

SOUTH AFRICA / JUDGMENT

Zixelele and Another v S (A01/2024)

[2024] ZAWCHC 312 (15 October 2024)

[2024] ZAWCHC 312**COURT**

Western Cape High Court, Cape Town

BEFORE

S Mthimunye, MI Samela

CASE / FILE NUMBER

A01/2024

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Source record**HIGH****COURT OF SOUTH AFRICA,****WESTERN CAPE DIVISION,****CAPE TOWN****Case No.: A01/2024**

In the matter between:

MZUNZIMA

ZIXELELE

First

Appellant

LUVUYO

MAYEKISO

Second

Appellant

and

THE

STATE

Respondent

JUDGMENT

DELIVERED THIS 15TH DAY OF OCTOBER 2024

MTHIMUNYE AJ:

Introduction

[1] The appellants in this matter were convicted by the regional court magistrate in Parow on the 3 counts of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”) read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”), 1 count of attempted murder and 1 count of kidnapping.

[2] Both appellants were sentenced on Count 1 to: Fifteen (15) years imprisonment;

Count 2: Fifteen (15) years imprisonment;

Count 3: Twenty (20) years imprisonment;

Count 4: Eight (8) years imprisonment; and

Count 5: Six (6) years imprisonment

The sentences imposed in respect of Count 1, 2, 4 were ordered to run concurrently with the sentences imposed in respect of Count 3 and 5.

[3] In addition, the court a quo ordered that the sentence of accused 2 which he was already serving should run concurrently with the above sentences imposed. Both accused were declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.

[4] On 18 January 2024 pursuant to the appellants being sentenced they were granted leave to appeal by the court a quo against the sentence.

Grounds of Appeal

[5] The appellants in their application for leave to appeal against sentence raised the following grounds;

- i. The honourable court over-emphasized the seriousness of the offences and under-emphasized the Applicant’s personal circumstances.
- ii. The sentence induces the sense of shock and startlingly disproportionate.
- iii. Some of the complainant’s properties were recovered.

It is submitted that there are reasonable prospects of success in this application and that another court may come to a different

conclusion.

- [5] In their heads of argument both parties agree that notwithstanding the record being incomplete, it is a limited portion that is not before this court pertaining to the merits of the case. In addition, both parties are ad idem that due to the appeal relating exclusively to sentence, the record is adequate for the adjudication of the appeal.
- [6] The issues raised by the appellants in their heads of argument were amongst others, that the court a quo imposed a sentence that were shockingly inappropriate, in finding that that there were no substantial and compelling circumstances present. In addition, the regional magistrate failed to inform the parties that she was considering increasing the prescribed minimum sentence in relation to count 3.

Background

- [7] Both appellants were legally represented during the trial in the regional court. They were found guilty and convicted on the following 5 very serious charges on 12 November 2018, which are briefly as set out below:

Count 1: Robbery with aggravating circumstances in that on 1 August 2017 the appellants unlawfully and intentionally assaulted Victor January, and took his Nissan NP300 bakkie with force while threatening Victor with

a knife and firearm.

Count 2: Robbery with aggravating circumstances in that on 5 September 2017 the appellants unlawfully and intentionally assaulted Ismael Hassein, and took his Toyota Corolla motor vehicle with force while threatening Ismael with a knife and firearm.

Count 3: Robbery with aggravating circumstances in that on 31 October 2017 the appellants unlawfully and intentionally assaulted Aphiwe Siyozana, and took his Toyota Tazz motor vehicle, bag, wallet, and external hard drive with force while not only threatening Aphiwe Siyozana with a knife and firearm but also stabbing him with a knife.

Count 4: Attempted Murder in that the appellants unlawfully and intentionally attempted to kill Aphiwe Siyozana by stabbing him on 31 October 2017.

Count 5: Kidnapping in that on 31 October 2017 the appellants deprived Aphiwe Siyozana of his freedom by forcing him into a vehicle and driving with him to Nyanga.

- [8] The following evidence on sentence, and material to the determination of this appeal, appears from the trial record of proceedings in the regional court. First, prior to the commencement of the trial, the regional magistrate informed the appellants of the applicability of the provisions of the CLAA, which prescribes compulsory minimum sentences in counts 1, 2 and 3. Second, the provisions of the CLAA were included in the charge sheet. Third, during mitigation of sentence the regional magistrate engaged the legal representative of the appellants requesting submissions to be made, about her considering a

possible increase of the prescribed minimum sentences in terms of section 51(2) of CLAA.

