

SOUTH AFRICA / JUDGMENT

Van Zyl v S (A116/2016) [2017] ZAGPPHC 572 (22 August 2017) [2017] ZAGPPHC 572

COURT

North Gauteng High Court, Pretoria

BEFORE

DT Skosana, CP Rabie

CASE / FILE NUMBER

A116/2016

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IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NO: A116/2016

Not reportable

Not of interest to other judges

Revised.

22/8/2017

In the matter between:-

PETROS PAULUS DELINT VAN ZYL Appellant

and

THE STATE Respondent

JUDGMENT

SKOSANA AJ

[1] This is an appeal against the sentence only, leave having been granted upon petition.

[2] The appellant was convicted of the murder of Mr Petrus Theron Cilliers ("deceased") after shooting and killing him around midnight on 28 October 2009 within the vicinity of the Oros restaurant in Moreleta Park. He was also convicted of illegal

possession of a fire arm and ammunition.

- [3] The appellant had pleaded not guilty on all the charges. To the murder charge he alleged that he had acted in self-defence. This defence was rejected mainly because it was proved that the appellant had fired 8 shot that night, 6 of which struck the body of the deceased and that he had done so after following the deceased to his car. As far as the possession of the fire arm and ammunition is concerned, his defence that he was entitled to possess the fire arm by virtue of being an executor of his deceased father's estate, was also rejected.
- [4] The appellant was, upon conviction sentenced to 14 years' imprisonment for the murder charge, as well as 7 years' imprisonment

for possession of the fire arm without a licence and 7 years' imprisonment for possession of ammunition, The Magistrate ordered the sentences to run concurrently.

- [5] The grounds for the appeal can be summarized as follows:

[5.1] It is contended that the learned Magistrate misdirected himself during sentencing and imposed a sentence that is shockingly inappropriate;

[5.2] That the Magistrate did not sufficiently assist the appellant who was not legally represented in relating to sentence; and

[5.3] That the learned Magistrate erred in not finding that there were substantial and compelling circumstances to deviate from the minimum sentence of 15 years as provided for in section 51(2)(a)(i) of the Criminal Law Amendment Act ("the Minimum Sentences Act") 105 of 1997 read with Schedule 2 Part II thereof .

[5.4] There is also an additional ground that the appellant was denied an opportunity to obtain legal representation through Legal Aid South Africa for the purposes of the sentencing proceedings. The appeal is opposed by the State and both parties have filed heads of argument in this regard. I deal hereunder with each of the grounds raised on behalf of the appellant above.

- [6] For convenience, the ground that the sentence is shockingly inappropriate is dealt with hereunder together with the ground relating to the finding in respect of substantial and compelling circumstances.
- [7] The learned Magistrate imposed 14 years' imprisonment in relation to the murder conviction, which is less than the minimum sentence in terms of section 51(2)(a)(i) of the Minimum Sentences Act read with Schedule 2 Part II thereof. It is not entirely correct that the Magistrate did not find any substantial and compelling circumstances in this case. In his judgment on sentence[1], the learned Magistrate stated that "and except for the fact that you have spent about 8 months now, awaiting finalization of this case, the rest in my view, does not constitute substantial or compelling circumstances." It appears from this finding therefore that the Magistrate found that the substantial time spent by the appellant in prison before the date of sentence constituted a substantial and compelling circumstance which warranted a deviation from the minimum sentence of 15 years as prescribed. Since this was the only substantial and compelling circumstance, he reduced the prescribed sentence by 1

year.

[8] Nevertheless, the learned magistrate misdirected himself when he isolated the appellant's pre-sentence imprisonment as the only

substantial and compelling reason for purposes of the minimum sentence. It is clear that there were such other circumstances such

as the fact that the appellant was a first offender, he was under heavy alcoholic influence as he had been drinking not less than 4 hours, the deceased was also inebriated and had been observed within the restaurant as provocative and rowdy. All these circumstances,

taken together constitute reasons for re-evaluating the sentence.

