

SOUTH AFRICA / JUDGMENT

S v Olyn (K/S13/18) [2020] ZANCHC 64 (15 May 2020) [2020] ZANCHC 64

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

K/S13/18

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

No: K/S

13/18

Heard

on: 19-22/11/2018;
18-22/03/2019;
25-27/03/2019;
05 - 07/06/2019;
14-17/11/2019;
11/02 & 20/02/2020;
11
- 12/05/2020
Delivered

on: 15/05/2020
In

the matter between: THE
STATE
and
WILLEM
OLYN
ACCUSED

JUDGMENT

ON SENTENCE

MAMOSEBO J

[1] The accused was convicted on 17 October 2019 by this Court on 12 counts: Murder read with s 51(1) of the Criminal Law Amendment Act[1]; three counts of pointing of a firearm; three counts of assault common; theft; negligent driving; attempted murder; unlawful possession of a firearm; and unlawful possession of ammunition.

[2] The Supreme Court of Appeal held the following in *Ndlanzi v The State*: [2]

"[42] In determining an appropriate sentence, it is important for the court to maintain the delicate balance between the triad, difficult as the task might be. Friedman J expounds the approach as follows in *S v Banda & others* 1991 (2) SA 352 (BGD) at 355A – B:

'The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, 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. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less. '"

[3] It is trite that sentencing is pre-eminently a matter for the discretion of the court. In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that 'punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy.' [3] In addition to the aforementioned principles, the court must also consider the main purposes of punishment, which are deterrent,

preventive, reformatory and retributive. [4]

[4] Ms Patrinos, counsel for the accused, led the evidence of the accused's uncle, Mr Hendrik Olyn, in mitigation of sentence. He is the brother to the accused's mother who passed away ten to fifteen years ago. The accused was raised by his maternal grandparents. The accused's father is unknown to the uncle and has never played a role

in his upbringing. They come from an indigent family who depended on seasonal farm work for a living. The uncle was shocked to learn about the incident from the detective who had contacted him after the incident because he does not know the accused to be a violent person. The accused is his late sister's only child. The uncle pleaded for a lenient sentence on behalf of the accused.

[5] The accused elected not to testify. From the bar the following was placed on record: that he is 35 years old and in good health. He was employed as a farmworker and earned R1,200.00 per month prior to his

incarceration. He has two minor children the oldest of whom is 13 years and the youngest two years and seven months. The children

reside with their mother. His highest level of education is Standard 3 (Grade 5). The SAP 69 records that the offences, mainly

housebreaking with intent to steal and theft or theft, were committed from 2001 to 2009 and are over ten years old. Ms Patrinos submitted that the accused be treated as a first offender based on their superannuation. Counsel further contended that the accused was still young when the offences were committed and has since 2009 refrained from having brushes with the law. The accused has been awaiting trial since 31 October 2017, a period of two years and seven months.

[6] In as far as the offence of murder is concerned, it falls within the purview of the Criminal Law Amendment Act where a prescribed sentence is ordained unless compelling and substantial circumstances are shown

to exist warranting a deviation from the prescribed sentence. Ms Patrinos urged me to note the following as compelling and substantial

circumstances which justify the imposition of a lesser sentence:

- (a) That the accused grew up without a father;
- (b) That he was on the right path and did not commit any offence since 2009;
- (c) That he was supportive of and assisted and cared for his grandmother; and
- (d) That he is good human material who deserved a second chance.

[7] Mr Kgatwe, counsel for the State, argued that there are no compelling and substantial circumstances present and I should not deviate from the prescribed minimum sentence because all the offences with which the accused has been convicted are serious.

[8] It is unquestionable that murder is prevalent in this court's jurisdiction. What exacerbates the offences is that a firearm was used in their commission. The accused was also unprovoked. The deceased had requested him to vacate the farm seeing that he was causing trouble amongst other co-employees. The accused killed his employer in cold blood by inflicting multiple gunshot wounds to his head and neck. The deceased's death left his employees destitute and

without employment. This type of conduct demands serious condemnation.

[9] I consider the following to be aggravating circumstances: The accused was a farm labourer employed by the deceased. The killing of farmers and farm workers in this country is deplorable and must be frowned upon at all times. The deceased was a defenceless victim

who died of multiple gunshot wounds having caused no provocation. Over and above the murder, he committed further offences affecting colleagues and property. The accused's behaviour on that day can be likened to a bull in the Spanish Bull Run. The courts have a responsibility to deter people from taking the law into their own hands.

