

SOUTH AFRICA / JUDGMENT

S v Okah (SS94/11) [2013] ZAGPJHC 75 (26 March 2013)

[2013] ZAGPJHC 75

COURT

South Gauteng High Court, Johannesburg

BEFORE

C J Claassen

CASE / FILE NUMBER

SS94/11

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IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: SS94/11

DATE: 26/03/2013

In the matter between

THE STATE and HENRY EMOMOTIMI OKAH ACCUSED

SENTENCE

C. J. CLAASSEN J:

- [1] The accused has been found guilty of 13 charges relating to terrorism in one form or the other. It is now the court's duty to impose a fit and proper sentence. In doing so the court is duty bound to take into consideration factors which affect the crime, the criminal and the community.
- [2] In the present instance this court is in the peculiar situation that the community where this crime was committed is not within South Africa although the accused was arrested here and committed some of the planning and preparation for purposes of executing those crimes in Nigeria here in South Africa. This novel judicial jurisdiction derives from the application to this case of the provisions of the Protection of Constitutional Democracy Against Terrorists and Related Activities Act No 33 of 2004 ("the Act"), which gives this court the jurisdiction to hear crimes of terrorism that had been committed beyond the borders of this country.
- [3] The background to that Act can be found in the outcry against international terrorism, in particular after the 9/11 attacks on the World Trade Centre in New York in September 2001. Thereafter the United Nations agreed to various treaties to combat international terrorism.

South Africa became a signatory to these treaties as a result whereof South Africa was duty bound to adopt the provisions contained in these treaties and incorporate them into South African domestic law. The rationale for this is to be found in the fact that countries should not be regarded as safe havens for terrorists who commit terrorism in other countries. The underlying philosophy is that if terrorists know that they cannot hide in any country, they may be discouraged from committing acts of terrorism worldwide.

- [4] It is therefore the duty of this court in imposing a fit and proper sentence to take into account the interests of the community worldwide by making South Africa unattractive to any international terrorists. It is therefore important that, whatever sentence the court imposes when enforcing the provisions of the Act, the country's image as an opponent to international terrorism should not be tainted or undermined.

The Crimes

- [5] I then turn to the particular crimes that had been committed by the accused. It is not necessary to refer to each of the 13 counts. Suffice to say that they all relate to three events. The charges relating to the Warri bombings are set out in counts 1, 3, 5, 7, 9, and 11. The charges relating to the Abuja bombings are set out in counts 2, 4, 6, 8, 10 and 12. As previously stated, count 13 concerned the accused's engaging in threats of terrorist activity. These are all separate statutory offences and the accused have been found guilty on all of them.
- [6] It would, however, be wrong to regard these as separate offences for purposes of sentencing. In my view the appropriate view to adopt is to impose sentence only in three respects. All the counts dealing with the Warri bombings should be taken together for purposes of sentence and the same should occur in regard to all the counts dealing with the Abuja bombings. Count 13 should be regarded as a separate offence.

The Warri Bombings

- [7] The first event was the car bombs that exploded in the town of Warri in Nigeria on 15 March 2010. This occurred at a post amnesty dialogue meeting that was organised for that day in Warri. The purpose of this meeting was most commendable as it was intended to explore such things as skill acquisition and training programs for the former militants; re-evaluating the strategies to reconstruct the communities devastated by militant activities and oil pollution; rehabilitation programs for such militants; disarmament and amnesty; bunkering and economic sabotage in Nigeria's economic zone; resource control; demilitarisation of the Niger Delta; and the security, economic development and peace in that area in general.

- [8] It is common cause that state governors and leaders of militant organisations and leaders of multinational oil companies, the elders and the youth from that particular region, women organisations and other members of society were to be present at this particular meeting. The purpose of the bombing as it appears from documents that were placed before this court, was to embarrass the governor, as well as the president of Nigeria, Dr Goodluck Jonathan in the presence of all these dignitaries.
- [9] The car bombs were parked in relative close proximity to one another and set to explode within 15 minutes from one another for the sole purpose of increasing the amount of damage and casualties. It was expected that once the first car bomb exploded, people would arrive to lend assistance to the injured. The purpose of the second car bomb was to endanger the lives and safety of those that gathered after the first explosion. It was therefore a very deliberate plan to detonate two car bombs one after the other in order to create as much havoc as possible. In the case of the Warri bombings one person died and 11 other persons sustained serious injuries.

