

SOUTH AFRICA / JUDGMENT

S v Siyeka (SS11/2014) [2015] ZAWCHC 208 (1 December 2015)

[2015] ZAWCHC 208

COURT

Western Cape High Court, Cape Town

BEFORE

Boqwana

CASE / FILE NUMBER

SS11/2014

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS11/2014

DATE: 1 DECEMBER 2015

In the matter between:

THE STATE

And

CHUMA SIYEKA.....Accused

S E N T E N C E

BOQWANA, J:

Sentencing principles

The considerations that the Court looks at when sentencing are trite, namely, the nature of the offence or offences, the offender and the interests of the society. This principle was aptly put in *S v Rabie* 1975(4) SA 855 (A) where the court observed that the punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances. At page 866 the court referring to *S v Zinn* 1969(2) SA 537 (AD) at page 541 with approval said the following:

“A judicial officer should not approach punishment in a spirit of anger because, being human that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness,

where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in determination of the appropriate punishment in the light of all the circumstances of the particular case.”

Holmes JA described the main purpose of punishment at page 862A-B to be ‘deterrent, preventative, reformatory and retributive’ as set out in *R v Swanepoel* 1945 (A.D.) 444 at page 455. He referred to a passage in Gordon, Criminal Law of Scotland where it was stated that:

“The retributive theory finds the justification for punishment in the past act, a wrong which requires punishment or expiation.... The other theories reformatory, preventive and deterrent, all find their justification in the future in the good that will be produced as a result of the punishment.”

Prescribed minimum sentences

Since 1997 the Legislature prescribed minimum sentences applicable in respect of a variety of offences involving serious and violent crimes with the introduction of the Criminal Law Amendment Act 105 of 1977 (‘Criminal Law Amendment Act’).

The provisions of section 51 of the Criminal Law Amendment Act are applicable in this case in respect of counts 9, 10 and 15. In respect of count 9 of attempted robbery with aggravating circumstances, the prescribed minimum sentence is 15 years imprisonment, for count 10 of murder it is life imprisonment; and in respect of count 15 of possession of prohibited firearm (which is a fully automatic firearm), the prescribed minimum sentence is 15 years imprisonment.

The Court may deviate from the minimum sentences prescribed if it finds that there are substantial and compelling circumstances warranting such deviation. The well-known decision of *S v Malgas* 2001(1) SACR 469 (SCA), set out how the concept of ‘substantial’ and ‘compelling’ circumstances should be approached. Key to these guidelines is a requirement for the Court:

“B... to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be truly convincing reasons for a different response, the crimes in question are therefore required to illicit a severe standardised and consistent response from the Courts.”

The concept of substantial and compelling has not been defined in the legislation. It has been left up to the courts to decide based on the circumstances of each case as to what constitutes compelling and substantial factors. What is important to note is that such circumstances do not require to be exceptional in the sense of being seldomly encountered or rare. Departure would be justified if there is justification to do so, having regard to the weight of all the relevant factors cumulatively. In contrast it would be improper to deviate from the minimum sentence purely for personal preference or ‘flimsy’

reasons.

Submissions in mitigation and aggravation

The defence presented to the Court various factors which it argued should be regarded as substantial and compelling and those are: Firstly, that the accused is a 50 year old family man, married with six children. One major daughter has a business university degree and is employed in a business environment. The accused also has a major son who is diabetic and unable to work. Four other children are minors and the youngest son being four year's old. His wife works for an NGO in Khayelitsha.

Secondly, that the accused is a solid citizen, being a businessman who participates in the economy by virtue of his taxi business; he also owns a house.

Thirdly, he spent approximately two years in custody awaiting trial.

Fourthly, his participation in the murder was limited. The argument advanced in this regard, is that the deceased was killed by a pistol shot whereas the accused was said to have carried an AK47 firearm. In this regard, it was contended that there was no evidence that the accused contributed to the death of the deceased.

Further that he was convicted on the basis of *dolus eventualis* as opposed *dolus directus*. In this connection, it was submitted by Mr Van der Berg that the accused's conviction was based on a subscription to a mandate to commit robbery and force was used in the execution of such mandate. He submitted that one is looking at participation in the form of foreseeability.

Fifthly, it was submitted that the Court should consider the fact that if life imprisonment was imposed, the accused would be 75 years of age before he becomes eligible for parole and that would not be in the interests of the society as such sentence would remove hope of a further life and would be a crushing sentence.

