

SOUTH AFRICA / JUDGMENT

S v Ndlovu (SS 062/2020) [2021] ZAGPJHC 762 (2 December 2021) [2021] ZAGPJHC 762

COURT

South Gauteng High Court, Johannesburg

BEFORE

T P Mudau

CASE / FILE NUMBER

SS 062/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 062/2020

DPP REF NO: 10/2/11/1-064/2020

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED: YES/NO

DATE: 02 December 2021
In

the matter between: THE
 STATE
 and
 NDLOVU,
 SIPHIWE
 GEORGE
 ACCUSED

JUDGMENT

ON SENTENCE

MUDAU, J:

- [1] The accused, George Siphiwe Ndlovu is before me for sentencing purposes after I returned guilty verdicts for certain specified offences. He was convicted of one (1) count of murder; three (3) counts of attempted murder; unlawful possession of firearm and ammunition. The offences were committed following an incident where the police together with the accused, enforced regulations issued in terms of the Disaster Management Act 57 of 2002, as a result of the Covid-19 outbreak.
- [2] It is trite that in the determination of an appropriate sentence, the personal circumstances of the accused, the nature of the offence or offences committed, and the interests of the community have to be considered.[1] In the assessment of an appropriate sentence, regard must be had inter alia, to the main purposes of punishment mentioned by Davis AJA in *R v Swanepoel*[2] namely deterrence, prevention, reformation and retribution[3]. The sentence however, must be blended with a measure of mercy.
- [3] However, as Schreiner JA stated: "It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment." [4]
- [4] The accused's sentence is subject to the relevant provisions of the Criminal Law Amendment Act[5] ("the CLAA") which prescribes a variety of mandatory minimum sentences to be imposed by the courts in respect of a wide range of serious and violent crimes. The accused was warned of this at the commencement of the trial. The consequences are that the accused faces for example, a minimum sentence of 15 years' imprisonment in respect of count one ; and 5 years' of imprisonment in respect of each of counts 3-5, unless I find there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentences.

- [5] The accused testified in mitigation of sentence. He also presented the evidence of a social worker in private practice, Ms Cilliers. The accused was born on 11 August 1974. He is the eldest child born of his parents' marital relationship and has two (2) younger sisters. As a family, they lived in KZN until his father's untimely death whereafter they relocated to Heidelberg, Gauteng where they lived with their maternal grandmother. The accused's mother provided background financial support as the sole provider. She made a living as a greengrocer and seller.
- [6] The accused was essentially raised by his grandmother. On his version, his mother and maternal grandmother were loving and caring and inculcated solid norms and values in them. The accused had excellent relationships with both of them and always regarded them as his role models. Unfortunately, while in custody, the accused lost both his mother and his grandmother to Covid-19, which he regrets. His mother died on July 07, 2021. Ten (10) days later, on July 17, 2021, his grandmother also perished.
- [7] The accused attended primary and secondary schools in Gauteng. He completed his primary school career at a primary school in Heidelberg, after which he attended a high school in Thokoza, where he passed matric at the end of 1994. He became a member of the so-called "self-defence units" in the East Rand established by the African National Congress ("ANC") underground structures. After the self defence units were disbanded by the ANC, he went to the SAPS training college immediately after completing his school career, where he completed a Basic Police Development Learning Programme (BPDLP). The duration of the learning programme was two (2) years, of which one (1) year was at the Academy and one (1) year in the workplace. After completing his police training, he worked as a constable in Thokoza, for about five (5) years until he was convicted of attempted murder and sentenced to eight (8) years of direct imprisonment in 2000. He was released on parole in 2004.
- [8] In 2006, the accused managed to secure a job at 'Westside Financial Services', where he quickly became the logistics supervisor followed by a similar position as a supervisor at 'Tanker Services Gas and Fuel', Germiston, in 2010. In 2014, the accused secured a position at 'Savika Armed Response & Investigation' as a security investigator. He assisted management in improving the security systems, he resigned thereafter (in 2016) to accept a position as an investigator at 'Magma Risk Solutions (Pty) Ltd', in Sandton, until his arrest for the current charges.
- [9] The accused was admitted to bail until he was rearrested for contravening his bail conditions. Bail was cancelled by this court (per Mhango AJ). Bail was cancelled because he handled a firearm contrary to strict bail conditions. The allegation is that he has no licence for that firearm, a police rifle, which is the subject matter of a pending case. The decision to cancel the bail has not been appealed against. Ms Cilliers did not recommend a particular sentence, but left it for the court's discretion after discussing various sentencing options

including correctional supervision, as would be expected. Ms Cilliers was alive to the mandatory minimum sentencing regime, but was concerned about the Covid-19 pandemic generally and conditions of the Correctional Service facilities, which should be taken note of when considering a suitable sentence. I stress that the accused is entitled to a presumption of innocence until he is dealt in accordance with the law.

- [10] Warrant Officer Heyns from the SAPS testified that the accused is well-known among the police as he regularly participated in operations, for example, where he [the accused], together with other members from Magma Security infiltrated criminal syndicates, albeit without authorisation and participated in other crime scenes. During cross-examination however, Heyns testified that criminal conduct on the part of the accused or any other civilian for that matter was not sanctioned, and if that were to happen, the law must run its course in which event, assistance of the kind the accused gave, could no longer be relied on.
- [11] The accused is a married father of three children, boys aged 7 and 12 years respectively, and a girl aged 14. Of the three, two were born out of wedlock. All the three children are of school going age. The accused's 12-year-old son lives with his biological mother in Middelburg, Mpumalanga and is employed by the Department of Correctional Services. After the accused's mother passed away, his 14-year-old daughter was sent to live with the accused's sister, Ms Busisiwe Ndlovu. Unfortunately, Ms Ndlovu was very recently diagnosed with lung cancer. The accused's daughter has therefore been placed in the care of her maternal grandmother.

