

SOUTH AFRICA / JUDGMENT

Mkhize v S (A357/2016) [2017] ZAGPPHC 567 (25 August 2017) [2017] ZAGPPHC 567

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose, Tlhapi

CASE / FILE NUMBER

A357/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: A357/2016

Not

reportable

Not

of interest to other judges

Revised.

25/8/2017

In

the matter between:

MKHIZE,
SIMPHIWE
MDUDUZI Appellant
and
THE
STATE Respondent

JUDGEMENT

MOKOSE AJ

- [1] The appellant, who was legally represented throughout the trial, pleaded guilty to a charge of robbery with aggravating circumstances on 2 May 2012 in the Regional Court held at Benoni and, was sentenced on the same day to 12 years imprisonment. He was also declared unfit to possess a firearm. In addition, the trial court ordered that he may only be considered for parole after serving two-thirds of the sentence imposed.
- [2] The appellant applied for leave to appeal against his sentence which was denied. He then petitioned the High Court of South Africa, Gauteng Division, Pretoria against the refusal for leave to appeal which petition was successful but limited to the order relating to parole.
- [3] The facts are briefly that at or near Daveyton the appellant unlawfully and intentionally assaulted Mr Humphrey Maswelie and forcibly took an LG cellular phone and R280,00 from him, the aggravating circumstances being that a knife was used. It is evident also that the complainant was hit with fists and kicked during the commission of the offence.
- [4] The Magistrate in the court a quo in sentencing the appellant, found substantial and compelling circumstances which enabled him to defer from the prescribed minimum sentence of 15 years imprisonment in terms of Section 51 (2)(a) of Act 105 of 1997 in that the appellant and his co-accused saved the court time and money by pleading guilty. She also found that they were first offenders who showed true remorse. The court then sentenced the appellant to 12 years imprisonment but further ordered that he may be considered for parole after serving two-thirds of the sentence. She also ordered that he is unfit to possess a firearm.
- [5] The Magistrate purported to act in terms of Section 2768 (1) of the Criminal Procedure Act 51 of 1977 which provides as follows:

" 276 8 Fixing of Non-parole period

- (1)(a) If a court sentences a person convicted of an offence to imprisonment of a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
- (b) Such period shall be referred to as the non-parole period, and may not exceed two-thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."
- [6] The issue to be decided is whether the Magistrate in the court a quo misdirected herself by ordering a non-parole period before the appellant can be considered for parole.
- [7] A cursory reading of the record indicates that after the parties had addressed the Magistrate on both mitigating and aggravating

circumstances, the Magistrate then dealt with purposes of punishment. She also dealt with the prevalence of the crime and explained that it is one of the crimes that the legislators deemed fit to be covered under the Prescribed Minimum Sentence Act which prescribes a minimum sentence of 15 years. She continued therefrom and explained that the court had the ability to defer from that prescribed minimum sentence and that substantial and compelling circumstances exist which enabled her to defer from the prescribed minimum sentence of 15 years.

[8] The right to be heard and considered eligible for parole is circumscribed by Section 2768 of the Criminal Procedure Act 51 of

1977. This does not confer an automatic right to parole but places a prisoner in a position to be considered for parole by a Parole Board. A court imposing a sentence which provides that a prisoner is not entitled to parole is usurping or encroaching upon the Executive function, to wit, Correctional Services

Department, the latter being an entity vested with the right by the legislature to entertain the dynamics of parole.

See article: When is it appropriate for the sentencing court to interfere with parole? Nicholas Mgedeza and Dumisani Masuku De Rebus 29 August 2016

[9] In the matter of S v Pauls 2011 (2) SACR 471 (ECG) the court, pursuant to a plea of guilty to a charge of theft, sentenced the appellant to 8 years imprisonment, two years of which were suspended for 5 years on certain conditions. It further imposed a condition in terms of Section 2768 of the Criminal Procedure Act 51 of 1977 that the appellant had to serve a minimum of 4 years of the sentence before he could be considered for parole. The court held that Section 2768 should only be invoked in special circumstances and that the court must exercise proper care and caution when considering whether such exceptional circumstances exist. Furthermore, proper judicial considerations can only be considered where both the State and the defence have made submissions on the issue. Where exceptional circumstances are found to exist, it is the duty of the judicial officer to set them out explicitly in the judgement or it must be apparent therefrom. Discernible exceptional facts must emanate from both the State's and defence's submissions.

[10] It is evident from a cursory reading of the record that the Magistrate did not exercise proper care and caution when considering

whether exceptional circumstance exist so as to enable her to invoke Section 2768. Neither is there evidence that both the State and the defence made submissions on the issue prior to sentencing, nor did the Magistrate explicitly set them out.

[11] As such, I am of the view that there are no exceptional circumstances which enabled the Magistrate to impose an order that parole may only be considered after the accused has served two-thirds of his sentence. A sentence which provides that a prisoner is not eligible to parole is in contravention of the principles of legality, the doctrine of separation of powers and is arbitrary.

[12] In the circumstances, I propose that the appeal against sentence but limited to the order relating to parole is upheld and the sentence of the court a quo is substituted with the following sentence:

- (i) The appellant is sentenced to twelve years imprisonment;
- (ii) The appellant is declared unfit to possess a firearm;
- (iii) The sentence is ante-dated to 2 May 2012.

Acting Judge of the High

Court of South Africa

Gauteng Division,

PRETORIA

I agree and is so ordered

TLHAPI J

Judge of the High Court of South

Africa Gauteng Division, Pretoria

For the Appellant: Adv MMP Masete instructed by Pretoria Justice Centre

For the State:

Adv C Pruis instructed by

The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 21 August 2017

Date of judgement: 25 August 2017

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