

SOUTH AFRICA / JUDGMENT

S v Govender and Another (CCD22/2022) [2023] ZAKZDHC 59 (18 August 2023)

[2023] ZAKZDHC 59**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Kruger

CASE / FILE NUMBER

CCD22/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****LOCAL DIVISION, DURBAN****CASE****NO. CCD22/2022****In**

the matter between:

THE
STATE
and
DYLAN GOVENDER
ACCUSED 1
NED GOVENDER
ACCUSED 2
SENTENCE**JUDGMENT****KRUGER J**

- [1] Both Accused have been convicted of the crimes of Attempted Murder, Assault with intent to cause Grievous Bodily Harm and Assault Common.

- [2] In deciding upon an appropriate sentence, I am mindful of the purpose of sentencing viz – retribution; deterrence; prevention and rehabilitation. The author S S Terblanche, in his work entitled ‘A Guide to Sentencing in South Africa’, Third Edition, at chapter 9, provides some insight into these aspects. Retribution has been referred to by our courts as (a) an expression of society’s moral outrage (or natural indignation) at the crime and (b) it relates to the maxim that punishment must fit

the crime. Deterrence has been said to be the most important aspect of sentencing. It has two components, namely, deterring the offender from re-offending and deterring other would-be offenders. This would encompass the aspect or element of prevention as well. Rehabilitation has been seen as a means of improving the offender and persuading him or her to become a law-abiding citizen. Our courts have cautioned however that in cases of serious crime where long terms of imprisonment are imposed, rehabilitation becomes a minor consideration.

- [3] In *R v Karg* 1961 (1) SA 231 (AD) at 236 A–C, Schreiner JA held:

‘While the deterrent effect of punishment has remained as important as ever it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. This is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that the courts impose and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.’

- [4] It is indeed trite that I should consider the triad formulated in *S v Zinn* 1969 (2) SA 537 (AD) at 540 G, namely, the accused’s personal circumstances; the crimes of which they have been convicted; and the interests of society. I am also mindful of the fact that whatever sentence I impose should also be blended with a degree of mercy. In *S v Nyambosi* 2009 (1) SACR 447 (TPD) at 451 E–F, the court held:

‘Mercy means to a criminal court that justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed, not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation.’

- [5] I have been furnished with the following presentence reports in respect of each of the Accused:

- (a) a Probation Officer’s Report;
- (b) a Suitability Report in Consideration of Correctional Supervision as a Sentence; and
- (c) a Psycho-Legal Report compiled by Claire Hearne, a Clinical Psychologist.

- [6] I have also received a Victim Impact Statement relating to Mr Nkululeko Mangwe. Aspects of all these reports will be referred to later in this judgment. It has been held that the main purpose of a pre-sentence report is to provide guidance to the exercise of the sentence discretion. It aims to assist the presiding officer in gaining a better understanding of the offender and the

reasons

for his crime – see *S v Lewis* 1986 (2) PH H96 (AD). It must however be borne in mind that the courts are not bound by the recommendations contained in the pre-sentence reports and that the duty to impose an appropriate sentence rests on the presiding judicial officer.

Accuseds' Personal Circumstances

- [7] The Accuseds' personal circumstances have been outlined in all the pre-sentence reports. Accused 1, Dylan Govender, is 31 years old. He resides with his parents and siblings in a three bedroom house in Dessert Palm Gardens, Phoenix. He is single and has no children. He has obtained a Diploma in Fine Art, Animation and Graphic Design and is employed as a Manager in the family owned business. He earns a gross salary of R25 000.00 per month. He is a first-time offender. He suffers from asthma and collects treatment on a monthly basis. He spent approximately eight months in custody before being admitted to bail.
- [8] In her report and oral testimony, the Probation Officer, Ms Sikhakhane noted that the Accused, Mr Dylan Govender, is not remorseful and has not realised his wrongdoing. Ms Hearne, the Clinical Psychologist, in her testimony in court, confirmed that Mr Dylan Govender is not remorseful. He is of the view that he has been made a scapegoat and that he has been unfairly tried and convicted. As a consequence, he has become mistrustful of people, including the SAPS, Government, the Judicial system and most of all the media. He is of the view that his rights have been violated. One of the conclusions reached by Ms Hearne is that he 'did appreciate the wrongfulness of his actions at the time of the commission of the offence and was able to act in accordance with such appreciation'.

