

SOUTH AFRICA / JUDGMENT

Khumalo v S (A052/2024) [2025] ZAGPJHC 282 (14 March 2025)

[2025] ZAGPJHC 282**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Mdalana-Mayisela, Bokako

CASE / FILE NUMBER

A052/2024

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****CASE****NO: A052/2024****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

NO

In

the matter between:

KHUMALO

MTHANDENI GODKNOWS

Appellant

THE

STATE

Respondent

JUDGMENT

Mdalana-Mayisela J (Bokako AJ concurring)

- [1] The appellant appeals against the effective sentence of 20 years direct imprisonment imposed upon him by the District Magistrate, Orlando. The appeal is pursuant to leave having been granted by the lower court.
- [2] He was legally represented throughout the proceedings in the lower court. He was charged on count 1 with robbery with aggravating circumstances read with section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997, as amended (“the CLAA”), and on count 2 with attempted murder read with section 51(2)(c) of the CLAA. He was convicted on both counts. He was sentenced to 15 years imprisonment on count 1 and 10 years imprisonment on count 2. The lower court ordered 5 years portion of the sentence imposed on count 2 to run concurrently with the sentence of 15 years imprisonment imposed on count 1. The accused was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.
- [3] The facts giving rise to conviction and sentence are as follows. On 31 August 2017 at Orlando, the appellant and his co-accused shot Buhle Kwanele Maphumulo with a firearm and took R2 500 cash, bank card and cell phone in his lawful possession. He was shot at his left shoulder and left jaw. He was admitted in hospital and discharged after three weeks.
- [4] The grounds of appeal are as follows.
 - [4.1] An effective sentence of 20 years imprisonment is strikingly inappropriate;
 - [4.2] The lower court did not consider the period spent in prison awaiting trial when imposing sentence;
 - [4.3] The lower court did not consider the age of the appellant, and that he is a first offender.
 - [4.4] The lower court did not give reasons for imposing 10 years for attempted murder instead of 5 years prescribed in the CLAA section 51(2)(c) read with Part 1V of Schedule 2 for a first offender.
- [5] The appellant contended that the lower court committed a material misdirection by failing to consider whether the appellant’s personal circumstances cumulatively taken amounted to substantial and compelling circumstances warranting a deviation from the imposition of the minimum sentences. It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. The test for interference with the sentence imposed by the trial court is not whether or not the appeal court would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when it imposed the sentence. The appeal court will interfere where the imposed sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court or it induces a sense of shock.[1]

- [6] On perusal of the record of appeal it appears that the lower court did not apply its mind to the provisions of section 51(2)(a) read with Part II of Schedule 2 and paragraph (2)(c) read with Part IV of Schedule 2 of the CLAA. During the plea proceedings the accused asked the lower court to explain the aforesaid provisions and the lower court said the following:

“COURT: On the attempted murder if convicted you will serve between fifteen and thirty years’ direct unsuspended imprisonment depending on your criminal record if any. On the attempted murder you are exposed to a period ranging from five to I believe fifteen years’

direct unsuspended imprisonment. Understood?”

- [7] The appellant is the first offender. In terms of section 51(2)(a) of the CLAA the prescribed minimum sentence for robbery with aggravating circumstances for the first offender is 15 years’ imprisonment. In terms of section 51(2)(c) of the CLAA the prescribed minimum sentence for attempted murder for the first offender is 5 years. Section 51(3) provides that if any court referred to in subsection

- (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence. In *S v Malgas*[2] it was said:

“Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the

specified sentence. As was observed in *flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, ‘a requirement to give

reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based – than if it is not’. Moreover, those circumstances had to be substantial and compelling.”

- [8] In this appeal the lower court failed to consider whether there are substantial and compelling circumstances and if so, to spell out and enter on the record those circumstances. The lower court has committed a material misdirection. Therefore, this court is entitled to interfere with the sentence and consider whether the appellant’s personal circumstances cumulatively taken amount to substantial and compelling circumstances.

- [9] The appellant’s personal circumstances are as follows. He is the first offender. He was 26 years at the time of his sentencing. His highest level of education is standard 9. His mother is deceased. He is unmarried. He spent 1 year 11 months in custody awaiting trial. He has four children aged 7, 6, 3 and 1 year old with different women. The children reside with their grandmothers or mothers. The accused is not a primary caregiver. He was working at the carwash and earning R300 per month. He was supporting his children financially. The children are receiving government grant. The appellant testified in mitigation of sentence, and he showed no genuine remorse. This is what he said about remorse:

“Accused 1: I will like to apologise. Your worship, to the person who alleges that I did something wrong on him of which I have no knowledge about those allegations. Your Worship.”

