IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

DATE: 4/8/2005

CASE NO : A1414/99

In the matter of :

KGATLISO KENTRIDGE MAHLAKOANA Appellant

versus

THE STATE

JUDGMENT

GOOSEN AJ:

1. This is an application for leave to appeal to the Full Bench of the Transvaal Provincial Division of the High Court of South Africa.

2. Before delaing with the application itself, it is necessary to record the history of this matter in some detail :

2.1 The appellant was tried on four counts on 3 July 1998 in the

Regional Court for the district of the then Southern Transvaal, held at Benoni.

2.2 The appellant was convicted on all four counts and sentenced on 6 July 1998.

3. The appellant then launched an appeal against the convictions as well as the sentences imposed and the appeal was duly heard on 20 March 2000 by this Court. I, together with the late Mr Justice Van Dyk, presided.

5. For the sake of convenience and for ease of reference, a copy of the recording of the arguments advanced during the hearing of the appeal, as well as a copy of the judgment delivered at the time, is annexed to the present judgment, marked "X1" and "X2" respectively.

5. Subsequently, the appellant gave notice of appeal against this latter judgment on or about 10 October 2002, ie some 2 % years after the said judgment was delivered.

6. For reasons unknown, this so-called "notice of appeal" was enrolled in this court on Wednesday, 2 August 2005, in the form of an

application for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Bench of this court.

7. It is clear from the aforegoing that a period of more than 5 years has lapsed since the appellant's appeal against the convictions and sentences was heard by this court and judgment in respect thereof delivered.

8. It is in fact clear that the appellant has served a period of approximately seven years imprisonment to date hereof, ie on the date when he presented his application for leave to appeal earlier this week.

9. This short history of the matter brings me to a matter of grave concern.

10. In his notice of appeal, dated 10 October 2002, the appellant stated the following :

> *"The way the judge explained to* me *on the 20th* of *March* 2000 *is that the Regional Magistrate was supposed to sentence* me *to ten (10) years imprisonment, but he imposed* 13 *years on* me *which*

shows that the judgment was unfair on me. So *I hope that* my *sentence will be reduced* .... ".

11. The court file records the judgment delivered on 20 March 2000 as follows :

"Van Dyk R et Goosen, WR 20/3/2000

Die appel teen vonnis word van die hand gewys en word die vonnisse ten aansien van al die klagtes soos by die aanvang van die uitspraak uitgeklaar, bekragtig." (Emphasis applied)

12. Whilst this recordal of the judgment is perfectly correct, it does not reflect the content of material qualification "soos by die aanvang van die uitspraak uitgeklaar" which reads as follows (see Judgment: p 6, lines 1-7).

"Vir sover dit nie duidelik was tot nou toe nie, word die gevangenisstraf opgelê ten opsigte van klagtes 3 *en 4 gelyktydig uitgedien met die vonnisse ten aansien van klagtes* 1 *en* 2: *Dit wil sê effektiewelik* 10 *jaar gevangenisstraf.* " (Emphasis applied)

13. In his address to the court on Wednesday, 2 August 2005, the appellant once again alluded to the fact that the court of Appeal

explained to him that his sentence was reduced from twelve years effective imprisonment to ten years imprisonment, whilst the prison authorities disagree and informed him that his effective period of imprisonment is indeed 12 years. In support hereof, the appellant indeed produced his prison card indicating that his effective period of imprisonment is twelve years.

14. Adv Marriot, appearing on behalf of the State, and I interpolate to express my gratitude towards her regarding the manner in which she ably assisted both the court and the appellant during the present proceedings, promptly drew my attention to the fact that she also at the time, ie on 20 March 2000, recorded the appeal judgment with reference to the qualification referred to above.

15. The net effect of all this is the following: Whilst the court of appeal confirmed the sentences imposed on all four counts, its also ordered that the sentences imposed on counts 4 and 3, ie one year imprisonment on count 4 and two years imprisonment on count 3 should be served concurrently with the ten years imprisonment on counts 1 and 2, ie the five years imprisonment on count 1 and the five years imprisonment on count 2.

The cumulative effect of the aforegoing sentences is accordingly that the appellant is to serve an effective period of ten years imprisonment only, and not twelve years.