[9] There is also an issue relating to the fairness of the sentencing proceedings in so far as the appellant's right to legal representation is concerned, which is dealt with more fully hereunder.

[10] As far as the sentences relating to the possession of fire arm and ammunition are concerned, it is clear that the reduction of those sentences is warranted notwithstanding that they run concurrently with the murder sentence. I have not lost sight of the factors referred to by the Magistrate, namely that the appellant had taken the fire arm to a place where he knew that he would probably take alcohol and that his possession thereof could result in someone's death. However, these factors do not carry much weight as the charge related to possession of an unlicensed firearm only and both parties agreed that a sentence of 3 years imprisonment is appropriate in that regard.

[11] As regards the sentence of 7 years' incarceration in relation to the possession of ammunition, it is clearly disproportionate when regard is had to the fact that the boxes of ammunition referred to in the charge were apparently found at the appellant's home and not in his personal possession and they also seem to have been inherited from his deceased father's estate. In my view a sentence of 1 year imprisonment is sufficient in that regard. There is no minimum sentence applicable to this charge. The appellant has already been incarcerated for about 2 years.

[12] Returning to the sentence for the murder, the aggravating factors were the following factors:

[12.1] The appellant had cold bloodedly killed the deceased by firing not less than 6 shots at him, some of which were at a very close range and the rest of which entered the body of the deceased from the back;

[12.2] He seems to have known the deceased very well. He was therefore not firing at a complete stranger;

[12.3] The appellant persisted during the trial, during mitigation and still persists at this stage that he was acting in self-defence and which suggests he does not acknowledge the wrongfulness of his conduct.

[12.4] The appellant was found to have followed the deceased to his car before the shooting.

[13] The contention that the Magistrate did not appropriately assist the appellant after his conviction and that there was a measure of irritation on his part does not amount to an irregularity.

[14] On the other hand, the following factors constitute substantial and compelling reasons for the deviation from the prescribed minimum sentence:

[14.1] The appellant is a first offender who acted under heavy influence of alcohol. Although the self-defence was rejected by the trial court, the conduct of the deceased before leaving the restaurant does not exclude a possibility of some form of provocation, The appellant may probably have been in no position to remember the details of the occurrence due to his state of intoxication at the time.

[14.2] The typed notes of the Magistrate show that the appellant's right to legal representation may not have been properly safeguarded. There was also no follow-up made as to the appellant's appeal or attempt to appeal to the Legal Aid head office for legal assistance, though the appellant seems to have later abandoned such appeal.

[14.3] There is a misdirection by the learned Magistrate as to the finding in respect of substantial and compelling circumstances. Hence it was even suggested that the imposition of 14 years' imprisonment sentence may have been a slip of a tongue.

[14.4] The wide discretion of this court and the extensive misdirections referred to above, warrant the interference even without a formal review,

[15] Having found that substantial and compelling circumstances existed beyond those found by the learned Magistrate and taking into account all the circumstances of this case, the sentences imposed on the appellant are shockingly inappropriate and warrant interference by this court.

[16] An appropriate sentence for the murder is 12 years of imprisonment while the sentence for possession of a fire arm and ammunition ought to be reduced from 7 years' imprisonment to 2 years and 1 year term of imprisonment, respectively.

[17] Accordingly, the following order is made:

[17.1] The appeal against sentence succeeds;

[17.2] The sentence of 14 years' imprisonment imposed in respect of murder is reduced to 12 years' imprisonment;

[17.3] The sentence of 7 years' imprisonment imposed in respect of illegal possession of a fire arm is replaced with a sentence of 3 years' imprisonment.

[17.4] The sentence of 7 years' imprisonment imposed in respect of illegal possession of ammunition is substituted with one of 1 year term of imprisonment.

[17.5] The aforementioned terms of imprisonment are to run concurrently and are imposed with retrospective effect from the date of sentencing on 19 March 2015.

DT SKOSANA

Acting Judge of the High Court

I concur.

CP Rabie

Judge of the High Court

[1] Transcript p. 441

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