COURT: How can you apologise sincerely for something you did not do sir? How do you expect the Court to believe that apology?

Accused 1: What the complainant testified about, Your Worship, it is not what is contained in the charge sheet, Your Worship.

COURT: My goodness, yes proceed.

DEFENCE: That will be all from the defence, Your Worship.”

[10] In determining whether there are substantial and compelling circumstances, a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a particular circumstance to call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors - that lessen an accused’s moral guilt. The specified sentences are

not to be departed from lightly and for flimsy reasons.[3]

[11] It was submitted on behalf of the accused that the following circumstances cumulatively taken are substantial and compelling. They are his age, period spent in prison awaiting trial and that he is a first offender. The legislature in prescribing the sentences of 15 and 5 years has taken into account a clean record. Those sentences are prescribed for a first offender and therefore, the clean record is not a substantial and compelling circumstance in this case.

[12] His age of 26 years old is a neutral factor.[4] There is no evidence on record showing how his relative youthfulness influenced him in committing the premeditated offences. This is not a substantial and compelling circumstance. Courts are obliged to impose the minimum sentences prescribed by the Legislature for specific offences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the Legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s notion of fairness.[5]

[13] The lower court has considered the period spent in prison awaiting trial. It applied an element of mercy and ordered that a portion of the sentence imposed on count 2 to be served cumulatively with a sentence imposed on count 1. Furthermore, the period spent in prison awaiting trial is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the crimes committed. 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 crimes and whether the sentence in all

circumstances, including the period spent in detention awaiting trial is a just one.[6] Accordingly, I find that the appellant's personal circumstances cumulatively taken are not substantial and compelling and they do not warrant deviation from the imposition of the prescribed minimum sentences.

[14] The appellant was sentenced to 10 years imprisonment for attempted murder. Section 51(2) (c) of the CLAA read with Part IV of Schedule 2 provides for a sentence of 5 years for a first offender. The lower court did not warn the appellant of its intention to increase the minimum sentence and did not afford the appellant an opportunity to address it on this aspect. It also did not give reasons for deviating from the sentence prescribed by the Legislature. It committed a material misdirection. This court is entitled to set aside the inappropriate sentence of 10 years imprisonment and impose a prescribed minimum sentence of 5 years imprisonment on count 2.

[15] In considering an appropriate sentence, I take into account the impact of the offence on the victim, the interests of society, the seriousness and prevalence of the offence, appellant's personal circumstances, mercy, and the purposes of punishment, which

are aimed at rehabilitation, deterrence and retribution. In considering the cumulative effect of the sentences, I am of the view

that a portion of the sentence imposed on count 2 should be ordered to run concurrently with a sentence imposed on count 1.

[16] In the premises, the appropriate effective sentence which fits the appellant as well as the crime is the one that follows.

ORDER

[17] The following order is made.

1. The appeal against sentence is upheld.
2. The sentence of 15 years' imprisonment imposed for robbery with aggravating circumstances by the District Court, Orlando is confirmed.
3. The sentence of 10 years imprisonment imposed on count 2 is set aside and substituted with the following sentence:

"Accused 1 is sentenced to 5 years direct imprisonment for attempted murder."

4. The 2 years of 5 years imprisonment sentence imposed for attempted murder is ordered to be served concurrently with the sentence of 15 years imposed on count 1. The effective sentence is 18 years direct imprisonment.
5. The order made by the lower court declaring the appellant unfit to possess a firearm in terms of section 103 of Act 60 of 2000 is confirmed.

6. The sentence set out in paragraph 3 and 4 of this order is antedated to 7 August 2019.

MMP Mdalana-Mayisela

Judge of the High Court

Gauteng Division,

Johannesburg

I agree

T Bokako

Acting Judge of the High Court

Gauteng Division,

Date of delivery: 14 March 2025

Appearances:

On behalf of the appellant: Adv S Hlazo

Instructed by: Legal Aid SA

On behalf of the State: Adv RL Kgaditsi

Instructed by: National Prosecuting Authority

[1] S v Nkosi and Another 2011(2) SACR 482 (SCA); S v Kgosimore 1999 (2) SACR 238 SCA; S v Obisi 2005(2) SACR 350 (WLD); S v De Jager 1965 (2) SA 616 (A) at 628; S v Sadler 2000 (1) SACR 331 (SCA).

[2] 2001

(1) SACR 469 (SCA); 2001 (2) SA 1222; [2001] 3 ALL SA 220.

[3] S v Malgas ibid

[4] S v Matyityi 2011 (1) SACR 40 SCA.

[5] S v Matyityi ibid

[6] DPP v Gcwala (295/13) [2014] ZASCA 44 (31 March 2014).

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