

SOUTH AFRICA / JUDGMENT

Vukile v S (A366/11) [2015]

ZAGPPHC 275 (19 February 2015)

[2015] ZAGPPHC 275

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela, JJ. Strijdom

CASE / FILE NUMBER

A366/11

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

Case No: A366/11

Date: 19 February

2015

In the matter

between:

The State

Andile

Vukile.....Appellant

Versus

State

JUDGMENT

Maumela J.

1. In person, before the court a quo, appellant, who was legally represented, successfully applied for leave to appeal. The court a quo ruled to the following effect: “Leave to appeal is granted”. It provided no specifics. As a result, initially it was not readily clear as to whether this appeal is against conviction, sentence, or both. However, subsequently it became common cause between the parties that this appeal shall be; much as it is, against sentence only.

2. Before the Regional Court for the district of Gauteng, sitting in Oberholzer, the Appellant was arraigned together with 4 (four) others. They were charged with the following 3 (three) charges:

Count I: Murder,

Count II: Attempted Robbery,

Count III: Robbery with aggravating circumstances, read with Section 1, of the Criminal Procedure Act 1977: (Act No: 51 Of 1977) “Criminal Procedure Act”;

3. On Count I, Murder, the allegations were that upon or about the 6th of April 2007, and at or near Khutsong, Carletonville, in the District of Obelholzer, in the Regional Division of Gauteng, the accused did unlawfully and intentionally kill Thembinkosi Hamilton Daweti, by assaulting him with an unknown object.
4. On Count II, the allegations were that upon or about the 6th of April 2007, and at or near Khutsong Carletonville, in the District of Obelholzer, in the Regional Division of Gauteng, the accused did unlawfully and intentionally assault one Nomvula Zingelwa, and did with force and violence attempt to take from her possession, the following items, to wit one cellphone, her property, or property in her lawful possession.
5. On Count III, the allegations were that upon or about the 6th of April 2007, and at or near Khutsong Carletonville, in the District of Obelholzer, in the Regional Division of Gauteng, the accused did unlawfully and intentionally assault Jonas Isaac Mosia and did with force and violence take from the possession of the said Jonas Isaac Mosia, the following items, to wit one Samsung B900 cellphone, his property, or property in his lawful possession; the aggravating circumstances being that the complainant was stabbed with a knife, or a similar sharp object.
6. Before the court a quo, all the five accused persons pleaded not guilty to all the three counts. All five accused persons opted not to tender plea explanations. The State led evidence.
7. On count 1, (Murder), all the accused were found Not Guilty and Discharged at the close of the State’s Case in terms of section 174 of the “Criminal Procedure Act”. Eventually, accused number 1, 2 and 5 were convicted on counts 2, (Robbery), and 3, (Robbery with aggravating circumstances). They were sentenced each to undergo 10 (ten) years of imprisonment on count 1, and 15 (fifteen) of years imprisonment on count 2.
8. Briefly, the court a quo found that the state successfully proved the following facts against accused number 1, 2 and 5: On the 6th of April 2007, in the night, one Isaac Jonas Mosia, the complainant in count III, attended a night vigil at a place called Joe Slovo. He was in the company of others, including his girlfriend, Nomvula Zingelwa, who is the complainant in count II.

9. On their way home, they came upon a group of boys in which there seemed to be a commotion. It turned out that the boys were attacking someone. He and his companions mistakenly surmised that it is nothing serious and that the boys were behaving as such because they were drunk. Thinking it safe to do so, they strove to walk past. The boys turned on them. A scrimmage ensued, pursuant to which they ended up robbed of a Sumsung D900, and a Motorola V360 cell phones, belonging to him and his girlfriend respectively.
10. Under oath, Mosia testified to the effect that during the course of the skirmish, one Maboyi, stabbed him twice with a knife on his head. Maboyi's name is Nhlanhla Bambhula and he was accused number 2 (two) before the court a quo. He said that he realized that he is bleeding due the stabbing. That prompted him to desist from resisting the robbery. He said that the value of his cellphone is R 3 650.00. One Tshepo, a friend of his, helped trace the culprits to a place known as Vusi's Tavern. They were fidgeting with Mosia's cell phone. Upon noticing Mosia and Tshepo, the culprits fled. As they did so, Mosia and Tshepo shouted to no avail for the appellant to give the cell phone back.
11. On the following day as he walked alone, he found all three culprits, including the appellant, standing at a corner next to Margaret's Tavern in the Chris Hani area! He greeted them in order to determine if they recognize him. Further up the same street, he met Maboyi, (accused number 2), whom he also greeted as he passed. He went to inspect the spot along the same street where he and Tshepo had attempted to chase the culprits hoping to find some of the items he and his girlfriend lost during the robbery. He then came across a police van, surrounded by a group of people. He found out that there is a dead person lying on the ground. He suspected that person to be the same person that was being attacked by the boys on the previous night. He learnt that

