radioed for assistance

and as he spoke on the radio he noticed that the third man had approached their vehicle and was about three to four paces away. When he looked up the man fled in the direction of the other two men. Hlako succumbed to gunshot wounds to the head and neck. Maleka testified that they did not return fire because they were unarmed. They were called while he was on duty at the charge office. The deceased was behind the wheel when he was shot. Other policemen had converged on the crime scene prior to their approach. They too were in pursuit of the three men. He gave them the direction in which the men had fled. He also gave them a description of the clothing the third man was wearing, a black jacket and khaki short trousers. A man who was naked on his upper body and only clad in a khaki short trousers, was found beneath a pile of building sand in one of the premises nearby and in the surroundings the police discovered a blue T-shirt with white stripes and a pair of takkies. Maleka identified the appellant as the one who fired shots at their vehicle. Mr Mononyane also identified him as the one seen at the scene of the ATM brandishing a firearm. The appellant was identified by the clothes he was wearing. The description of the clothing was similar to the clothing the appellant testified he was wearing on that day.

- [4] The appellant allegedly led the police to where he had hidden the firearm. A trial-within a trial was conducted and the pointing out was not admitted. The police conducted a search of the surroundings and found a balaclava, a jacket and hand gloves. A gun powder residue test was conducted on the appellant at the scene of his arrest and the items were taken for DNA analysis.

The appellant was conclusively linked by DNA on the hand gloves and balaclava.

- [5] The accused pleaded not guilty. He denied knowledge of the entire incident. He testified that on 16 May 2008 he had travelled from Johannesburg to visit his girlfriend at Madidi Village. He left Madidi between 22h00 and 23h00 and because it was late to travel back to Johannesburg, he decided to sleep over at his cousin's place in Soshanguve. He was walking down a road towards Block GG when he was arrested by the police without reason. He was assaulted and lost consciousness and came to his senses in prison around June 2008. This evidence contradicted his evidence at an earlier bail hearing on where he was when he was arrested and allegedly assaulted by the police.
- [6] The appellant testified in mitigation. He was 33 years old and was born in Kwa-Zulu Natal where he resided with his parents till he matriculated during 1999. He had six other siblings. He was single and had two minor children M., and N. eight and four years old, respectively. M. lived with the appellant's mother and N. resided with his mother who was unemployed. The appellant took up employment at Nancefield Hostel, Johannesburg as a security guard and earned a salary of R800.00 per week. He was responsible for the maintenance of his minor children. The appellant was a first offender and had spent three and half years in prison awaiting trial. He called his father as a character witness.

GROUND OF APPEAL

- [7] It was submitted for the appellant that the court a quo failed to give sufficient weight to factors that constituted substantial and compelling circumstances and had also failed to have regard to its pronouncement that the appellant was a candidate for rehabilitation. Again, that the court a quo did not take into account the period appellant spent in prison awaiting trial.

THE LAW

- [8] It was trite that punishment was pre-eminently a matter for the discretion of the trial court and that a court of appeal would only interfere with the findings of a trial court where such discretion had not been judicially and properly exercised. In considering

punishment our courts were enjoined to ensure that punishment fits the criminal as well as the crime; that punishment should be fair to society and be blended with a measure of mercy; *S v Rabie* 1975

- (4) SA at 857 D-E and 862 G.

- [9] Life imprisonment was prescribed for count 2 in terms of Act 105 of 1997 ("the Act). The approach to sentencing in terms of the Act was stated in *S v Malgas* 2001

- (1) SACR 469 (SCA) 481 H to 482 F that:

- Sentencing was to be approached conscious of the fact that the Legislature had prescribed sentences for certain offences;
- That such sentences should not be departed from for flimsy reasons;
- In determining whether or not substantial and compelling circumstances were present, which would justify the imposition of a lesser sentence than that which was prescribed by the Act, all the factors traditionally taken into account to mitigate punishment

continued to play a role and together with other factors identified by the court must cumulatively be considered to determine the

presence of such circumstances.

