

SOUTH AFRICA / JUDGMENT

Khoenyane v S (CA&R6/2020)

[2020] ZANCHC 51 (7 August 2020)

[2020] ZANCHC 51**COURT**

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Van Tonder

CASE / FILE NUMBER

CA&R6/2020

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Reportable:	YES/NO Circulate
to Judges:	YES/NO Circulate
to Magistrates:	YES/ NO Circulate to Regional Magistrates: YES/NO IN THE HIGH COURT OF SOUTH AFRICA NORTHERN CAPE DIVISION, KIMBERLEY Case
no:	CA&R6/2020 Date
heard:	25/05/2020 Date
Delivered:	07/08/2020 In the matter between: - SELLO KHOENYANE Appellant and THE STATE Respondent

Coram:Mamosebo J et Van Tonder AJ

JUDGMENT

VAN TONDER AJ

1. The appellant appeared in the Regional Court, Galeshewe on a charge of murder read with s 51(2) of the Criminal Law Amendment Act 105 of 1997. He pleaded not guilty to the charge but was convicted thereto on 16 September 2016. The Magistrate having found that there were no substantial and compelling circumstances which justified a lesser sentence than that prescribed sentenced him to 15 years imprisonment.
2. The appellant had initially filed an application for leave to appeal both his conviction and sentence but subsequently abandoned that application. On 18 February 2019 he applied for condonation and leave to appeal only with regards to his sentence. This appeal is with leave of the trial court against sentence.
3. Mr. Steynberg, for the appellant, invoked *S v Matyityi* 2011(1) SACR 14 SCA par 14, to substantiate the two grounds that according to him mitigates against the application of the minimum sentence of 15 years: first, the appellant's age of 19 at the time of the commission of the offence, and secondly the period of 13 months that he spent in custody awaiting trial. Mr Steynberg submitted that, the appellant's personal circumstances, his awaiting trial period and his youthfulness cumulatively comprise substantial and compelling circumstances which justified a deviation from the 15 years imprisonment.
4. Ms. Jansen, for the State, argued that there was no evidence that the appellant was immature, or had been influenced by other persons when committing the crime. On the contrary, submitted counsel, the evidence was clear that the appellant had gone to school with a knife on the day in question which he later used to stab the deceased in the neck in front of a number of witnesses. Counsel furthermore pointed out that the period of 13 months in custody was not an exceptionally long time, and was distinguishable from the matter of *S v Vilakazi* 2012
- (6) SA 353 (SCA) wherein the accused was in custody for more than 2 years. She argued that there were no substantial and compelling circumstances that necessitated any other sentence but the prescribed minimum sentence of 15 years.
5. The Magistrate took into consideration the following factors: that the murder committed was gang-related and brutal and committed in the sight of many people; the reason for the stabbing was that the deceased was in the presence of the rival gang; despite the concession by the State that the appellant was 19 and therefore young when the offence was committed, the Court exercised its discretion not to be bound by the concession by the State; he is unmarried with no children; he was a pupil in Grade 12 and was in custody since his arrest

for a period of about 13 months. The accused has a previous conviction of assault with intent to cause grievous bodily harm where he was sentenced on 25 September 2013 to R1500 or 24 months imprisonment.

6. The Supreme Court of Appeal has held the following regarding appeals against sentence in respect of Section 51 of the Criminal Law Amendment Act 105 of 1997:

"What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not." [1]

7. The Magistrate considered the appellant's age and made the following remarks in his

judgment:

"Your attorney argued that the court should not impose the minimum sentence mainly because of your age. But you were not a minor when you committed this offence. You are now 21 years old and you committed this offence in January last year. So at the minimum you may be, maybe you have been 19 years old. "

"You have gone to school with a dangerous weapon in your pocket. Because when the school came out, you had a knife and you stabbed to death. The court is today of the opinion that the interest of the community outweighs the fact that you were only 19 years old. "

8. There was no misdirection by the Magistrate in the approach adopted when considering the appellant's age. The following remarks by Ponnann JA in Matyityi [2] pertaining to age are insightful:

"Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor."

9. At best, the appellant's age can be regarded as a neutral factor. Nothing regarding his age tips the scale in his favour. It therefore follows that the appellant cannot succeed on this ground.
10. The second ground relied upon by the appellant is the period of 13 months awaiting trial. This ground on its own cannot amount to substantial and compelling circumstances. As stated earlier, the appellant's personal circumstances were considered by the trial court.

This does not explain the violence that was perpetrated on the deceased for no apparent reason. Even if one views the factors relied on cumulatively as argued by the appellant's counsel, it just ignores the objective gravity of the offence of murder, its prevalence in this country and the legislature's more standardised approach by the courts when adjudicating offences where minimum sentences are prescribed.

11. In my view, the nature of the attack on the deceased, the previous conviction of assault with intent to cause grievous bodily harm and the fact that the murder was gang-related, outweigh the mitigating circumstances and the two factors do not constitute substantial and compelling circumstances that warrant any departure from the prescribed minimum sentence.
12. There was no misdirection on the part of the Magistrate in his application of the relevant principles.
13. In view of the aforesaid, there are no substantial and compelling circumstances that warranted a lesser sentence than the prescribed

minimum sentence in terms Section 51 of the Criminal Law Amendment Act 105 of 1997, and there is, therefore, no justification for this court to interfere with the sentence imposed.

14. In the result, the following order is made:

The appeal is dismissed.

AG VAN TONDER

ACTING JUDGE

Northern Cape Division, Kimberley

I concur

MC MAMOSEBO

JUDGE

For the Appellant: Adv. H. Steynberg oio Legal Aid SA

For the Respondent: Adv. C.G. Jansen oio DPP

[1] S v PB 2013 (2) SACR 533 {SCA} at 539 f-g

[2] Supra at 48a-b

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