the deceased was killed at around 2h00am, while he and his companion were attacked at around 1 h30am. He informed the police about what he and his companions witnessed the previous night. They took him to the police station to make a statement and to lay a charge.
12. Upon return from the police station, he and Tshepo met Andile, (the appellant), at Margret's Tavern. Appellant denied complicity in the robbery. They informed him that the other unknown man that he, (Andile) and the other boys attacked on the previous night died. This gave Andile a fright and he, (Andile), became co-operative. He pleaded with them not to reveal his identity as a culprit to the police. He took them to the place where he had sold his, (Mosia's), cellphone. He also told them that the other cellphone, (the V360), is with Maboyi, (accused number 2), who had since gotten arrested for a different cause.
13. While in the company of his cousin Maruping, they found the person to whom Andile had sold the cell phone. He, (the witness), proved ownership by providing the relevant PIN number. When switched on, the cell phone depicted his and his girlfriend's photos on its screen. The said person revealed that Andile had told him that the phone had been robbed off a white man.

14. He traced the Appellant again and told him he had recovered his phone. He demanded his girlfriend's cell phone. Appellant offered to rather replace it, stating that it would be difficult to recover. On the following day, he could not find the Appellant. Driving along the street, he came upon accused number 3 (three), who sought to convince him that he, and Andile merely stood by as the robbery took place.
15. Inspector Mangwenya, the second witness to be called by the state corroborated most of what Mosia told court. He is the Investigating Officer in this case. He obtained a statement from the robbery victim, who implicated the appellant, Andile Vukile. He said that the victim of the robbery retrieved his cell phone from the appellant, who together with his friends promised to return a second cell phone on condition that the witness does not expose him to the police. He also told court about the sequence in which he effected arrests of the culprits in this case.
16. He got to know the appellant even before this case arose. The complainant in the robbery case showed him the appellant's place of residence from whence he arrested him. Appellant in turn led him to the home of one Nhlanhla, (accused number 2), who had been arrested previously, and whose previous case was still outstanding.
17. Bethuel Ngobeni also testified on behalf of the state. He told court that on Good Friday in April 2007, upon being offered, he bought a D 900 cell phone from the appellant who was in the company of someone he does not know. The two did not seem to know the relevant PIN number for the cell phone. The two left him with the phone promising to return. A while later, the appellant returned in the company of someone who demanded the cell phone as his. This person knew the PIN number for the cellphone. His and his girlfriend's pictures showed up on the screen. It turned out that the cell phone was stolen. He explained to this person that appellant had given him an impression that the cell phone was stolen from a white man.
18. Anton Mbiza, also testified for the state. He told court that for R 350-00, he once bought a V 360 Motorola cell phone from a person called Richard, who is accused number 5. Richard did not tell him where he had obtained the said cell phone from. The cell phone was eventually confiscated by the police. This scared him because he had not been confronted by the police for any reason before. The serial numbers on the cell phone he's talking about, which were not disputed were 352511012340626.
19. The issue before court concerns the correctness or otherwise of the sentenced imposed against the appellant by the court a quo. It was argued on behalf of the appellant that the court a quo erred in applying the provisions of the "Criminal Procedure Act", and the "Criminal Law Amendment Act", in imposing sentence in respect of the Robbery charge. As a result, the court a quo unduly considered the question whether substantial and compelling circumstances are attendant to the person of the appellant, or not. It was argued that the court a quo has to consider the sentence afresh.

20. Relevant to this case, section 51 (2) of the Criminal Law Amendment Act 1997: (Act No 105 of 1997) “Criminal Law Amendment Act” reads as follows:

“(2). Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall—

(a), if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person, in the case of—

(i). a first offender, to imprisonment for a period not less than 15 years.

21. The Appellant had previous convictions. On the 7th of October 2004, appellant was convicted of two counts of Assault with intend to do Grievous Bodily Harm. On one of the two charges he was sentenced to undergo 12 months imprisonment. The whole sentence was suspended conditionally for 5 years. The imposition of sentence in respect of the second conviction was suspended for five years in terms of section 297 (1) (a) of the Criminal Procedure Act 1977: (Act No 51 of

1977) “Criminal Procedure Act”;

22. On the 17th March 2005, appellant was convicted of Assault with intend to do Grievous Bodily Harm. He was sentenced to undergo 19 months imprisonment of which 6 months was suspended for 5 years on condition that the accused is not convicted of an offence of Assault with intend to do Grievous Bodily Harm, which offence was committed during the period of suspension. On the 22nd of June 2006, Appellant was convicted of Assault Common. He was sentenced to pay a fine of R800 - 00 or to undergo 60 days imprisonment. The whole sentence was suspended for 5 years on condition that the accused is not convicted of an offence of which assault is an element, which offence shall have been convicted during the period of suspension.

