

SOUTH AFRICA / JUDGMENT

Sibisi and Another v S (AR171/20) [2024]
ZAKZPHC 107 (11 September 2024)
[2024] ZAKZPHC 107

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Henriques, M E Nkosi, M Tucker

CASE / FILE NUMBER

AR171/20

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE NO: AR171/20

In the matter between:

SENZO
SHOMPOLO SIBISI
FIRST APPELLANT
BONGINKOSI
ZIQUBU
SECOND
APPELLANT
and
THE
STATE
RESPONDENT
ORDER
On

appeal from: the High Court of South Africa, KwaZulu-Natal
Division, Pietermaritzburg, per Radebe J (sitting as court of

first instance):

1.
The first and second appellants' appeals against the sentences
imposed
is upheld.
2.
The sentences of the court a quo are set aside and replaced

with the following:

In respect of the first

appellant: 2.1 in
respect of the count of murder, the accused is sentenced to 25 years'
imprisonment;
2.2 in
respect of the count of robbery with aggravating circumstances the
accused is sentenced to 15 years'
imprisonment;
2.3 the
sentence imposed on count 2 will run concurrently with that imposed
on count 1.
In respect of the second

appellant: 2.4 in
respect of the count of murder, the accused is sentenced to 25 years'
imprisonment;
2.5 in
respect of the count of robbery with aggravating circumstances the
accused is sentenced to 15 years'
imprisonment;
2.6 the
sentence imposed on count 2 will run concurrently with that imposed
on count 1.
3.
Such sentences are ante-dated to 24
February 2014.

JUDGMENT

Henriques J (M E Nkosi J and M Tucker AJ concurring)

Introduction

- [1] This is an appeal by the first and second appellants against their sentences imposed by the court a quo on 24 February 2014 pursuant to their convictions of murder and robbery with aggravating circumstances on 30 January 2014. Leave to appeal against the sentences imposed only having been granted by the court a quo on 24 February 2014.
- [2] It is common cause that the provisions of the Criminal Law Amendment Act[1] (the CLAA) also known as the minimum sentencing legislation applied to their convictions. In respect of both counts they were convicted on the basis of common purpose, the court a quo finding that the respondent discharged the onus of establishing that the appellants acted in furtherance of a common purpose at the time of the commission of the respective offences.

- [3] Mr Barnard who appeared on behalf of the first appellant, submitted that the court a quo erred in finding that the first appellant had failed to show the existence of substantial and compelling circumstances allowing for a deviation from the prescribed minimum sentences. He submitted in particular that the court ought to have found the following factors cumulatively amounted to substantial and compelling circumstances namely:
- (a) that the first appellant had no previous convictions, was a first offender and had no pending cases;
 - (b) he was 28 years old at the time of the commission of the offences and was employed at the time of his arrest;
 - (c) he was a father of two minor children; and
 - (d) had spent four years in custody awaiting trial given his arrest in August 2010.
- [4] In addition, he submitted that the court a quo in considering the triad of Zinn failed to take into account that the murder was not planned or premeditated “but the appellant by chance stumbled across the deceased when he had been parked in his vehicle.” Although he concedes that a lengthy time of imprisonment was warranted the ultimate sentence of life imprisonment he submits, given the facts, was not warranted. In addition, no information had been placed before the court that the first appellant was not a good candidate for rehabilitation.
- [5] The main thrust of the first appellant’s appeal also relates to the fact that the time spent in custody awaiting trial was not considered having regard to the decisions in *S v Vilakazi*[2] and *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others*. [3] He submits that cumulatively the personal circumstances of the first appellant coupled with the time spent in custody warrants
- interference with the sentences imposed by the court a quo.
- [6] The second appellant represented by Mr Pillay, submits that the court a quo committed a misdirection in failing to find substantial and compelling circumstances to exist having regard to the second appellant’s young and tender age, he being 18 years and eight months old at the time of the offence, a first offender and that he had been in custody for three years and six months given his arrest in August 2010. He submitted in addition that the probation officer’s suggestion that the second appellant suffered from post-traumatic stress disorder coupled with the recommendation of correctional supervision given his unfortunate personal circumstances namely that his parents had passed away when he was at a young and tender age warranted a deviation from the prescribed minimum sentence.