16. It is abundantly clear that the Department of Correctional Services and the relevant prison authorities at the prison where the appellant had been incarcerated to date hereof, had been wholly unaware of the true effect of the judgment of the Court of Appeal. I have no doubt that they merely interpreted the sentences imposed by the learned magistrate, without regard to the qualification placed on the sentences thus imposed, as appears from Annexure "X2" hereto. It must be stated that they would not have been aware of the aforesaid qualification without reference to the judgment itself.

17. This court does not know what the effect on the appellant's imprisonment would have been, had the prison authorities been aware of the true meaning and effect of the sentences confirmed on appeal on 20 March 2000. It may well be that the appellant may have qualified for release on parole on an earlier date than would have been the case if appellant had to serve an effective period of twelve years imprisonment.

18. This aspect has to be reviewed as a matter of extreme urgency so as to minimise and/or avoid any further injustice towards the appellant. I will deal with this aspect more fully in the order I propose to make at the end of this judgment.

19. There is the further aspect of possible amnesty for which the appellant mayor may not have qualified. This aspect will also have to be reviewed urgently by the prison authorities.

20. These discrepancies in the interpretation of appellant's sentences, perhaps explain the appellant's adamant persistence with his application for leave to appeal, which presently serves before this court. To be told in person, on the one hand by the Judge entertaining his appeal on 20 March 2000 that he is only to serve ten years imprisonment, but to be told by the prison authorities on the other hand, as appears form appellant's prison card referred to above, that he is to serve twelve years imprisonment, must have caused appellant much anguish and frustration. This in itself resulted in a grave injustice towards the appellant. Alas appellant's plight as quoted in paragraph 10 above.

21. To remedy this injustice done and to avoid any further injustice towards the appellant, I can merely express the hope and I indeed

recommend, to the extent that it may be useful to the prison authorities who will have to review appellant's position as intimated hereinbefore, that appellant be released as soon as possible within the framework of competence of the Department of Correctional Services.

22. This will hopefully go some way to compensate the appellant for the anguish and frustration already experienced during the past five years.

23. Returning to the application for leave to appeal I remain convinced that another court will not reasonably come to a different result as regards the appellant's conviction and sentences, as qualified by the Court of Appeal in the first instance.

I accordingly make the following orders:

1. The registrar of this court is requested to forthwith forward a copy of this judgment, together with Annexures "X1" and "X2", to the Head Office of the Department of Correctional Services and to the Head of the prison where the appellant is presently held in custody;

2. The appellant's application for leave to appeal to the Full Bench of the this court is dismissed;

3. The appellant's sentence on all four counts is confirmed, but the sentences on counts 3 and 4 respectively, are to run concurrently with his sentences on counts 1 and 2, which have the cumulative effect that appellant's total effective period of imprisonment is to be ten years imprisonment calculated from 6 July 1998.

4. The Department of Correctional Services is requested to urgently record the correct sentence imposed on 20 March 2000 as per paragraph 3 above.

5. The Department of Correctional Services is requested to review, as a matter of urgency, the effect of the court order as qualified, furnished to the Department on or about 20 March 2000, relating to appellant's sentence, on the appellant's imprisonment from 6 July 1998 to date hereof on the basis that appellant was sentenced to an effective period of imprisonment of ten years and not twelve years and to report to this court at 10h00 on 25 August 2005. Without derogating from the generality of the aforegoing, the Department is requested to consider and report on appellant's entitlement to release on parole and/or amnesty and/or any other factor which may have entitled the appellant

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to earlier release had it been known that appellant's effective period of imprisonment was ten years as opposed to twelve years.

6. The Department is requested to record this court's recommendation that appellant be released as soon as possible in an effort to vitiate the effect of the injustice already done towards the appellant, as referred to in paragraph 19 of this judgment.

H GOOSEN AJ

A 1414/99-yva

Sneller Verbatim/yva

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAKNOMMER: A1414/99

PRETORIA

5

2000-03-20

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE : NO
(2) OF INTEREST TO OTHER JUDGES /NO
(3) REVISED.

DATE 4/8/2005 SIGNATURE

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In die saak tussen

KGA TLISO KENTRIDGE MAHLAKOANA

en

Applikante

DIE STAAT

U ITS P R A A K

GOOSEN. WR: Die appellant kom in hoer beroep teen sy skuldigbevinding en vonnis op vier aanklagtes. Poging tot roof, poging tot *moord*, besit van *'n* vuurwapen sonder dat hy die houer van 'n lisensie was en besit van ammunisie terwyl hy nie in besit van 'n wapen was waaruit die ammunisie afgevuur kon word nie.