- [10] It does not appear from the judgement that the court a quo took into account the time of three and a half years spent in prison as an awaiting trial prisoner in determining the appellant's

custodial sentence. It was now trite that a court must consider this aspect as a factor in determining the period of imprisonment. In *S v Vilakazi* 2009(1) SACR 552 (SCA) at paragraph 60 stated:

"While good reason might exist for denying bail to a person charged with a serious crime its seems to me that if he is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not brought to account in any custodial sentence imposed"

In S V Kruger 2012 (1) SACR 359 (SCA) the period of three years and eight months was taken into account and at para 11 the following was stated:

“Punishing a convicted person should not be likened to taking revenge. It must have all the elements and purposes of punishment, prevention, retribution, individual and general deterrence and rehabilitation”

In Sv Radebe 2013 (2) SACR 165 (SCA) at paragraphs 13, 14 and 18 was stated that the mechanical formula proposed to calculate the period of reduction was unhelpful because “the circumstances of an individual accused must be assessed” in each case to determine the extent of reduction. A better approach was to consider the period in detention presentencing as but one factor that should be taken into account “.....the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime committed” and in casu should not supersede a consideration of aggravating circumstances where present.

In Director of Public Prosecutions, North Gauteng :Pretoria v Gcwala and Others 2014

(2) SACR 337 (SCA) at paragraph 18 Lewis J stated that

“.....in all cases where a court is considering the justness of the sentence to be imposed: the sentencing court should consider in all cases whether the period of imprisonment proposed is proportionate to the crime committed, taking into account, for that purpose, the period spent in custody awaiting trial.”

[11] The court a quo had this to say during sentence:

Page 518

“Even though the accused appears to be a good candidate for rehabilitation at the age of 33 years, the offences he has been convicted of are serious warranting imprisonment as the only option, The accused’s personal circumstances and the fact that he is a first offender does not in my view amount not substantial and compelling circumstances in view of the aggravating factor present”

“The accused and his accomplices were motivated by greed when they went about their activities, armed with dangerous weapons without any care as to who might be injured or at worst killed in the process”

Pages 518 and 519

“..... the accused decided to brazenly confront the two officers, shooting Captain Hlako more than five times. From the number of shots fired, it is clear that the accused wanted to make sure that the shots were ultimately fatal”

pages 159

“...a sentence less than the prescribed sentence would be disproportionate to the offences for which the accused has been convicted”

- [12] The court a quo mentioned the fact that the appellant could have been a candidate for rehabilitation but found that the aggravating circumstances present outweighed a favourable consideration of his personal circumstances. The appellant was part of a gang whose intention to bomb an ATM machine at the Spar Complex was foiled by the presence of police. The deceased and Maleka were still on their way to the complex when they were attacked. The appellant's companions were also in possession of firearms as they approached the marked police vehicle and they fled past it without shooting. The aggravating circumstances in the conduct of the appellant as he fled the crime scene were evident in the callous manner in which he fired the shots. The court a quo found that five shots were fired at the deceased and Maleka and that it was by sheer stroke of luck that Maleka was not killed in the process.
- [13] It seems that the appellant still got closer to the vehicle because he was about four paces from the vehicle when Maleka raised his head. Maleka testified that they were unarmed and there was no attempt by them to apprehend the gun wielding men who were fleeing the crime scene. The appellant was found beneath a heap of soil and was conclusively linked by DNA to some of the items found in the surrounding area of his arrest. While there was nothing wrong in an accused person professing his innocence to the end, it was significant to note that there was no show of remorse in mitigation despite the overwhelming evidence linking him to the crime.
- [14] It is my view the Legislature prescribed life imprisonment because the killing of members of the police was on the rise. While it was important for the state to have called the deceased's family to testify in aggravation, this offence remained a very serious one. Members of the police were there to combat crime and to protect society. It was therefore incumbent upon the sentencing court to also reflect the repugnance for such conduct by society. Albeit that the time spent in prison was not specifically mentioned during sentencing, having considered the aggravating factors I do not find that there was any misdirection by the court a quo in its finding that no substantial and compelling circumstances were present. I find no reason to interfere with the sentences imposed by the court a quo.
- [15] In the result I propose the following:
1. The appeal against sentence is dismissed.

TLHAPI V V

(JUDGE OF THE HIGH COURT)

I agree,

MOSHIDI D S S

A A LOUW

MATTER HEARD ON

: 28 AUGUST 2015

JUDGMENT

RESERVED ON

: 28 AUGUST 2015

ATTORNEYS FOR THE APPELLANT

: LEGAL AID SOUTH AFRICA

ATTORNEYS FOR THE RESPONDENT : THE DIRECTOR OF PUBLIC

PROSECUTIONS

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