- [7] Mr Magwaza who appeared for the respondent submitted that the court a quo did not commit a misdirection and was correct in concluding no substantial and compelling circumstances existed given the serious nature of the offences and the circumstances under which they were committed. To a large extent he submitted that there were aggravating factors which warranted the imposition of the prescribed minimum sentences.

The judgment of the court a quo

- [8] The following circumstances were placed before the court at the time it gave consideration to the imposition of the appropriate sentences:
- (a) The first appellant was 28 years old, had completed standard seven, was employed as a taxi driver earning R500 per week, had no previous convictions, was a first offender, was a father to three children aged 13, 11 and eight years old and had been in custody since 2010.
 - (b) The second appellant was 23 years old at the time of sentence although he was 18 years and eight months old at the time of the commission of the offences, was unmarried with no children and had been in custody since 2010 as well.
- [9] At the instance of the court a quo a probation officer's report was obtained in respect of the second appellant and the probation officer testified. Regrettably neither the full report of the probation officer nor the evidence of the probation officer has been incorporated into the record and all this court can have regard to is certain pages of the probation officer's report which confirms the unfortunate circumstances of the second appellant. The recommendation of the probation officer is that of correctional supervision.
- [10] The court a quo appears to have considered the probation officer's report and the evidence given by the probation officer but does not appear to have been persuaded to follow such recommendations and it was of the view that the probation officer had not had the benefit of hearing the evidence given during the course of the trial relating to the circumstances under which the offences had been committed. It is trite that the sentencing court is not bound by any recommendations of the probation officer.[4]
- [11] Apart from the submissions made from the bar by the first and second appellants' attorneys of record, the court a quo also considered the evidence of the deceased's father in aggravation of sentence. It was of the view that the youthfulness of the appellants was a motivation for the crime but that neither one of them had displayed any remorse. What the court found particularly

aggravating was that despite his youthfulness the second appellant actively played a role in the stabbing of the deceased during the robbery and eventually the murder of the deceased.

- [12] Having regard to the evidence presented, it was the second appellant who was the aggressor and who took the knife and stabbed the deceased whilst he sat in the vehicle even after he had been injured from the initial stab wounds which had been inflicted. It was the second appellant who took a lighter and set the vehicle alight. It is common cause that the court a

quo relied on the evidence of two s 204 witnesses who were present at the time the robbery and murder took place and who it regarded as testifying frankly and honestly thereby discharging them from prosecution.

- [13] The court a quo when sentencing the appellants was aware that the starting point was the prescribed minimum sentences and further that it had the

discretion to deviate from the imposition of such sentences if it found substantial and compelling circumstances to exist. The court had regard to the personal circumstances of both the appellants at the time of sentencing. In addition, the court was alive to the fact that it had to individualise the sentences when making a decision to impose an appropriate sentence and had regard to the triad of Zinn and specifically the personal circumstances of the appellants.

- [14] The court a quo also took into account what motivated the appellants to commit the offences and took a dim view that both the appellants persisted in their denial of the roles that they played in the commission of the offences and did not display any remorse. It was alive to the fact that it had to find a balance between the recognised objectives of sentencing as well as the interests of society.

- [15] It also considered the aggravating circumstances under which the offences were committed and that the appellants displayed a lack of compassion for the deceased. Radebe J took into account the fact that the first appellant was “sly and manipulative” having regard to the evidence presented by all the witnesses in the court a quo: That he was dangerous and feared in the community and was a factor which she considered when sentencing him and also that whilst in custody attempts were made to interfere with witnesses who would incriminate him in the offences specifically his co-accused as well as the s 204 witnesses.