- [10] The accused's mitigation must be measured against his entire attitude. At no stage during the trial did he show any remorse. It is clear that even at the sentencing stage the accused still maintained his innocence and does not accept responsibility for his wrongful actions. What further aggravates the situation is that the accused lied and fabricated evidence in an effort to escape the consequences of his actions.

Murder

- [11] The accused has been convicted of murder read with the provisions of s51(1) of the Minimum Sentences Act. A minimum sentence of life imprisonment is applicable unless the court finds substantial and compelling circumstances that justifies a deviation from the prescribed minimum sentence, see *S v Malgas*[5].
- [12] Murder remains a heinous crime. It robs family, friends, neighbours and colleagues of a loved one. No amount of punishment will match the loss of a loved one. It is necessary to consider the impact of the crime on the victims during the sentencing phase, see *S v Matyityi*[6]. We heard from the deceased's sister, Ms Selma Clarke, how the family was and still is traumatised by his death. The deceased was the only son born of six siblings. He cared for his parents, siblings and their children. After his death, Ms Clarke and her family had to relocate from Kathu to Postmasburg to care for her parents as their health has deteriorated. One of the deceased's older sisters had to undergo counselling for the loss of her brother while the other consulted a medical practitioner. Not all family members have received therapeutic intervention to date. Ms Clarke was in tears while testifying, which confirms that the family has not had closure yet. She testified that her mother is still keeping all the deceased's clothes and his toiletries just as he had left them.
- [13] The society looks up to the courts for its restoration of public confidence. It is worse when committed where the accused had bitten

the hand that was feeding him. The right to life is entrenched in the Bill of Rights; notwithstanding, the accused has displayed lack of respect for the deceased's life.

- [14] From the submissions made by counsel I could not discern any factors that amount to substantial and compelling circumstances. As was stated in *Malgas*[7] the courts should not deviate from them for flimsy reasons. The mitigating factors are all neutral factors that, in my view, are not considered as compelling and substantial.

Pointing of a firearm (Counts 2, 6, 11)

- [15] In *R v Humphries*[8] the court's interpretation of pointing of a firearm was broader and favoured by the Supreme Court of Appeal in *Xabendlini v State*[9] where the SCA said:

"[7] ...A wider interpretation was favoured in Humphries and Hans. In my view, the wider interpretation is to be preferred. First, it accords with the intention of the legislature which is to protect the public from the dangers associated with the handling and use of firearms and the resultant fear induced in the mind of the person at whom the firearm is pointing that he would or could be struckThird, I endorse the view expressed by CR Snyman that the specific harm sought to be combated by the legislature, namely, inducing fear in the mind of the person at whom the firearm is directed, would exist irrespective of proof that the bullet, if discharged, would have struck or missed him or her."

[16] The occupants of the Toyota Forhmer were afraid and sped off with the vehicle exiting the farm in reverse to escape harm or imminent danger. It is clear that the pointing of the firearm in their direction induced the belief that they will be shot at. The accused's motive, even though he did not testify, can only be inferred that it could have been to obstruct them not to reach the deceased in order to isolate him from everyone.

Attempted murder (Count 9)

[17] In as far as this count is concerned, it boils down to the quality of life of Mr Dion Barends with a bullet still lodged in his body. He must now face an uncertain future of periodically visiting the hospital for a sonar scan. The shooting was also unprovoked and has left him physically and psychologically scarred.

Assault common (Count 3, 4 and 5)

[18] The three state witnesses, Messrs Benjamin Witbooi, Gracious Lakay and Ricardo Pyl were enjoying their lunch under the tree when a shot was fired at them. Lakay was unwell and had to hide in the nearby bushes while others sought help. There is a close link between these three counts because they emanate from one fired shot. I regard the assault on the trio as serious. However, these counts will be taken together for purposes of sentence.

Theft

[19] Ms Patrinos has asked me to disregard the accused's previous convictions as they do not involve violence, but dishonesty. They are all housebreaking with intent to steal and theft over almost a decade. Counsel says because they are old it serves no purpose to consider them. I disagree. This Court was faced with a similar application in *S v Neville van Staden*[10] and held:

"[10] Section 271A of the Criminal Procedure Act, 51 of 1977 (the CPA), determines that certain convictions fall away as previous convictions after the expiration of 10 years unless during that time the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed. See Du Toit: Commentary on the Criminal Procedure Act, Service 56, 2016 at 27-8. Although most of the accused's previous convictions are older than 10 years, the number and nature of the convictions do signify a trend hence I hold the view that they should be taken into account."

[20] What strikes me in the matter before me now is that first, the accused's perpetuation of his dishonesty having denied stealing the bakkie and maintaining that he just found it idling in a veld and he drove it away fleeing from fired shots. Secondly, it shows his attitude of continued disrespect for other people's property. He did not just drive off with the bakkie but capsized and damaged it. The remarks by Ponnann JA in *S v Matyityi*[11] pertaining to remorse are apposite.