The girl's biological mother is re-married and has a good relationship with the daughter. To his credit, after learning about the death of the deceased, the accused contributed R15,000-00 towards funeral costs with the help of the church in which he is a member. The money was received by the deceased family reportedly from the Kambule family. It would appear that the deceased's family were unaware that the accused also played a hand in that regard.

- [12] Ms Ntombikayise Amos testified in aggravation of sentence. Her testimony is that they have all been subjected to prolonged trauma and are battling to recover. One of the children, U[...] still experiences the physical scars of the said tragedy as a result of loss of hearing. According to Ms Amos, the deceased was forty (40) years old at the time of his untimely death. The deceased was not married and did not have any children.
- [13] At the time of his death, the deceased was not formally employed. His only income was as a street vendor. The deceased's one sister has thirteen (13) year old twins cared for by the family. The deceased undertook to assist the family in caring for the twins because they were struggling financially. Ms Amos testified that her cousin's death is challenging for the family - especially for their mother. The events on the day of the shooting, and the days that followed, were traumatic. They were very shocked and experienced a clutter of emotions.
- [14] In this case there is very little to mitigate the seriousness of the offences. Although prodded numerous times by defence counsel, Adv. Roots, the accused could not verbalize any remorse for his conduct. I gained a distinct impression that he was only sorry for the

position in which he found himself and the concomitant sentence that is to follow. The accused maintains his innocence for all the charges he has been convicted of. The death of the deceased was utterly unnecessary and inhumane. Murder offences involving the use of firearms are an extremely disturbing feature of our lives in this country. This court finds that there are aggravating factors which justify a departure from the minimum sentence prescribed for the offences the accused has been convicted of, in particular the murder charge.

- [15] As indicated, the accused admitted to previous criminal conduct. He was convicted of attempted murder of a civilian whilst in the employment of the police. He was sentence to an effective term of imprisonment, albeit approximately 20 years ago. It counts in his favour that it was the last time he faced a criminal conviction. In this case however, the accused and his victims were in a relationship of unequal balance which rendered it impossible for the deceased in particular, to protect himself from the accused's

unlawful conduct.

- [16] The main offences committed as indicated, are subject to the mandatory minimum sentencing regime. They are in their very nature grave offences, which is an aggravating factor. There is no doubt in my mind that in this case, the accused abused his position of trust and authority in committing the crimes in the presence of members of the SAPS. He abused his position of authority by shooting at the defenceless victims. It was an egregious abuse of trust and authority for discharging a firearm in circumstances that did not call for it. There was no justification in law to do so, especially within a closed space and he encroached the sanctity of the deceased's home. He knew from his experience and training the danger inherent in the use of the shotgun. Given his training and experience as a police officer, he abused his position of trust and authority by not rendering first aid to the fallen deceased, in circumstances where he could have done so. He manifested his indifference when he turned and left the scene shortly after the deceased had fallen on the veranda.

- [17] Given that the accused was in the company of SAPS members, he was in a position to exercise effective control over the deceased without resorting to extreme violence for any questioning, if that was necessary. But in this instance there was none as the deceased had not committed any offence other than to raise concern on what seemed to be unlawful conduct by the police, which is permissible in a functional democracy that subscribes to the principles of the rule of law.

- [18] The deceased was murdered in the presence of children, some of whom fell victim, hence the attempted murder charges. The grief that the family and acquaintances experienced is immeasurable. All the offences were committed by the accused as part of a group of three or more who in my view actively participated in the crimes. These findings provide the substantial and compelling grounds that justify an aggravated sentence as his conduct has been proved to be more serious.

[19] Accordingly, I find that the accused's personal circumstances, relatively old previous conviction, the period of internment pending trial after the cancellation of bail and social background do neither, singularly, nor cumulatively constitute substantial or compelling circumstances that render the minimum sentences unjust. His personal factors are common place. The Covid19 concerns are misplaced. With the vaccine rollout also implemented in Correctional Services for convicted offenders, which he is willing to

take, these are adequate measures to minimise the risk of infection. As I demonstrated, there is justification for an aggravated sentence as his conduct has been proved to be more serious. On the facts as found proved, there was no serious resistance to this approach. That said, the overall effective sentence still has to be tempered with a measure of mercy.

[20] Accordingly, the accused is sentenced as follows:

[20.1] Count 1 (murder) read with section 51(2) of Act 105 of 1997 – 25 years' imprisonment;

[20.2] for each three counts of attempted murder (Counts 3-5) five years' imprisonment;

[20.3] Count 10 (Possession of an arm without the necessary license) – five years' imprisonment; and

[20.4] Count 11 (possession of ammunition) - two years' imprisonment.

[21] The sentences imposed in respect of counts 3 to 5; 10 and 11 are to run concurrently with the sentence imposed in respect of count 1. Effectively therefore, the accused is to serve 25 years' imprisonment.

[22] In terms of section 103 of Act 60 of 2000, the accused is declared unfit to possess a firearm.

T P MUDAU

Judge of the High Court

APPEARANCES

For the State:

Adv. R Barnard

Instructed by:

DPP Johannesburg

For the Accused: Adv. F Roets

Instructed by:

Botha Attorneys

Date of hearing:

Date of Judgment: 2 December 2021

- [1] Also called the 'Zinn triad'. See *S v Zinn* 1969 (2) SA 537 (A).
- [2] 1945 AD 444 at 455.
- [3] *S v Whitehead* 1970 (4) SA 424 (A) at 436E-F; see also *S v Rabie* 1975 (4) SA 855 (A) at 862.
- [4] *R v Karg* 1961 (1) SA 231 (A) at 236A-B.
- [5] 105 of 1997.
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