[9] “Section 51(2)(a) of the Criminal Law Amendment Act, read as follows:

“(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High court shall sentence a person who has been convicted to an offence referred to in–

(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;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) ...

(c) ...

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection “

[10] Pursuant to the appellants legal representatives’ submissions and after the state addressed the court in aggravation of sentence the regional magistrate granted the order and imposed the above-mentioned sentences. In respect of count 3 the regional magistrate diverted from the prescribed minimum sentence of 15 years by adding a further 5 years, effectively imposing a sentence of 20 years imprisonment on the appellant’s respectively.

[11] Initially the appellants launched an application for leave to appeal against both conviction and sentence. However, on 18 January 2024 the appellants legal representative abandoned the application for leave to appeal against the conviction and only proceeded in terms of the sentence.

The test on Appeal

[12] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. The approach to an appeal against sentence was set out in *S v Malgas* (117/2001)

[2001] ZASCA at page 18, paragraph 12 as follows:

“...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it.”

- [13] It is clear in *Malgas* [supra] that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, just casually substitute the sentence arrived at by the regional magistrate because it simply prefers it.
- [14] It is necessary to point again that although the record is incomplete, the evidence relating to mitigation and aggravation of sentence as well as the judgment pertaining to sentence is available. This court is therefore able to determine which factors the court a quo considered and how it influenced in the sentencing of the appellants in respect of count 1, 2, 3, 4, and 5.

Appellants

submissions

- [15] At the outset of the proceedings the legal representative on behalf of the appellants submitted that they were abandoning their argument that the regional magistrate in the court a quo had misdirected herself on count 3 by increasing the prescribed minimum sentence from 15 years to 20 years without affording the defence an opportunity to address the magistrate in that regard. The legal representative conceded that only after perusing the record did she become aware that the previous legal representative who dealt with the trial was indeed afforded an opportunity by the regional magistrate to address

her on the aspect of her considering to increase the prescribe minimum sentences. Appellant's legal representative further

submitted that in light of the seriousness of the offences with which the appellants had been convicted of they are no longer pursuing the argument that the magistrate erred in not taking into consideration the substantial and compelling circumstances of the appellant's

during sentencing.

Respondents

submissions

- [16] The respondent submitted that the magistrate showed mercy when sentencing the appellants, because even though she found that there were no compelling and substantial circumstances she ordered that the sentences should run concurrently. The respondent further submitted that the application for leave to appeal should be dismissed, because it is clear that there was no misdirection by the court a quo in imposing the said sentences.

Evaluation

- [17] The offences committed by the appellants during their violent spree of kidnapping, assaulting and hijacking the motor vehicles of all the complainants is abhorring. They made use of dangerous weapons such as firearms and knives to intimidate the complainants to hand over their motor vehicles. What is aggravating is the traumatic experience that the complainant in count 3 had to experience by not only being kidnapped after his vehicle was

forcefully taken from him, but being stabbed in the process and landing up in hospital. These facts clearly aggravated the imposition of sentence. Even though the first appellant is a first offender and the second appellant not, I am of the opinion that considering the seriousness of the crimes that they have committed that their personal circumstances should recede into the background as was observed in the Supreme Court of Appeal in *S v Vilakazi* (576/07)

[2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008) at page 32, para 58;

“In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what the period should be, and those seem to me to be the kind of “filmsy” grounds that Malgas said should be avoided.”

[18] The appellants pose a real danger to society and vehicle owners. Considering the severity offences and the appellants conduct during these hijacking and robberies, I find that the regional magistrate in her judgment have dealt succinctly with the substantial and compelling circumstances of the appellants and imposed a just and appropriate sentence by considering all the facts cumulatively. The sentences therefore imposed by the regional magistrate on all 5 counts are merited.

[19] Accordingly, the sentences on counts 1, 2, 3, 4 and 5 are confirmed and the appeal is upheld.

[20] The only issue left to be dealt with by this court is the bona fide mistake in the wording of the court a quo's order which read as follows:

“Evidently the cumulative effect of all the sentences is going to be harsh. Though you did not show the complainants any mercy I am going to show you mercy today. I am going to order that the sentences in counts 1, 2 and 4 should run concurrently with sentences imposed in counts 3 and 5.”

[21] It is clear from the record that the intention of the regional magistrate was that the sentences she imposed would run concurrently.

[23] Order

1. The appeal against the sentences is upheld
2. The order by the court a quo order is set aside and replaced by the following order:

It is ordered that the sentences in respect of count 1, 2, 3, 4 and 5 are to run concurrently.

S Mthimunya

Acting Judge of the High Court

I agree and it is so ordered.

MI Samela

Judge of the High Court

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