

SOUTH AFRICA / JUDGMENT

Xulu v S (AR242/18) [2020] ZAKZPHC 34 (31 July 2020)

[2020] ZAKZPHC 34

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen, Van Zijl, Nkosi

CASE / FILE NUMBER

AR 242/18

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION

PIETERMARITZBURG

Not

Reportable

Case

no: AR 242/18

In

the matter between:

KHULEKANI

THABANI

XULU

APPELLANT

and

THE

STATE

RESPONDENT

Coram:

KOEN, VAN ZIJL and NKOSI JJ

Heard:

17 July 2020

Delivered: 31 July 2020
ORDER
On
appeal from: KwaZulu-Natal
Division of the High Court, Southern Circuit Local Division
(Mokgohloa J, sitting as a court of first instance)
The
appeal against sentence is dismissed.

JUDGMENT

Koen J (Van Zijl et Nkosi JJ concurring)

- [1] The appellant was convicted of murder[1] (count 1), theft[2] (count 2), unlawful possession of a prohibited Z88 9mm semi-automatic firearm (count 3), and unlawful possession of four rounds of 9mm ammunition (count 4). He was sentenced to periods of imprisonment of 20 years in respect of count 1, 3 years in respect of count 2, and 8 years in respect of counts 3 and 4 (which were taken together for the purpose of sentence). It was directed that the sentence on count 2 would run concurrently with the sentence on count 1, resulting in an effective sentence of 28 years' imprisonment. The present appeal, with the leave of the Supreme Court of Appeal, is against the sentences imposed.
- [2] The evidence established that on 2 March 2013 Thembinkosi Makhosonke Mzimela (the deceased) and his girlfriend Tholakele Makhathini (Ms Makhathini) were walking towards the deceased's homestead. They were approached from behind by a white Toyota Tazz motor vehicle, driven by the appellant with Ms Philile Mjoka as a passenger. The vehicle drove past them, stopped, and then reversed until it came to a standstill next to them. The appellant produced a firearm and asked them, 'what is up?' They did not respond. The appellant then fired 2 shots at them and drove off. Ms Makhathini noticed that the deceased was holding on to his right side. She assisted him to sit down. That is when she noticed that he was bleeding from his nose and mouth. She placed her bag next to him and ran to the deceased's homestead to call for help. When she could not find any help, she decided to return to check on the deceased. Before she could reach the deceased she noticed that the Tazz had made a U-turn and was again approaching the scene where she had left the deceased. It stopped at the point where the deceased was lying, the appellant alighted from the Tazz while the headlamps of the Tazz shone on the deceased, he turned the deceased and then fired another shot at the deceased before taking Ms Makhathini's bag and driving off.
- [3] When the police arrived at the scene, the deceased was already dead. They later took Ms Makhathini to a place where the Tazz was spotted. Her bag was retrieved from the Tazz.
- [4] Ms Mjoka, provided more information on the events of that evening. She was requested by the appellant to accompany him and his friends to a tavern. They left the friends at the tavern and she and the appellant drove further. After the incident where the deceased was first shot, the appellant asked her what cell phone she was using. When she replied that it

was a Nokia the appellant stated, with reference to the deceased, 'that bastard' had a Blackberry cell phone and that he (the appellant) was driving back to take it from the deceased. That was when he shot the deceased again, and took Ms Makhathini's bag. Back in the car he searched through the contents of the bag, and then threw it on the back seat, from where it was retrieved subsequently.

- [5] Later, after returning to the tavern, the appellant gave some boys a lift and when he demanded payment and they could not pay, he stopped the vehicle, alighted and took out the firearm, but the boys fortunately managed to run away. Ms Mjoka warned the appellant that it was not 'the right thing' to play around with a firearm.
- [6] Thereafter they proceeded to an Engen garage where the appellant quarrelled with the petrol attendant and told her that he could shoot her and nothing would happen to him. He later also confronted Ms Mjoka's sister's boyfriend with the firearm.
- [7] It is apparent from the brief narration above that the appellant adopted a cavalier and reckless attitude regarding the firearm. The firearm was furthermore a prohibited firearm as the identifying mark or serial number had been changed or removed, and he should not have been in possession thereof at all. The murder of the deceased was a brazen and cowardly act.
- [8] The learned trial judge concluded that the appellant is a violent person. Although there was some alcohol consumed that evening, she stated that there was no evidence that the appellant was so drunk that he did not know what he was doing. She furthermore concluded that the aggravating circumstances outweighed the personal circumstances[3] of the appellant. The appellant had three previous convictions for assault dating back to 2005, 2006 and 2011. The trial judge further held that the appellant was not remorseful, as he never accepted the wrongfulness of his actions. The trial judge was not persuaded that there were substantial and compelling circumstances present.
- [9] The aforesaid comments notwithstanding, the learned judge concluded:

‘...I do accept that alcohol played a role in this thing and I can maybe at this stage that if I sentence the accused the cumulative

effect of the sentences that I must give to the accused they must be proportionate to the crime and to him also as the offender. That is why I have decided that the other sentences – I will actually order some of the sentences in other counts to run concurrently and the sentences of the other counts will be taken together for purposes of sentencing.’

- [10] It is not clear why the learned judge did not impose the prescribed minimum sentence in respect of the murder count, particularly as the conduct of the appellant, in returning to the deceased after the initial shooting, when he again fired at the deceased, suggests premeditation. It might be that a sentence of life imprisonment was not imposed in respect of count 1 as the appellant

was not convicted of robbery with aggravating circumstances but only theft in respect of count 2. The appellant should perhaps consider himself fortunate that he was not sentenced to a period of life imprisonment on count 1 and that he was convicted of theft rather than robbery.

[11] Mr Mbatha who appeared for the appellant, correctly conceded that the sentences imposed on the various counts could not be said to be so disproportionate as to justify any interference by this court. He confined his argument to the cumulative effect of the sentences.

[12] The effective sentence imposed furthermore does not induce a sense of shock. It is trite law that a court of appeal can only interfere with the sentence imposed by a trial court if it is vitiated by irregularity, misdirection or disturbingly inappropriate.[4] The learned judge was aware of the cumulative effect of the sentences, hence her direction that the sentence on count 2 would run

concurrently with that in respect of count 1. It seems clear that the learned judge did have regard to the overall cumulative effect of the sentences in deciding on what would be an appropriate effective sentence to be imposed.

[13] It has not been shown that the trial judge committed any material misdirection in her deliberations in that regard. Accordingly, the appeal against sentence falls to be dismissed.

KOEN J

Appearances

For appellant: Mr Mbatha

Instructed by: Legal Aid South Africa

183 Church Street

Pietermaritzburg

For respondent: Mr Mthembu

Instructed by: Director of Public Prosecutions

[1] The indictment provided that the charge had to be read with section 51 and Schedule 2 of Criminal Law Amendment Act 105 of 1997.

[2] The original charge was one of robbery with aggravating circumstances, read with section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[3] These included that the appellant was 27 years of age, unmarried, had two children aged 12 and 6 years, that he had progressed to grade 7 at school, was employed, and that he had some diseases which he suffered from.

[4] S v Rabie 1975 (4) SA 855 (A) at 857D-F.

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