In aggravation of sentence the State led the evidence of the deceased's wife, Natasha Jones ('Mrs Jones') who testified about the impact the deceased's death has had on her and their 7 year old son. They had to receive counselling as a result of his death which they could not continue attending due to financial constraints. Her son is still suffering and continues to ask for his father and does not understand why his father is not there for him anymore. He is sometimes out of control

and the school has advised that he must go for further counselling. Before the deceased died, the couple had applied for a mortgage bond which was approved. She did not pursue the bond because she could not afford it. She now faces a severe financial crisis and has had to remove her son from a lot of activities as she cannot afford to pay for them. She currently lives with her mother. Mrs Jones was evidently emotional when she gave evidence in court. She stated that it was unfair that her husband's life ended in the way it did.

According to the State what was also grave in this case was that the robbery was carefully planned by robbers who used handguns, and an AK47 which is a fully automatic firearm. The lives of innocent people were put at risk.

The deceased was unarmed and his colleagues were shot at and one of them was injured. The deceased was a young man in his thirties with his best years ahead of him. Bullets that were fired from the scene could have hit anyone on the way. Furthermore, the accused failed to show any remorse and was motivated purely by greed because he was a man with businesses and earned an income. Mr Wolmarans argued that there are no substantial and compelling circumstances to warrant a deviation from the minimum sentence prescribed.

As regards previous convictions, both parties submitted that the accused should be regarded as a first offender. The State however submitted that the Court ought to put the previous convictions of the accused into the 'melting pot', on the basis that the accused has not learnt any lesson from his previous encounters with the law and that that should play a role on the question of whether he would be a candidate for rehabilitation.

The accused's previous convictions ranged from four convictions of theft in 1995; one of assault in 1996 and two of fraud in 2000 and 2009 respectively. According to Mr Van der Berg, the Court should not place any weight on the convictions dating to 1995, 1996 and 2000. The only one with some currency is the conviction of fraud in 2009, which in his view may coincide with the attempted robbery because it contains an element of dishonesty. He contended that it has no relevance to the other offences and that the accused is effectively a first offender, which is an element that the courts have regarded to be a cogent mitigating circumstance.

Offences

Dealing with the offences. The incidences which gave rise to the conviction of the accused occurred on 20 September 2013 and on 25 October 2013 respectively. On 25 October 2013 the accused together with four others, armed with pistols, an AK47 and an assault rifle, set out to rob a Coin Security vehicle which was parked in Monte Vista Boulevard, Bellville District, in front of an ATM, using a white Mazda bakkie which was stolen earlier on 20 September 2013 in Rondebosch. They removed the bakkie's canopy and changed the registration numbers by putting false number plates on the vehicle in order to facilitate their assignment and disguise their evil deeds. The Mazda bakkie was later found abandoned.

Their expedition was unsuccessful because they encountered resistance from a crew member of the Coin Security vehicle. The attackers pretended to be customers walking around and/or coming out of nearby shops. One of them was talking on a cell phone. These men surprised the crew member, Witbooi who was in charge of securing the area by attacking him and charging towards the Coin Security van.

They did not get what they wanted but shot Witbooi in the shoulder and also at the van particularly aiming at Hloi, the man responsible for carrying the cash who was inside, at the back of the van. The bullet did not penetrate as the vehicle was bullet proofed. The gunfire that ensued resulted in the death of the driver of the Coin Security vehicle, Jones, ('the deceased').

As they were fleeing the scene, they met up with the District Watch security officers, Butler and Kotze who were alerted to the alarm activations from a pharmacy in Monte Vista Boulevard. Kotze shortly thereafter noticed a seeming robbery in progress in that street. A further shootout between Butler and the attackers erupted at the intersection of Monte Vista Boulevard and Diaz Road, where an AK47 firearm was fired from the back of the Mazda bakkie and shots exchanged with pistols from both vehicles. Both Butler and Kotze were not injured from this encounter.

All the witnesses testified about how horrifying the ordeal was for them and how they feared for their lives as this was happening. Hloi was so scared that he locked himself in the back of the Coin Security van. Witbooi who managed to fend off the attackers also joined him in the back of the van as he did not know how many assailants were still around. Kotze ran 'for his life' and went to hide in the dentist's surgery and Butler relayed how thankful he was to be alive after this encounter as one bullet missed him by 30 centimetres.