The Abuja Bombings

- [10] The second event was the bombings that occurred on 1 October 2010 at the National Independence Day celebrations in Abuja. In this instance, several heads of state attended, as well as President Goodluck Jonathan and other senior government representatives. The same methodology was adopted in exploding first one car bomb and then 10 to 15 minutes later another. On this occasion, 8 people died and 53 persons sustained serious injuries.

Threats of Terrorism

- [11] The third event, which is the subject of count 13, pertained to threats directed at the South African government and its nationals employed in Nigeria. Threats were made to take such individuals hostage. This occurred subsequent to the bombings and therefore forms the third leg of the events which gave rise to the convictions of the accused on all 13 counts.
- [12] It cannot be gainsaid that these are all serious crimes as lives were lost and the safety of South African citizens were threatened by the acts of the accused. All of this indicate that these were very serious crimes and they have to be punished appropriately.

The Criminal

- [13] As to the criminal, the following facts appear from the bail hearing which was handed in as an exhibit in this case. The accused was born on 22 March 1965 and he is currently 48 years old. He has been granted a permanent residence visa to reside in South Africa. He is married and has four children, all of whom are still dependent on him.
- [14] The defence tendered the evidence of the deputy head of the school attended by these children, Mr J Clark. He testified that they have suffered as a result of the stresses and strains following upon the accused's arrest on 2 October 2010.

- [15] The accused is a qualified marine engineer. He is a businessman and owner of a company known as San Froid Ltd. He has no previous convictions. Since his arrest on 2 October 2010, he has been detained in custody for a period of two and a half years.
- [16] The accused, however, has not accepted any responsibility for any of the crimes committed nor has he shown any remorse. There was, however, evidence before this court that he is regarded as a leader in Nigeria and in particular in the Niger Delta.
- [17] The militancy in the Niger Delta region was caused by the failure of the Nigerian government to adequately promote the interests of the community in that area. The evidence disclosed that much of the revenue that was gained by the government from oil extraction was not re-invested in the development of the region in the form of building of infrastructure, schools, clinics, etcetera.
- [18] The militants who gathered in the creeks in the Niger River Delta committed acts of terrorism by blowing up some of the pipelines of the international oil companies and taking their executives hostage, claiming ransom in return for their release. The money thus generated was used to purchase further armaments to continue their militant struggle.
- [19] The accused became the leader of this struggle. I shall accept for purposes of sentence that it was politically motivated in order to draw the attention of the government to its failure to develop the Delta region adequately. It would therefore be wrong for this court to turn a blind eye to the fact that this struggle in Nigeria was politically motivated for a good cause, namely the proper development of the Niger Delta Region.

The Community Interests

- [20] It is of course true that once a political struggle becomes militant, the foreseen and unforeseen consequences are always bloodshed and tragedy. In the present instance that is exactly what happened in the two bombings that occurred on 15 March and 1 October
2010. The question that arises is how to balance the legitimate political aspirations of a community within a country with the duty of a court to punish crimes of violence. A comparable problem faced the courts in South Africa during the 60's when it had to sentence ANC leaders for their acts of terrorism. I agree with Mr J P Marais for the accused that these factors must be taken into account when the imposition of a proper sentence is considered.
- [21] However, section 1(5) of the Act states that political, philosophical, ideological, racial, ethnic, religious and other motives are not to be considered as a justifiable defence for terrorist activities. The conviction of the accused underscores the fact that this court did not regard his political motives as a justification for the crimes that he had committed. But when a proper sentence is considered, I do believe that those political motivations should form part of the matrix of the facts to be considered when imposing sentence.