Finally, she concludes that Mr Dylan Govender 'is currently not considered to be a risk to society'. Accordingly, she is of the view that he is a suitable candidate for correctional supervision – a view similarly expressed in the report by the Department of Correctional Services.

- [9] The Probation Officer however has recommended that the court impose a term of imprisonment. This conclusion is reached after she consulted with all the necessary parties, including the deceased's family. She concludes that given the seriousness of the offences, imprisonment is considered the most suitable as it 'balances aspects of deterrence, punishment and rehabilitation'.

[10] Accused 2, Ned Govender, is 32 years old. Like his brother, Accused 1, he resides with his parents and siblings in Phoenix. He is also unmarried and has no children. He has a Diploma in Mechanical Engineering and is currently employed as a Financial Manager and Factory Manager in the family owned business – DG Branding. He earns a gross salary of R25 000.00 per month. He is

also a first offender. He suffers from asthma and collects his treatment on a monthly basis. He also spent approximately eight

months in custody before being admitted to bail.

[11] The Probation Officer, Ms Sikhakhane noted that he as well did not express any remorse. Ms Hearne also testified that Mr Ned Govender is not remorseful. He is of the view that both he and his brother have become scapegoats. He experiences a great sense of injustice and is ‘upset and disappointed by the fact that he was not given an opportunity to say what he wanted to say to the police or in court’. This is somewhat alarming as the record will clearly show that he testified in court and was not restricted

in any manner whatsoever. As a consequence of the aforesaid, Mr Ned Govender has lost trust in the South African Judiciary as he feels he has been unfairly treated. Ms Hearne has concluded that he too, like his brother, ‘fully appreciated the wrongfulness of his actions at the time of the commission of the offences.’ He is also not considered to be a risk to society and accordingly is a suitable candidate for correctional supervision – a view similarly expressed in the report from the Department of Correctional Services.

[12] For the same reasons expressed in her report on Mr Dylan Govender, Ms Sikhakhane is of view that an appropriate sentence to be imposed on Mr Ned Govender is one of imprisonment.

The Crimes

[13] The second element of the triad involves a consideration of the crimes committed by the Accused and the circumstances attendant upon the commission of the crimes.

[14] There can be no doubt that the crimes of which the Accused have been convicted are serious crimes. The evidence clearly shows that the complainants were merely walking along the road, unarmed and minding their own business. They were set upon by the Accused and their companions for no reason whatsoever. As pointed out in the Judgment, Accused 2, Ned Govender, conceded that he was not attacked by anyone and accordingly there was no need to defend himself. There was no evidence before this court to show that the

complainants had interfered with anyone, nor with anyone’s property. The complainants were seriously assaulted. Mr Mangwe, in his testimony before court, testified that he was brutally assaulted and left for dead. In fact, some of his attackers returned later to find out if indeed he was dead. In the Victim Impact Statement by Mr Mangwe, he relates to the difficulty he has in walking given the nature of the injuries that he sustained. As a consequence, he cannot provide

for his family and regards himself as a disabled person. He is extremely angry and resentful towards members of the Indian community as he regards the attack upon him as being part of a racial war.

[15] The video footage clearly shows the assault upon Mr Putuzo. As stated in the Judgment, due to the poor manner in which the matter was investigated, his medical reports were not available to confirm the injuries that he sustained. It was purely on this technical basis that the Accused were convicted of Assault Common. This is not to say an Assault Common is not a serious offence. Any form of assault is indeed serious, especially when it is perpetrated in an unprovoked situation.

The Interests of Society

[16] In *Director of Public Prosecutions, North Gauteng v Thabethe* 2011

(2) SACR 567 (SCA) the court held, at paragraph 22:

‘Our courts have an obligation to impose sentences . . . of the kind which reflects the natural outrage and revulsion felt by law abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.’

I agree with the sentiments expressed by the learned Judge. Should the public lose confidence in the criminal justice system, it would, in my view, lead to anarchy.