23. In sentencing the appellant for purpose of Count III, the court a quo applied the provisions of section 51 (2) of the Criminal Law Amended Act

1997. (Act Number 105 of 1977) “Criminal Law Amended Act”¹. The court viewed itself to be enjoined to impose the minimum sentence prescribed, unless ‘exceptional and compelling’

circumstances were to be found to be attendant to the person of the appellant, which justify the non-imposition of the minimum sentence so prescribed; which sentence is 15 years of imprisonment in respect of Count III.

24. It was common cause between the parties that throughout the trial, before the court a quo, the implications of the applicability of the provisions of section 51 (2) of the “Criminal Law Amended Act” were never explained to the Appellant. In *State v Chowe*², the court held that the court is obliged to inform an accused person that the minimum sentencing dispensation provided for in section 51 of the “Criminal Law Amended Act” shall be applicable for purposes of sentence against him or her in the event of a conviction. The court stated that the obligation to inform the accused obtains even where the accused is legally represented.

25. Over and above that, section 35 (3) (a) of the Constitution of the Republic of South Africa 1996, requires that an accused be informed of the charge with sufficient detail to answer to it. This obligation should obtain even where it regards the applicability of the minimum sentence regime. In the case of *Toubie v The State*³, the court held that it should be clear from the reading of the record of the case that the provisions which provide for minimum sentences were explained to an accused person in such a way that he or she would be able to put up a defence if he or she feels inclined to do so.
26. In the *Toubie* case⁴, the court went on to state⁵: “Failure to forewarn the accused is in conflict with the provisions of s 35(3)(a) of the Constitution⁶, which provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This court is entitled to raise this issue *mero motu* because the irregularity resulted in an injustice and was prejudicial to the appellant who, in the eyes of the full court deserved life imprisonment for the murder see (section 322(1) (c) of the CPA). The appellant was legally represented by Mr Omar, a senior attorney, from the outset of the trial up to this court. I can only assume that Mr Omar should have been vigilant, but this is no excuse to prejudice the appellant”.
27. In the light of the failure by the court to make the appellant aware of a possible application of the provisions of section 51 of the “Criminal Law Amendment Act”⁷, the court stated as follows: “The question is, whether the irregularity is of such a nature as to render the entire proceedings unfair. The answer is no: because not the entire proceedings are vitiated by the irregularity. Only the sentence is affected. The nature of the irregularity of the sentencing procedure is such that it could be safely separated from the proceedings as a whole in such a manner that the conviction for robbery and murder remains intact. It satisfies the requirements of a fair trial; see *Phithela Mapule v The State*⁷ .
28. As was the case in *S v Toubie*⁸, the irregularity in this case lies in the fact that the appellant was not informed of the applicability of s 51 of the Criminal Law Amendment Act, either at the plea stage, or during the trial. As the appellant was not informed that he was charged under the Criminal Law Amendment Act, the full court erred in sentencing him in terms of that Act. He could only have been sentenced, in accordance with the trial court’s ordinary penal jurisdiction. However, I am of the view that it will not serve any useful purpose to refer the matter back to the trial court. This court has all the facts before it and is therefore able to consider the sentence afresh, although the record is incomplete, nothing of importance is lost, as the missing part is the address to court by both counsels. However whatever facts

the court *a quo* had before it, this court also has. This means that the court will consider an appropriate sentence outside the minimum sentence regime. See *Legoa*; *Ndlovu* and *Makutu*.

29. In this case, the court a quo also took onto consideration that the offences of which the Appellant is convicted are rife. To that end, the court even referred to an article in a local newspaper, The Carletonville Herald, where statistics were provided which prove that offences entailing Robbery, including Robbery with aggravating circumstances are not only rife, but are also on increase all the time.
30. From a reading of the constitution of this country and the case law cited, this court views that the failure on the part of the court a quo to raise the aspect of the applicability of section 51 (2) of the “Criminal Law Amendment Act” with the appellant at the start of the trial constitutes an irregularity. As determined in the Toubie case above, the irregularity committed vitiates only the sentence meted out against the appellant, without affecting the rest of the proceedings in the case against him.
31. It is clear from the record of the proceedings of this case that the court a quo applied the provisions of the minimum sentence legislation⁹ in arriving at the sentence it imposed¹⁰. It is also clear that the court a quo did not benefit the accused with an explanation on the implications of the Robbery charge in count III being read with Section 1, of the Criminal Procedure Act 1977: (Act No: 51 Of 1977) “Criminal Procedure Act” where it regards sentence in the event of a conviction. The appeal against sentence therefore stands to succeed.
32. This court also has to consider a suitable sentence to be imposed on the appellant. It is trite that in the case of *S v Zinn*¹¹ the court laid down a principle on the approach to sentencing. The said principle is referred to as the “triad on sentencing”.

