

SOUTH AFRICA / JUDGMENT

S v kganye (CAF 9/2010) [2013] ZANWHC 25 (7 March 2013)

[2013] ZANWHC 25

COURT

North West High Court, Mafikeng

BEFORE

A A Landman, A M Kgoele, N Gutta

CASE / FILE NUMBER

CAF 9/2010

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IN THE NORTH WEST

HIGH COURT

MAFIKENG

CASE NO.: CAF 9/2010

In the matter

between:

FRANS KGANYE

.....Appellant

and

THE STATE

.....Respondent

JUDGMENT

LANDMAN J:

Introduction

[1] Frans Kganye, the appellant, was indicted in a Circuit Court of this Division sitting at GaRankuwa on three counts, namely murder (count 1), unlawful possession of firearm (count 2) and unlawful possession of ammunition (count 3). He pleaded not guilty on all counts. He was represented by Ms Kang. He was convicted and sentenced as follows:

Count 1: Twenty Five

(25) years imprisonment;

Count 2: Five (5) years imprisonment;

Count 3: Two (2) years imprisonment.

The sentences on counts 2 and 3 were ordered to run concurrently with the sentence imposed in respect of count 1.

- [2] The appellant appeals, with leave of the Supreme Court of Appeal, against the sentence imposed on him by the court a quo. The appeal against sentence, as expressed in the appellant's petition, is "mainly on the Count of murder". However, no submissions were made as regards counts 2 and 3.
- [3] When the appeal was called the appellant was represented by Mr Nkhahle. Mr Nkhahle adopted the heads of argument drawn by Mr Skibi. The respondent was represented by Ms Van Niekerk. The heads of argument were drawn by Ms Rantsane. However, Ms Van Niekerk did not adopt the heads of her predecessor.

Count 1 murder

- [4] The indictment does not refer to and no mention was made of the provisions of section 51(1) or (2) of the Criminal Law Amendment Act 105 of 1997. No mention was made of this Act when the indictment was read to the appellant and no mention was made of the Act before or when sentence was imposed.
- [5] It was submitted on behalf of the appellant that an accused must be warned of the implications of the minimum sentence when he is facing a charge which might attract the imposition of any of the prescribed minimum sentences. See the case of *S v Ndlovu* 2003 (1) SACR 331 (SCA).
- [6] There is nothing in the judgment or on record which suggests that the court a quo misdirected itself by considering that the minimum legislation applied. There is no mention of the minimum sentence legislation and no finding concerning the issue of substantial and compelling sentences. The court a quo does say that it decided not to impose the ultimate sentence ie life imprisonment. This does not mean that the court considered that a minimum sentence was applicable.
- [7] It was submitted that, in the judgment refusing leave to appeal, the court a quo, by implication considered that the offence on count 1 carried a minimum sentence of 15 years imprisonment. However, the court stated that it may impose a sentence in excess of the said minimum. In my view the court a quo treated the matter and imposed sentence as one to which the minimum sentence legislation did not apply.
- [8] The sentence, in my view, can only be challenged on the basis that sentence is harsh, too severe or induces a sense of shock. See *S v Kgosi* 1999

- (2) SACR 238 (SCA) and S v Matlala 2003 (1) SACR 80 (SCA).
- [9] In Ms Rantsane's heads it is correctly pointed out that the High Court's jurisdiction to try crimes of murder existed before the introduction of the minimum sentence legislation and, because of its inherent jurisdiction, it could sentence a person to life imprisonment where the circumstances require such a sentence. The introduction of the minimum sentence legislation did not take the powers of the High Court away to impose life imprisonment where such a sentence is appropriate.
- [10] Ms Van Niekerk, if I understood her correctly, submitted that this court cannot ignore the minimum legislation and that it should investigate whether there are substantial and compelling circumstances which would justify a lesser sentence than the prescribed 15 years imprisonment.
- [11] Ms Van Niekerk's submission flies in the face of the decisions cited above. But I believe that what she means is that the minimum sentence, which is intended to be heavier than average sentences before the minimum legislation, was passed, should serve as a guideline in the circumstances where this legislation does not govern the situation.

The crime

- [12] Vincent Mashaba testified that a gang comprising the appellant, himself, Jerry (the deceased), William and Bauwe, were all together when he over-heard the appellant asked for the firearm and bullets (cartridges) from the deceased. The deceased said that he did not have them and then the appellant shot him several times.
- [13] The court a quo found that the evidence of Vincent Mashaba as well as Doctor Masuku, who saw the incident but who could not hear what was being

said, proved that at the time that the accused shot the deceased, the deceased was standing with his hands in his pockets. None of them testified that the deceased made any move to take out a firearm. All five of them were more or less at the same time in the vicinity of the gate of the shop. The court a quo rejected the appellant's version that he acted in self defence.