- [22] The Act itself does not impose minimum sentences for all the statutory terrorist crimes created therein. In fact the act allows a wide spectrum of sentences to be imposed ranging from the imposition of a fine, up to and including life imprisonment. There is, however, a minimum sentence applicable to these crimes by virtue of the Criminal Law Amendment Act, Act 105 of 1997.
- [23] Section 51(1) of Act 105 of 1997 prescribes that the court shall sentence a person convicted of an offence referred to in part 1 of schedule 2, to life imprisonment. Part 1 of schedule 2, states that an offence referred to in sections 2, 5, 8, or 14 of the Protection of Constitutional Democracy Against Terrorists and Related Activities Act, No 33 of 2004 shall fall within the ambit of Section 51(1), if the offences endangered the life or caused serious bodily injury or death to any person or a number of persons or caused serious risk to their health or the safety of the public or any segment of the public or created a serious public emergency situation or a general insurrection. These are obviously applicable to the counts arising from the Warri and Abuja bombings, except for count 13.
- [24] Section 51(2) of Act 105 of 1997 states that a High Court shall sentence a person who has been convicted of an offence referred to in part 2 of schedule 2 in the case of a first offender to imprisonment for a period of not less than 15 years. These prescriptions would apply to counts 9 and
10. The remaining counts, other than counts 9, 10, 11, 12 and 13, all attract a minimum sentence of life imprisonment in terms of Act 105 of 1997.
- [25] However, a court is not obliged to impose the minimum sentence if it is of the view that there are substantial and compelling circumstances which would justify the imposition of a lesser sentence. See section 51(3)(a) of Act 105 of 1997. In order for this court to arrive at a just and proper sentence it is therefore necessary to ascertain whether there are in fact such compelling circumstances which would justify the imposition of a lesser sentence.
- [26] Although Mr Abrahams for the State submitted that there are none, I am of the view that there are in fact certain factors in this case which cumulatively constitute substantial and compelling circumstances entitling a deviation from the minimum sentence. I shall list them as follows. The first and the most important one is the fact that these offences were motivated by a political desire to improve the living conditions of the community in the Niger Delta. Albeit that the motivation to resort to violence may have been misguided, it is important for purposes of imposing a proper sentence to take into account that the ultimate purpose of the violence was to draw the government's attention to the pollution and lack of infrastructures and other developments in the Niger Delta.

- [27] The next factor which in my view acts as a mitigating factor is the accused's non-criminal record up to the age of 48 years of age. It means that for a substantial portion of his life he steered clear from any criminal activity for which he was convicted. I am of the view that his clean record, both here and in Nigeria, should redound to his benefit when sentence is imposed. He is also a husband and father of four minor children who will suffer when he is incarcerated.
- [28] The remaining factor which in my view justifies a departure from the minimum sentence is the fact that to all intents and purposes the accused was regarded by Nigerians as a strong leader. Mr Orubebe went so far as to state that should the accused, here in this court, renounce violence and forsake his ideals of attaining his goals by military methods, the government would only be too happy to welcome him with open arms to assist in the restructuring of the economy and development of the well-being of the community in Niger Delta.
- [29] The evidence also disclosed that he was otherwise a good man in the sense that he was willing to help others, albeit that there were always some strings attached to such offers of assistance. It appears that he was willing to fund the needs of others in return for their services to assist him in the attainment of his goals of causing havoc in that region and to attract the attention of the Nigerian government.
- [30] If taken cumulatively all of these factors, in my view, are sufficient to depart from the minimum sentence of life imprisonment. Although the lives of people were lost in the two bombings it does not necessarily follow that the maximum punishment must be imposed.
- [31] In this court there are many instances where the crime of murder is punished by imposing sentences less than life imprisonment because of the peculiar circumstances of such cases. Each case must therefore be viewed on its own merits derived from its peculiar set of facts. What then is appropriate sentences taking into account all these factors?
- [32] I have had many months to consider what a proper sentence would be, since I found the accused guilty on 21 January this year. This is not an easy matter to pass an appropriate sentence. This is also not a case where this court has to protect this society within South Africa against the terrorist activities of the accused. The sentence should, however, send the necessary deterrent message to would-be terrorists, wherever they may be.
- [33] To sentence the accused to life imprisonment, in my view, would be totally disproportionate to the seriousness of the crimes he committed. On the other hand a suspended sentence would be too lenient and send the wrong message to those wishing to commit terrorist activities.
- [34] The only appropriate sentence, in my view, would be a determinate period of imprisonment. Having anxiously considered what an appropriate sentence would be, I have come to the conclusion that the accused should be sentenced as follows:

Counts 1, 3, 5, 7, 9 and 11, are taken together for purpose of sentence, and the accused is sentenced to 12 years' imprisonment. Counts 2, 4, 6, 8, 10 and 12 are taken together for purposes of sentence and the accused is sentenced to 12 years' imprisonment.

On count 13, the accused is sentenced to 10 years' imprisonment.

It is ordered that the sentence imposed on count 13 is to run concurrently with the sentence imposed on counts 2, 4, 6, 8, 10 and

12. Effectively, the accused is therefore sentenced to 24 years imprisonment. The accused is also declared unfit to be in possession of a weapon.

DATED THIS 26th DAY OF MARCH 2013 AT JOHANNESBURG

C. J. CLAASSEN

JUDGE OF THE SOUTH GAUTENG HIGH COURT

Counsel for the State: Adv S. K. Abrahams instructed by the Director of Public Prosecutions

Counsel for the Accused: Adv J. P. Marais instructed by McMenamin, Van Huyssteen & Botes Attorneys

Argument on Sentence took place on 26 March 2013

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