In that regard, the court stated that in sentencing, the court has to take into consideration, the nature of the crime committed; the interests of the accused; and the interests of the community.

33. The offences for which the appellant stands convicted are serious. In their commission, violence and threats thereof were employed against helpless, unarmed victims. In *S v Mnguni*¹², the court stated that there is aggravation where an accused person inflicts a brutal, cruel, and inhuman attack on a helpless, unarmed harmless victim.
34. However, there is nothing in the offences committed, which suggests that they could have been planned. The complainants seem to have merely stumbled upon the appellant and his friends on that fateful night. In *S v Mofokeng*¹³, the court stated that an unplanned murder is mitigating.
35. Our courts have also emphasised that sentences must be individualized, and each case must be dealt with in its own peculiar

facts¹⁴ (see *State v Samuel*¹⁵). The appellant was 19 (nineteen) years of age at the time he was arrested. He had previous convictions as follows:

- (i). On the 7th of October 2004, he was convicted of two counts of Assault with Intent to do Greivous Bodily Harm.

In count 1, he was sentenced to undergo 12 (twelve) months imprisonment, which sentence was wholly, and conditionally suspended for 5 (five) years.

In count 2, the passing of sentence was postponed for a period of 5 (five) years in terms of section 297 (1), (a), (ii), of the “Criminal Procedure Act”.

(ii). On the 17th of March 2005, he was convicted of an offence of Assault with Intent to do Greivous Bodily Harm. He was sentenced to undergo 19 (nineteen) months of imprisonment, of which 6 (six) months imprisonment was suspended conditionally for 5 (five) years.

(iii). On the 22nd of June 2006 he was convicted of an offence of assault common. He was sentenced to pay a fine of R800-00(Eight Hundrend Rands), or to undergo 60 (Sixty days) imprisonment, the whole sentence was conditionally suspended for 5 years (Five years)

36. Throughout the trial before the court a quo, the appellant did not show contrition for the crime for which he stands convicted. In the case of S v D16, the court stated that lack of remorse on the part of an accused person was only regarded as “not mitigating”. The same view was held in S v Landau¹⁷.
37. Our courts have held that in passing sentence courts have to infuse an element of mercy. In S v Kumalo¹⁸, Holmes JA stated: “Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances”. In this case the offences committed are very serious. The victims did not conduct themselves in any manner that rendered them to be deserving of the attack launched against them. The crimes also seem to have been motivated by greed on the part of the Appellant and his colleagues.
38. The court can therefore not afford to meet out a lenient sentence against the Appellant in the face of the seriousness and callousness of the offences of which his stands convicted. Section 280 of the “Criminal Procedure Act” provides for the ordering of sentences in respect of convictions on more than one count to run concurrently in instances were doing so is necessary.
39. In the circumstances the court has determined the sentence stated hereunder, and in that regard the following order is made :

ORDER.

- (a) The appeal against sentence succeeds.
- (b) The sentence passed by the court a quo is set aside, and is substituted by the following sentence:

SENTENCE.

- (a). On count II, Robbery, the appellant is sentenced to undergo 7 years imprisonment.

(b). On count III, Robbery with Aggravating Circumstances, read with Section 1, of the Criminal Procedure Act 1977: (Act No: 51 Of 1977) "Criminal Procedure Act", the appellant is sentenced to undergo 13 years imprisonment..

(c). Both sentences are ordered to run concurrently.

T. A. Maumela.

Judge of the High Court of South Africa.

I agree.

JJ. STRIJDOM AJ

Acting Judge of the High Court of South Africa.

1 See page 132 of the transcribed record of this case: Paginated page 141 of the papers in this appeal.

2 2010 (1) SACR 141 (GNP).

3 (635/11) [2012] ZASCA 133 (27 September 2012).

4 See footnote 3 above.

5 On paragraph 22.

6 Act No 108 of 1996 "The constitution".

7

[2012] ZASCA 80 paragraph 15.

8 Supra.

9 The Criminal Law Amendment Act 1997: (Act No 105 of 1997).

10 See page 132 of the transcribed record of this case: Paginated page 141 of the papers in this appeal.

11 1969

(2) SA 537 (A).

12 1994 (1) SACR 579 (A), at page 483 paragraph E.

13 1992

(2) SACR 710 (A), at page 715 g - h.

14 See S v Samuel 2011 (1) SACR 9 (SCA), paragraph 9.

15 2011 (1) SACR 9 (SCA), at paragraph 9.

16 1995

(1) SACR 259 (A).

17 2000

(2) SAVR 673 (W).

18 1973 (#) SA 697 (A), at 698 (A).

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