- [14] The court a quo said the appellant shot the deceased point blank in cold blood. The appellant and the deceased were members of a gang. The court was not informed of the motive for the murder. Mashaba could or would not say why the murder was committed. The appellant's

version was rejected. But clearly something had triggered the appellant's reaction to the refusal of his request. Furthermore

there is evidence of Mashaba who said that after the deceased was shot Bauwe then ordered the appellant to shoot him ie Mashaba, but the appellant refused to do so. This piece of evidence points to there being a motive for the murder which has not surfaced and it shows that the appellant was not prepared to murder Mashaba on the instructions of another.

The offender

[15] The following personal circumstances were placed on record for the purposes of mitigation of sentence:

- (a) The appellant is a first offender;
- (b) He was 22 years old at the time of the commission of the offence;
- (c) He is single with one minor child;
- (d) He left school at Matric;
- (e) At the time of the commission of the offence he was doing odd jobs earning R400.00 per week which he used to assist his mother and your siblings; and
- (f) He aspired to further his studies.

[16] His legal representative informed the court a quo that he was remorseful for what he did.

[17] In addition the appellant had been in custody for 16 months; a relevant fact which was not mentioned by the court a quo.

[18] The court a quo observed that:

“The Court must also take into consideration the interest of society. Society is sick and tired of people losing their lives at the hands of youngsters like yourself which roam around the streets thinking that you are the law unto yourselves. As Doctor Masuku testified that you were one of the notorious group of gangsters in the vicinity and you made it your business of robbing and harassing people in the vicinity.”

Any reason to interfere with sentence?

[19] In Mr Skibi's heads he submitted that the fact that the Supreme Court of Appeal has granted leave to appeal to this court means that that court feels that the sentence imposed by the trial court is shockingly severe. This is Mr Skibi's interpretation of the order of the Supreme Court of Appeal. In truth it means only that two Judges of Appeal believe that the appellant has a reasonable prospect of appeal. The order also constitutes an entitlement and a direction to this court to entertain the appeal. We do so as we would hear any other appeal, carefully and judiciously taking into account the law and the facts and the submissions made by the representatives.

[20] It was submitted that it is a mitigating factor that the murder was not premeditated or pre-planned. The fight amongst the gang members took place on the spur of the moment. The appellant was relatively young and was a first offender. The court a quo erred by over-emphasising the seriousness of the offence and thereby over-looked the personal circumstances of the appellant.

[21] In the heads prepared by Ms Rantsane it is submitted that accused are accustomed to enjoying the benefit of the age of the appellant as a strong mitigating factor but this factor must now be interrogated. Two decisions *S v MaQityi* 2011 (1) SACR 40 (SCA) and *Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and others* 2009 (2) SACR 361 were responsible for the change. The court in *S v Matyityi* 2011 (1) SACR 40 (SCA) held that:

"...what exactly about the respondent's age tipped the scales in his favour, was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness', without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is *prima facie* to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. . . . 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."

See *S v Matyityi* 2011 (1) SACR 40 (SCA) page 47 to 48.

[22] The heads makes the point that the appellant in this appeal was two years older than the age mentioned in the passage cited. He was 22 years during the commission of the offence. He furthermore, did not submit any evidence to show that he was immature. This was a brutal attack on a person who was relaxed with his hands in his pockets. The appellant had no reason to shoot the deceased at all.

[23] Finally it was submitted in the heads that the sentence imposed by the court *a quo* was appropriate and that no court will come to a different decision and the appeal against the sentence must be dismissed.

[24] Ms Van Niekerk submitted that a sentence of 15 years would be an appropriate sentence.

[25] In my view at 22 years of age the appellant should be treated as a youth and it is well known that a youth may act impulsively without considering the consequences. A sentence of 25 years imposed on the appellant is too severe in the light of the mitigating factors and it does not take appropriate account of the need to rehabilitate the appellant. A sentence of 18 years would be appropriate taking into account that the appellant was in custody for 16 months before he was sentenced.

[26] It follows, in my opinion that the appeal against the sentence as regards count 1 should succeed but the appeal against counts 2 and 3 should be dismissed.

Order

[27] I make the following order:

1. The appeal against the sentence imposed as regards count 1 is upheld.
2. The appeal against the sentences imposed as regards count 2 and 3 is dismissed.

3. The sentence in respect of count 1 is set aside and replaced with a sentence of 18 years imprisonment which is antedated to 19 November 2004.
4. The effective sentence, as regards all counts, is therefore 18 years imprisonment (as the sentences in respect of counts 2 and 3 run concurrently with the sentence in count 1).

A A LANDMAN

JUDGE OF THE HIGH COURT

I concur

A M KGOELE

N GUTTA

APPEARANCES:

date of hearing : 15 February 2013

date of judgment : 07 march 2013

counsel for appellant : mr nkahle (heads argument by adv skibi) of legal aid board

counsel for respondent : adv l van niekerk (heads of argument by adv rantsane) of the director of public prosecutions, north west

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