Die appellant is op 6 Julie 1989 gevonnis tot vyf jaar gevangenisstraf vir die roof, poging tot roof, vyf jaar gevangenisstraf vir die poging tot *moord*, twee jaar gevangenisstraf vir die onwettige besit van die vuurwapen en een jaar gevangenisstraf ten opsigte van

die besit, onwettige besit van die ammunisie. Vir sover dit nie duidelik was tot nou nie, word die gevangenisstraf opgelê ten opsigte van klagtes 3 en 4 gelyktydig uitgedien met die vonnisse opgelê ten aansien van klagtes 1 en 2. Dit wil se effektief 10 jaar gevangenisstraf. Die appellant was regsverteenwoordig tydens die verhoor in die Streekhof Benoni en hy het van sy swygreg gebruik gemaak.

Gedurende die verhoor het die klaer, Timothy Nkosi en sy minderjarige dogter Bosibe Nkosi, getuienis afgelê. Die appellant het in sy eie verdediging getuienis onder eed afgelê. Die getuienis was kortliks soos volg. Die klaer het op 30 Augustus 1997 om ongeveer 1 9h30 met sy motorvoertuig by sy woning arriveer. By sy aankoms het hy twee persone wat aan hom bekend was, te wete appellant en ene Sarami opgemerk waar hulle op die hoek gestaan het. Terwyl sy voertuig stilstaande was, maar voordat hy die perseel binnegery het, het appellant en Sarami hom genader. Sarami het 'n vuurwapen by hom gehad. Hulle het geëis dat die klaer sy voertuig se sleutel aan hulle oorhandig. Die klaer se voertuig se ligte was aan, so ook die straatligte. Sarami het aan appellant gesê om die klaer te slaan, waarop die klaer gehoor het hoe Sarami die vuurwapen oorhaal. Die klaer het die vuurwapen uit Sarami se hand geskop. Die klaer het Sarami gegryp en vasgehou waarop Sarami die wapen na appellant geskop het en vir die appellant beveel het om 'n skoot af te vuur wat appellant gedoen het. Kort voordat appellant 'n skoot afgevuur het, het kinders of 'n kind by die woning uitgekom. Nadat appellant die skoot afgevuur het, het hy op die vlug geslaan. Die klaer se

minderjarige dogter is deur die koeël wat afgevuur is, getref.

Die getuienis is dat die klaer die appellant voor die voorval geken het, oënskynlik van sien en het nie probleme met hom gehad nie. Dit is aan die klaer gestel dat hy 'n rede gehad het om appellant by die misdrywe te impliseer. Aangesien die klaer die appellant op 9 April 1 997 genader het om vir eersgenoemde veilings aan te koop en dat die klaer vir hierdie doel R500,00 aan appellant oorhandig het. Die klaer het met die appellant gereël dat hy die veilings, die saad terug by appellant se wonings sou kom afhaal. Die appellant het egter op 10 April R390 van die geld uitgegee toe hy vir hom klere gekoop het. Hierna het die klaer die appellant 'n paar keer genader, maar het die appellant die klaer probeer ontduik omdat hy nie die geld gehad het nie en ook nie die veilings nie. Trouens, op die appellant se weergawe het hy daarin geslaag om die klaer te vermy en te ontduik van ongeveer 10 April of 25 April 1997 totdat die appellant in hegtenis geneem is op 12 Februarie 1998, behalwe vir die aand van 30 Augustus waaroor die klaer getuig het. Die appellant se verweer kom op 'n alibi neer. Hy beweer dat hy op 30 Augustus 1997 om 18h00 saam met In vriend na 'n taverne gegaan het. Daar het 'n bakleiery ontstaan waarop appellant en sy vriend Collin na 'n ander nagklub Toeka toe is om 21h00 en dat hulle op 23h00 na Collin se woonplek is om te gaan slaap. Appellant onthou 30 Augustus 1997 in groot detail. Dit is 'n datum vyf maande voorafgaande sy arrestasie en ongeveer een jaar voor die verhoor. Hy onthou die dag ook omdat hy en Collin na bewering na 'n begrafnis toe is, maar Collin het ook nooit tydens die verhoor kom getuig nie. Dit wil voorkom of die