This attack happened in daylight in the afternoon and in the public street which was commercially active and naturally would have people walking up and down visiting shops in the area and vehicles moving around.

Interests of the Society and seriousness of the crimes

Cash-in-transit heists have become the order of the day in South Africa. Many lose their lives only because of greed from those who think they are entitled to claim what belongs to others with impunity and without working for it. Families in our country shed tears on a daily basis because of the loss of their loved ones due to these callous acts.

Hopefully the time will come when sense will prevail, and when the dignity and respect of other people's lives and property would be valued. Society demands a certain amount of retribution/punishment for crimes which are rife. The courts should continuously send out strong messages that such heinous acts will not be tolerated.

The Court has before it one accused in an act which was committed together with four others who are possibly still at large within the communities and who fled with firearms that they used to commit these crimes.

Appropriate sentence

In considering the appropriate sentences the Court must consider all the relevant circumstances before it. These factors must be considered collectively in coming to a decision of what an appropriate sentence should be. The mental approach that the Court engages in is indeed not a straightforward one and the approach is also not a straightjacket approach. Whilst the Court is permitted to look at case law as a guideline as to what sentence should be appropriate under

what circumstances, each case remains unique. In other words, the balancing exercise depends on the circumstances of each case. The court in *S v Bailey* 2013(2) SACR 533 (SCA) acknowledged at paragraph 21 that the most difficult question to answer is always a question of what are substantial and compelling circumstances. It noted that: “the term is so elastic that it can accommodate even the ordinary mitigating circumstances.” The court in that case held that the term involved a value judgment on the part of the sentencing court. It further found the definition in *S v Malgas* supra at paragraph 22 to be ‘illuminating and helpful’. In *Malgas Marais JA* noted in that relevant paragraph that:

“The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of the consideration of the circumstances the Court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

Both parties were in agreement that the offences were very serious. Dangerous and deadly weapons were used with shots fired liberally. The seriousness of these crimes and their impact on the society and those directly affected cannot be understated. An innocent young man lost his life which has left his family without a husband and a father who was the main provider of income for the family. The traumatic loss is evidently still being felt by the family of the deceased. They have to live with this experience for the rest of their lives. Mrs Jones emotionally relayed how their 7 year old son has to grow up without a father to teach him about being a man. The acts of the accused and his co-perpetrators left devastation behind.

There were others who were fired at and who could have been injured or killed. They were also emotionally affected by the incidents. There were also members of the community who were innocent bystanders within the vicinity of the incidence who were also at risk as the area was turned into a war zone. Against that background the accused deserves a lengthy sentence without a doubt.

The age of the accused is a factor that should be taken into consideration in the Court’s view. At 50, the accused is not a young man. It is a fact that if the Court were to impose a minimum sentence of life imprisonment, the accused will still be in prison at least by the age of 75 years.

By stating this fact, the Court is not taking into account policy arrangements of the executive relating to parole and it is also not intending to tailor the sentences it deems appropriate with those considerations in mind.

The age of the accused on its own, the Court agrees, cannot be a compelling reason to deviate from the minimum sentence. Whilst the accused does not have a clean record, per se, he is to be regarded as a first offender for the murder which is the ‘flagship’ offence in this case. The same applies to the attempted robbery and possession of prohibited firearm offences. It is also notable that the accused was last involved in the violent crime some 19 years ago and that was for assault

for which he received a suspended sentence of six months. The Court does take into account the fact that the accused has had brushes with the law in the past, the latest of these being fraud committed some six years ago, which is an element of dishonesty. The four theft convictions happened some 20 years ago in 1995. Apart from the fact that those convictions happened a long time ago, it is the first time that the accused has been convicted of offences as serious as in this case.

The case of *S v M* 2007(2) SACR 60 (W) that the State referred to did not necessarily propagate for a view that the first offender status should not count. It simply restated, inter alia, what is established which is that the issue of an accused being a first offender cannot be in and out of itself justify departure from the minimum sentence ordained. The court in that case found at paragraph 69 that “At most, it would be one of the considerations taken into account for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding.”

Furthermore, the accused spent two years in custody awaiting finalisation of the trial. This is a relevant factor that the Court takes into account.

The personal circumstances of the accused also do indicate that he has some stability in his family and he contributed productively to both the family and the community through his taxi business. That also counts in his favour.

