

SOUTH AFRICA / JUDGMENT

S v Mzila and Another (SS34/2021) [2022] ZAGPJHC 891 (1 November 2022)

[2022] ZAGPJHC 891

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

SS34/2021

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS34/2021

REPORTABLE: NO.

OF INTEREST TO OTHER JUDGES: NO.

REVISED.

1/11/2022

In the matter between

THE STATE

And

MZILA, M

Accused 1

VELANGENKOSI, Z X

Accused 2

S E N T E N C E

STRYDOM, J:

This is judgment on sentence. The two accused were found guilty as follows. The accused 1 was found guilty on one count of being in possession of a firearm, the serial number or any other identifying mark having been changed or removed without the written permission of the Registrar being a prohibited firearm. Count 4.

Also on a count of attempted murder and one count of being in unlawful possession of ammunition. These were counts 8 and 9.

Accused 2 was found guilty on the same counts as accused 1 that is on counts 4, 8 and 9 and also on counts 6 and 7. Count 6 is a count of robbery with aggravating circumstances as a firearm was used when Mr Okerafor was robbed of his motor vehicle, cash and cell phones. Count 7 is a kidnapping count.

These are serious counts. In relation to the convictions pertaining to the unlawful possession of a semi automatic firearm which was also prohibited the Firearm Control Act legislated a maximum sentence in terms of section 121 to be 25 years imprisonment.

The legislature only prescribed a maximum sentence which leaves it in the discretion of the Court to consider an appropriate sentence.

The Criminal Law Amendment Act 105 of 1997 prescribed a minimum sentence in relation to an offence pertaining to a semi automatic firearm to be 15 years imprisonment.

This sentence should be imposed unless the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence so prescribed.

The robbery count also carries a minimum sentence of 15 years imprisonment in terms of the Criminal Law Amendment Act.

The structure of a sentence should be determined by a requirement for the balancing of the nature and circumstances of the offence, the characteristics and circumstances of the offender and the impact of the crime on the community, its welfare and concern.

The Court should strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of, and to the exclusion of the others.

There must be a balance between the interest of the victim, the society and offender. The main purposes of punishment are deterrent, preventative, reformatory and retributive and the punishment should fit the criminal as well as the crime, be fair to society and be balanced with a measure of mercy according to the circumstances. This was held by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 862a-b.

Both accused face a minimum sentence for the conviction on the firearm count.

As part of the mitigation of sentence and to indicate whether substantial and compelling circumstances exist to deviate from the prescribed minimum sentences the personal circumstances of the two accused were placed before Court.

Accused 1 is 39 years old and has three minor children. These children reside with their biological mothers. Accused 1 has been in custody since 3 October 2019 which means that he has been in custody for just over three years.

The state has proven no previous convictions against this accused. Consequently he will be dealt with as a first offender.

Accused 2 is currently 32 years old and also has three children staying with their biological mother. He is also a first offender and has been in custody for just over three years awaiting trial.

The first question for decision is whether these two facts that both accused are first offender and spent approximately three years awaiting trial constitute substantial and compelling circumstances to deviate from the minimum prescribed sentences.

These factors should be considered with the aggravating circumstances that the firearms found in possession of the accused both had their serial numbers filed off.

The only reason why this would be done is to hide the origin and ownership of these firearms. The only inference that can be drawn why this is done is that these firearms are to be used to commit crimes to prevent it to be traced back to its owner.

In my view if the seriousness of the crimes are weighed against the circumstances placed before Court on behalf of the accused, the accused failed to show substantial and compelling circumstances for this Court to deviate from a prescribed minimum sentence.

This does not mean that the Court will leave out of the equation the fact that the two accused are first offenders and that they have spent approximately three years awaiting trial.

The Court will keep these factors in mind when the court considers an appropriate sentence and to what extent sentences should run concurrently.

Accused 1 was found guilty on the counts that related to one incident in Alberton. For an unknown reason he with accused 2 attempted to kill Mr Jiyane by firing a shot at his vehicle.

Mr Jiyane was just lucky not to have been killed. Even more fortunate were the two accused for not killing him because if that was the situation a much more severe sentence would have been applicable.

It was at this scene where accused 1 possessed the prohibited firearm and the unlawful ammunition. In my mind an aggravating factor is that the accused used the vehicle of Mr Okerafor which was previously robbed from him.

The same applies to accused 2 as far as this incident is concerned. Accused 2 was further found guilty on a very serious count of armed robbery.

It has become well known in society that the robbery of motor vehicles has become prevalent in our country and people convicted of such an offence should not expect to be treated lightly.

It should also be mentioned that substantial and compelling as far as this count was concerned was also not shown by the accused 2.

When considering an appropriate sentence the Court will bear in mind the cumulative effect of sentences and will allow portions of the various sentences to run concurrently.

The Court will also bear in mind, as far as accused 2 is concerned, that the crimes he is convicted of were committed on different dates and places.

Lastly, the Court will also consider the fact that not one of the two accused showed any remorse and came to court denying their participation in the face of strong evidence against them. The two accused can now stand.

Accused 1 is sentenced as follows. On count 4 to 15 years imprisonment. On count 8 to seven years imprisonment. On count 9 to three years imprisonment. It is ordered that five years of the sentence on count 8 should be served concurrently with the sentence imposed on count 4. The sentence on count 9 should be served concurrently with the sentence on count 4. Effectively accused 1 is sentenced to 17 years imprisonment.

Accused 2 is sentenced as follows. On count 4 to 15 years imprisonment. On count 6 to 15 years imprisonment. On count 7 to five years imprisonment. On count 8 to seven years imprisonment. On count 9 to three years imprisonment. 10 years of the sentence imposed on count 6 is to run concurrently with the sentence on count 4. The sentences on counts 7 and 9 are to run concurrently with the sentence on count 4 and five years of the sentence on count 8 is to run concurrently with the sentence in count

4. Effectively accused 2 is sentenced to 22 years imprisonment.

That concludes the sentencing.

STRYDOM, J

JUDGE OF THE HIGH COURT

DATE: 9/11/2022-----

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