[17] Mr Mbokazi, on behalf of the State, has asked that the court impose a sentence of direct imprisonment. He has submitted that a sentence of correctional supervision will send out a wrong message to society. Ms Hearne has concluded that correctional supervision would be an appropriate sentence. She has however not identified the relevant section of the Criminal Procedure Act 51 of 1977 (‘the Act’) which would be applicable. The report from the Department of Correctional Services has concluded that both Accused meet the physical criteria for a sentence of correctional supervision in terms of s 276(1)(h) of the Act. This section however provides for a sentence not exceeding three years imprisonment. Mr Van Schalkwyk, on behalf of Accused 2, has conceded that if the court was inclined to impose a sentence in excess of three years, then correctional

supervision will no longer be an option. There is also of course s 276(1)(i) of the Act which would result in the sentence being

custodial in part. A sentence in terms of this provision should however be imposed if the offence does not warrant a term of imprisonment exceeding five years. In my view an objective determination of the facts of this case warrants a period of imprisonment that exceeds five years.

[18] The Accused are not remorseful, both Ms Sikhakhane and Ms Hearne have arrived at this conclusion. Despite this court’s findings that the circumstances at the time were not as described by the Accused in their Affidavits presented at the bail hearing, it is noted that their profession of innocence to Ms Hearne is still based on those circumstances. The Accused have clearly not come to terms with the consequences of their actions. It is indeed

sad to note that they both, as a result, have expressed a loss of trust in the South African Judicial System.

- [19] I have not lost sight of the fact that these crimes were committed during the period of unrest in some parts of the country, particularly KwaZulu-Natal. This period of unrest was characterised by looting and lawlessness. It is indeed so that people were fearful and under extreme stress and anxiety for the safety of their lives, their families and their property. Almost everyone effected by the lawlessness in this Province were going through the same thoughts and fears as this was unprecedented times. Ms Hearne, the Clinical Psychologist, alludes to the state of minds of both Accused prior to the incidents of which they have been convicted. Her report

sets out in detail the fear the Accused experienced due to the threats received via social media. Like others, they had a fear for the safety for their family and property. She describes the characteristics of an enmeshed family unit and confirms that both

Accused come from a very close-knit family where boundaries are blurred. The Accused portrayed an unhealthy level of emotional

dependence. This would explain the anxiety that the Accused felt at the time of the incidents and the need to protect their family.

However, the facts of this case show that there was absolutely no danger or threat imposed by the complainants to the Accuseds'

person, family or property. As stated earlier, the complainants were unarmed and posed no imminent threat or danger to the Accused. The assaults upon the complainants were totally unprovoked.

- [20] The Correctional Services Report has suggested that the court should order the Accused to pay compensation to the victims. A compensation order is governed by the provisions of s 300 of the Act. I am of the view that such an order would be inappropriate in the circumstances. In any event there is no application before me from either the injured persons or the prosecution on their behalf, as envisaged in the Act.

- [21] I am accordingly of the view that an appropriate sentence is a custodial one. This, in my view, would not be disproportionate to the serious nature of the crimes nor is it startlingly inappropriate. I have reached this conclusion after having weighed all the facts and circumstances placed before me in both mitigation of sentence and in aggravation of sentence.

- [22] It has been submitted on behalf of the Accused that should I be so inclined to impose a custodial sentence, then I should take into account the length of time spent by the Accused in custody before being admitted to bail. In this regard Counsel has relied on the case of *S v Brophy and Another* 2007 (2) SACR 56 (WLD). The facts in *Brophy* are distinguishable in that the Accused had spent a lengthy time in prison awaiting trial – Accused 1, four years and

four months and Accused 2, two years and four months. The Accused before me spent approximately eight months in custody before being admitted to bail. It is noted (from Ms Hearne's report) that at some stage the Accused abandoned their bail application. This no doubt would have contributed to the length of time spent in custody. The period spent in detention is however one of the factors which is taken into account in determining an appropriate sentence and I have taken it into consideration as well.

[23] Having regard to all of the aforesaid, I impose the following sentences:

1. Accused 1

1.1 In respect of Count 1

The conviction of Assault with Intent to cause Grievous Bodily Harm

You are sentenced to three (3) years imprisonment.

1.2 In respect of Count 2

The conviction of Assault Common

You are sentenced to twelve (12) months imprisonment; and

1.3 In respect of Count 3

The conviction of Attempted Murder

You are sentenced to seven (7) years imprisonment.

1.4 All sentences will run concurrently.

1.5 In terms of Section 103 of the Firearms Control Act 60 of 2000, you will remain unfit to possess a firearm.

2. Accused 2

2.1 In respect of Count 1

2.2 In respect of Count 2

2.3

2.4 In respect of Count 3

2.5 All sentences will run concurrently.

2.6 In terms of Section 103 of the Firearms Control Act 60 of 2000, you will remain unfit to possess a firearm.

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