It does however baffle one’s mind why the accused would decide to undertake such a devastating path and that does exasperate matters.

Whilst the legislature, might have seen it fit to place murder committed in the course of a robbery with aggravating factors and also with common purpose as those categories of crime deserving of life imprisonment, it could not have been the legislature’s intention that those convicted of such crimes would automatically be sentenced to life imprisonment or would be uniformly sentenced. Sentences must still be individually considered.

Life imprisonment is an ultimate sentence which must be imposed in cases where, inter alia, there is no hope of rehabilitation or an accused regaining stability in his life and community. The Court must be mindful not to impose a sentence which has a result of ultimately crushing the person if circumstances are such that the sentence of life imprisonment would be disproportionate.

Having evaluated and weighed all the relevant factors and submissions in this case cumulatively, the Court is of the view that substantial and compelling circumstances do exist to justify departure from the prescribed minimum sentences. The Court is satisfied that a sentence of life imprisonment will be unjust.

Nonetheless, the crimes committed and in particular the murder remain particularly horrific and of the severe nature and should still be viewed in relation to what the legislature had in mind, when prescribing minimum sentences which is imposition of severe punishment in serious and violent cases. A lengthy sentence of imprisonment which meets the crime, the criminal, and the interests of the society would accordingly be just and appropriate in this case particularly in respect of murder.

Reasons for departure in respect of murder are equally applicable in the counts of robbery with aggravating circumstances and prohibited possession of a firearm. As regards possession of a firearm, it has been held by the full bench of this division in *Swartz v S* (A430/13) [2014] ZAWHCH 113 (4 August

2014) that the Criminal Law Amendment Act is applicable. Both the defence counsel and the state agreed that that was the position in respect of count 15. Unlawful possession of a prohibited firearm is regarded as a serious offence, which attracts heavy punishment. Same can be said about attempted robbery with aggravating circumstances for which purpose this firearm was carried and used. In respect of the theft and attempted murder convictions the evidence is quite clear.

In view of all the circumstances the accused is accordingly sentenced as follows:

1. IN RESPECT OF COUNT 8, THEFT OF THE MOTOR VEHICLE, THE ACCUSED IS SENTENCED TO 3 (THREE) YEARS IMPRISONMENT.
2. IN RESPECT OF COUNT 9, THE ATTEMPTED ROBBERY WITH AGGRAVATING CIRCUMSTANCES, THE ACCUSED IS SENTENCED 12 (TWELVE) YEARS IMPRISONMENT.
3. IN RESPECT OF COUNT 10, MURDER, THE ACCUSED IS SENTENCED TO 20 (TWENTY) YEARS IMPRISONMENT.
4. IN RESPECT OF COUNT 11, ATTEMPTED MURDER, THE ACCUSED IS SENTENCED TO 8 (EIGHT) YEARS IMPRISONMENT.
5. IN RESPECT OF COUNT 12, ATTEMPTED MURDER, THE ACCUSED IS SENTENCED TO 8 (EIGHT) YEARS IMPRISONMENT.
6. IN RESPECT OF COUNT 13, ATTEMPTED MURDER, THE ACCUSED IS SENTENCED TO 8 (EIGHT) YEARS IMPRISONMENT.
7. IN RESPECT OF COUNT 14, ATTEMPTED MURDER, THE ACCUSED IS SENTENCED TO 8 (EIGHT) YEARS IMPRISONMENT.
8. IN RESPECT OF COUNT 15, POSSESSION OF PROHIBITED FULLY AUTOMATIC FIREARM, THE ACCUSED IS SENTENCED TO 10 (TEN) YEARS IMPRISONMENT.
9. IN RESPECT OF COUNT 16, POSSESSION OF AMMUNITION, THE ACCUSED IS SENTENCED TO 3 (THREE) YEARS IMPRISONMENT.

10. SENTENCES ON COUNTS 8, 9, 11, 12, 13, 14, 15 AND 16 WILL RUN CONCURRENTLY WITH THE SENTENCE ON COUNT
10. THE EFFECTIVE SENTENCE IS 20 (TWENTY) YEARS IMPRISONMENT.
11. THE ACCUSED IS DECLARED UNFIT TO POSSESS A FIREARM IN TERMS OF SECTION 103 OF THE FIREARMS CONTROL ACT 60 OF 2000.

BOQWANA, J

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