- [16] The court a quo was of the view that the second appellant was “a brutal and heinous killer” and that there was nothing in his background to suggest that this would have caused him to commit the offences. The appellants were motivated by greed when they made a decision to rob and subsequently kill the deceased. In determining whether there were any prospects of the appellants being rehabilitated, the court was of the view that this was up to the Department of Correctional Services to determine after the appellants had served some period of their sentences. It took the view that there were no substantial and compelling circumstances and that because the actions of the appellants were brutal and merciless the prescribed minimum sentences were the only appropriate sentences to be imposed. The court imposed the prescribed minimum sentences and the sentence on count 2 would have been served concurrently with that of life imprisonment imposed on count 1.

- [17] Although the imposition of sentence falls pre-eminently within the discretion of the sentencing court, a court on appeal can interfere with it in circumstances where the proceedings are vitiated by an irregularity, where there is a misdirection, and in circumstances where the sentence imposed was disturbingly, and startlingly inappropriate.

[5]

- [18] In my view, the basis upon which the appeal ought to succeed relates to the misdirection committed by the court a quo, firstly in imposing the prescribed minimum sentence on the basis that the facts justified the imposition thereof and secondly, its failure to find that substantial and compelling circumstances existed; alternatively, in failing to find, given the circumstances of this particular case, that the imposition of the prescribed minimum sentence would be disproportionate having regard to the triad of Zinn and given the time both appellants had spent in custody. As a consequence of these misdirections this court is entitled to impose sentence afresh.
- [19] It is trite that the court a quo can deviate from the prescribed minimum sentences if to impose them would be disproportionate having regard to the triad of Zinn. In this particular matter in my view the court committed a misdirection in failing to take into account the period of time which both appellants spent awaiting trial prior to their conviction and sentencing. The judgment on sentence was silent in this regard. The court summarised this as one of the factors submitted in mitigation of sentence but does not appear to have taken it into account in its reasoning when sentencing appellants.
- [20] Having regard to the judgment in Vilakazi at paragraph 60 the Supreme Court of Appeal (SCA) held:
- ‘...While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.’
- [21] The period spent in custody awaiting trial has subsequently been considered as a factor which must be considered by a court to deviate from the prescribed minimum sentence as was confirmed by the SCA in DPP, North Gauteng: Pretoria at paragraph 28 where the court held the following:
- ‘I have already indicated that the four-year period spent by the respondents in custody awaiting trial must be regarded as a factor that requires this court to deviate from the prescribed sentence; life imprisonment is not proportionate to the crime in the circumstances...’
- [22] In my view given that the time spent in custody was not a factor considered by the court a quo when imposing the sentences this court ought to intervene.

Order

- [23] In the result the following orders will issue:

2. The sentences of the court a quo are set aside and replaced with the following:
in respect of the count of murder, the accused is sentenced to 25 years’ imprisonment;

in respect of the count of robbery with aggravating circumstances the accused is sentenced to 15 years' imprisonment;

the sentence imposed on count 2 will run concurrently with that imposed on count 1.

3. Such sentences are ante-dated to 24 February 2014.

Henriques J

Case Information

Date of Argument: 3 May 2024 Date of Judgment: For the First Appellant: Mr L Barnard For the Second Appellant: Mr T P Pillay Legal Aid The Marine Building 22 Dorothy Nyembe Street Durban Email: ThiagrajP@legal-aid.co.za For the Respondent: Mr D S Magwaza Instructed by: DPP 286 Pietermaritzburg Street Pietermaritzburg Tel: 033 845 4485 Email: Dmagwaza@npa.gov.za

[1] Criminal Law Amendment Act 105 of 1997.

[2] S v Vilakazi 2009

(1) SACR 552 (SCA) para 60.

[3] Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others 2014 (2) SACR 337 (SCA) para 28.

[4] S v Botes 2011

(1) SACR 439 (GNP) para 17; Essop v S [2021] ZASCA 66 para 14.

[5] S v Kgosimore 1999

(2) SACR 238 (SCA); Director of Public Prosecutions, Gauteng Division, Pretoria v DMS and Another 2023

(2) SACR 113 (SCA.

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