appellant sy alibi haarfyn gereed gehad het, sou hy op enige tydstip uitgevra word oor sy doen en late op 30 Augustus 1997. Ek vind dit onwaarskynlik dat 'n persoon soos die appellant (ek sal hierdie stelling aanstons verduidelik) na vyf maande sy uur tot uur bewegings vyf maande tevore so goed in herinnering kan terugroep. Die persoon soos die appellant waarna ek hierbo verwys het, is natuurlik 'n verwysing na 'n persoon soos die appellant wat so bond gepraat het soos die appellant oor ander aspekte van die saak. Hierdie bondpratery is in weerwil van sy uitdruklike en uiters spesifieke instruksies aan sy prokureur oor die verloop van gebeure gedurende April 1997 met verwysing na datums en dae van die week toe die klaer aan appellant R500 sou oorhandig het. Die uitstaande onwaarskynlikheid in die appellant se weergawe wentel om die omstandighede waaronder die klaer na bewering R500 aan die appellant oorhandig het.

Die appellant vra die hof om te aanvaar, een, dat appellant die klaer die eerste keer in appellant se lewe gesien of ontmoet het op 7 April 1997, aldus die appellant of op 9 April 1997 volgens appellant se prokureur. Dat die klaer by hierdie eerste ontmoeting aan die appellant R500 oorhandig omdat die klaer vir die appellant gesê het dat die klaer alreeds vir die appellant geken het. Drie, dat die klaer aan 'n skolier, soos die appellant, R500 oorhandig om veilings vir hom te koop, sonder dat die klaer enige rede het om te glo dat appellant iets met veilings te doen het. Die Streeklanddros het tereg tot die slotsom gekom dat appellant op twee pilare steun om die hof te oortuig dat hy nie die persoon is wat verantwoordelik is vir die voorval

op 30 Augustus 1997 nie en waaroor die klaer en sy dogtertjie getuig het nie. Die twee pilare is enersyds sy ontkenning dat hy by die voorval betrokke was en andersyds die veiling transaksie. Ek meen vir die redes deur die Streeklanddros genoem dat die staat die poging tot roof op die klaer, die poging tot moord van die klaer en of sy minderjarige dogtertjie asook die feite wat op klagte 3 en 4 betrekking het, bo redelike twyfel bewys het. Ek meen dat die appellant se weergawe ten aansien van die veiling transaksies so onwaarskynlik is, dat dit verwerp moet word. As die een pilaar natuurlik tuimel, val die appellant se kaarthuis in duie. Bowendien is dit uiters onwaarskynlik dat die klaer, ondersteun deur sy dogtertjie se getuienis so 'n gedetailleerde storie sou kon opdis. Dit is immers gemeensaak dat sy raakgeskiet is, en dat sy een van die klaer se aanvallers, Sarami, geken het. Ons word vandag meegedeel vir die eerste keer dat appellant ook vir Sarami goed geken het.

Hierdie weergawe bots lynreg met die appellant se volstrekte ontkenning van betrokkenheid by die misdrywe hom ten laste gelê. Die gebruik van 'n vuurwapen met impiniteit deur die appellant, hy kon die minderjarige dogter netsowel noodlottig gewond het.

Verduidelik dan ook waarom dit nie onwaarskynlik is dat aanvallers wat aan die klaer bekend was, by die voorval betrokke was nie. Gewapen met hierdie vuurwapen was die klaer immers nie veronderstel om die roof te oorleef nie. Ek is dus van mening dat die appel nie kan slaag nie en word die skuldigbevinding derhalwe bekragtig op al vier klagtes.

Die appellant se persoonlike omstandighede is vir doeleindes

van vonnis uiteengesit deur die Streeklanddros. Vandag is hierdie hot meegedeel dat die rede waarom die appellant voel die vonnis te swaar is, is die feit dat hy een kind gehad het wat huidiglik deur sy broer versorg moet word. Daar is geen redes vandag voor hierdie hot gelê op grond waarvan die hot by magte is om met die vonnis in te meng nie en blyk dit ook nie uit die uitspraak van die Streeklanddros ten aansien van vonnis, dat daar gronde bestaan op grond waarvan daar met die vonnisse ingemeng behoort te word nie. Die vonnisse is hoegenaamd nie skokkend onvanpas op enige wyse hoegenaamd nie. Derhalwe word die appel teen die vonnis ook van die hand gewys en word die vonnisse ten aansien van al die klagtes soos in die aanvang van hierdie uitspraak uitgeklaar, bekragtig.

VAN DYK,R: Ek stem saam, so 'n bevel word gemaak. –

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