Negligent driving

[21] Speeding off on a gravel road to flee from the crime scene and the law enforcement officers was irresponsible and bordered on being

reckless. A complete waste of State limited resources. He also posed a danger to the farmworkers who walk to and from work on that main road. The fact that the bakkie rolled over after he had failed to navigate a curve demonstrates just that fact.

Unlawful possession of a firearm and ammunition

[22] The accused merely denied being in possession of the .22 rifle. It is also unclear how he acquired its possession. What is undeniable is that he was in unlawful possession thereof and had fired shots therefrom which killed one and attempted to kill others. This is a statutory offence for which the sentences are prescribed. Unlawful possession of such a firearm warrants a direct imprisonment sentence. The maximum period of imprisonment for contravening s 3 of the Firearms Control Act is 15 years.

[23] The following were taken into consideration: the accused was seen by the state witnesses when firing the shots from the .22 rifle which he later fled the scene with. He was apprehended whilst having it in his possession. The rifle was still loaded and was emptied by the police at a later stage. Ammunition was recovered from the scene. The rifle was used to commit the offences upon which he has been convicted.

[24] All the above offences are serious in nature. Mindful of the cautionary rule that the courts must be careful not to unduly accentuate one element at the expense of and to the exclusion of the others, the pronouncements by Brand JA in *S v SD*[12] are befitting:

"[16] When one looks at the offences under present consideration and the interests of society, I can come to one conclusion only: the offences for which the appellant has been convicted are so severe that incarceration cannot be avoided. In that sense it is 'the last resort of punishment'. Any sentence which fails to recognise the severity of these crimes may lead to society losing its confidence in the criminal justice system. Especially in a society where violence has become prevalent and endemic, one simply cannot afford that risk."

[25] Regard needs to be had to the cumulative effect of the sentence and the guide provided in S v Moswathupa[13] where Theron JA stated (concurring in by Ponnann JA and Seriti JA): "where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe." See also S v Johaar[14].

[26] As indicated earlier, the accused was convicted on twelve counts. The incidents occurred on the same day. I hold the view that the

cumulative effect of the separate sentences would result in a sentence which might be shocking or disproportionate to the accused's

blameworthiness. Counts 3, 4 and 5 are taken together for purposes of sentence. Counts 2, 6 and 11 will also be taken together for the purposes of sentence. To further ameliorate a disproportion, the sentences in counts 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13 should run concurrently with the sentence in respect of count 1.

[27] In the result the following sentences are imposed:

1. Count 1 (Murder Willem van der Westhuizen): Life imprisonment.
2. Counts 2, 6 and 11 (Pointing a firearm) taken together for purposes of sentence: 18 months imprisonment.
3. Counts 3, 4 and 5: (Assault common on : Messrs Benjamin Witbooi, Gracious Lakay and Ricardo Pyl) taken together for purposes of sentence: 18 months imprisonment
4. Count 7 (Theft): 3 years imprisonment
5. Count 8 (Negligent driving): 2 years imprisonment
6. Count 9 (Attempted murder: Mr Deon Barends): The accused is sentenced to 7 years imprisonment.
7. Count 12 (Unlawful possession of a firearm): 4 years imprisonment
8. Count 13: (Unlawful possession of ammunition): 2 years imprisonment.
9. Counts 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13 are ordered to run concurrently with Life imprisonment imposed on Count one.

NORTHERN CAPE DIVISION

For the State:

Adv. K.M. Kgatwe

Director Public Prosecutions

For the accused: Adv. V. Patrinos

Legal Aid Board (Judicare)

- [1] Act 105 of 1997
- [2] (318/13) [2014] ZASCA 31 (28 March 2014) at para 42
- [3] S v Rabie 1975 (4) SA 855 (A) at 862G - H
- [4] R v Swanepoel 1945 AD 444 at 455
- [5] 2001 (1) SACR 469 (SCA) at 479 (para 14)
- [6] 2011 (1) SACR 40 (SCA) at 48 (para 16
- [7]
- [8] 1957 (2) SA 233 (N) at 234F - G
- [9] (608/10)(2011) ZASCA 86 (27 May 2011) at para 7
- [10] K/S 21/2016 delivered 20 March 2017 at para 10
- [11] 2011 (1) SACR 40 (SCA) at para 13
- [12] 2015 (2) SACR 363 (SCA) at 368 para 16
- [13] 2012 (1) SACR 259 (SCA) para 8
- [14] 2010 (1) SACR 23 (SCA) para 14
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