IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2008-09-25

Case Number: A48/2007

In the matter between:

RUFUS THELEDI MANGANYE Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 29 October 2004 the appellant was found guilty in the Pretoria High Court (per Mabuse AJ) of –

(1) Murder;

(2) Robbery with aggravating circumstances;

(3) Contravening section 2 of Act 75 of 1969 (unlawful possession of a firearm);

(4) Contravening section 36 of Act 75 of 1969 (unlawful possession of ammunition)

and, on the same day, the High Court sentenced the appellant to –

(1) Life imprisonment for the murder;

(2) 15 years imprisonment for the robbery with aggravating circumstances;

(3) 15 years imprisonment for contravening section 2 of Act 75 of 1969;

(4) 1 year imprisonment for contravening section 36 of Act 75 of 1969.

With the leave of the court *a quo* the appellant appeals against the sentences. In granting leave to appeal the court *a quo* observed that another court may come to another conclusion because, as I understood his reasons, the possibility exists that in committing the offences the appellant was to a large extent influenced by accused no 2 who was acquitted.

[2] In convicting the appellant the court *a quo* accepted the evidence of Titus Mngomazulu and rejected the evidence of the appellant and accused no 2. According to Titus Mngomazulu he and friends were gambling when the appellant and accused no 2 arrived in a motor vehicle. The appellant and accused no 2 first approached the gamblers and then, after a few minutes, the appellant returned to the motor vehicle and fetched two handguns. As he approached the gamblers again the appellant started firing shots into the air. When this happened, the gamblers, including the deceased, ran for cover. The appellant pursued the deceased, shooting at him. The deceased first ran around a nearby shack and then ran to his motor vehicle. The appellant pursued him the whole way, still shooting. Altogether the appellant fired six shots at the deceased while he was chasing him. Eventually when the deceased reached his vehicle the appellant fired another shot at him which struck him high up in the leg. The force of the shot knocked the deceased to the ground. The appellant walked up to the deceased and pushed him flat with his foot. The appellant then searched the deceased and took his wallet and cellphone. The appellant and accused no 2 then left the scene in their motor vehicle. The deceased died of the bullet wound.

[3] In his heads of argument the appellant's advocate contends that –

(1) the sentence of life imprisonment for the murder was not

justified because –

(a) it was not so violent and gruesome that the sentence was justified;

(b) the fact that the appellant denies that he committed the murder does not in itself mean that the appellant has no remorse and is incapable of rehabilitation;

(c) the personal circumstances of the appellant do not justify the sentence – the appellant was 33 years old when he committed the offences; he was a first offender; he was employed and supported his children and he was clearly not a hardened criminal;

(d) in the circumstances the sentence is startlingly inappropriate.

(2) The sentence for the contravention of section 2 of Act 75 of 1969 is startlingly inappropriate and should be substituted with an appropriate sentence;

(3) The minimum sentence of 15 years imprisonment prescribed by Act 105 of 1997 is not applicable to the contravention of section

2 of Act 75 of 1969 – as decided in ***S v Khonye* 2002 (2) SACR 610 (T).**

(4) The appellant's counsel also referred to the fact that when the appellant was convicted and sentenced, Act 75 of 1969 had been repealed by the Firearms Control Act 60 of 2000 which contains its own criminal provisions. Because the court *a quo* refused leave to appeal against the convictions the appellant's counsel felt that he could not take the matter further.

[4] There is no dispute that the murder and the robbery with aggravating circumstances are subject to the minimum sentences provided for in section 51 of Act 105 of 1997. The circumstances in which a court may impose a lighter sentence than that prescribed are comprehensively dealt with in ***S v Malgas* 2000 (1) SACR 469 (SCA).** In particular the Supreme Court of Appeal said that the cumulative impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained (482d-e). The SCA also said that if the sentencing court, on consideration of the circumstances of the particular case, is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence (482e-f). The

SCA emphasised that courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances (481h-i) and unless there are and can be seen to be truly convincing reasons for a different response, the crimes in question are required to elicit a severe, standardised and consistent approach from the courts (481i-j).

[5] The appellant's counsel has not identified any circumstances which could be regarded as substantial and compelling and justified the imposition of a lesser sentence. The murder was clearly premeditated and the appellant hunted the deceased until he could not escape and then shot him in cold blood. Far from showing remorse, the appellant proceeded to rifle through the deceased's pockets while the deceased was lying badly wounded on the ground and take his wallet and cellphone. The murder was not preceded by an argument or incident which could have caused a rush of blood on the part of the appellant. There is no suggestion that the appellant's co-accused played a part in the attack. The appellant's evidence that he was carrying out the instructions of accused no 2 was rejected by the court *a quo.* The argument that the appellant was possibly influenced by accused no 2 is therefore pure speculation and this approach is contrary to the ***Malgas*** judgment (482a-b) which pertinently excludes from consideration 'speculative hypothesis favourable to the offender'. In my view the

sentences imposed for the murder and robbery with aggravating circumstances were justified and were properly imposed and there is no reason to interfere with them.

[6] Counts 3 and 4 relate to contraventions of section 2 (unlawful possession of a firearm) and section 36 (unlawful possession of ammunition) of the Arms and Ammunition Act, 75 of 1969. The Arms and Ammunition Act was repealed by the Firearms Control Act, 60 of 2000 which, with certain exceptions, including the penal provisions, commenced on 1 July 2004.

[7] Sections 120 and 121, the penal provisions of Act 60 of 2000 commenced on 1 June 2001. Section 120 provides that a person is guilty of an offence if he or she contravenes or fails to comply with any provision of the Act and section 121 provides for the penalties for such contraventions or failures to comply, the penalties are set out in Schedule 4. Section 3 of Act 60 of 2000 provides that no person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of the Act for that firearm. Save for the definition of 'firearm' the wording of section 3 is similar to the wording of section 2 of Act 75 of 1969. The new definition of firearm changes the nature of the offence. Section 90 provides that no person may possess any ammunition unless he or she, *inter alia,* holds a licence in respect of a firearm capable of discharging that ammunition.

Schedule 4 stipulates a maximum penalty of 15 years imprisonment for a contravention of these sections.

[8] The appellant committed the crimes on 9 June 2003 and he was charged with these crimes in the High Court on 26 October 2004 when he pleaded not guilty. Since this may affect the sentences imposed on counts 3 and 4 it is necessary to consider this issue. The appellant's counsel contends that the appellant was wrongly convicted of contravening sections 2 and 36 of Act 75 of 1969 because –

(1) Sections 2 and 36 of Act 75 of 1969 were repealed from 1 June 2001. The appellant's counsel contends that this argument is supported by section 11 of the Interpretation Act, 33 of 1957;

(2) Section 12(2) of the Interpretation Act and the judgments in ***S v Makape and Another*** **1989 (2) SA 753 (T)** and ***S v Sithole*** **1988 (4) SA 177 (T)** do not take the matter further. The appellant's counsel contends that the provisions of the Interpretation Act are not applicable to crimes.

The respondent's counsel contends that the provisions of section 12(2) of the Interpretation Act and the judgments referred to are decisive and that the appellant was properly convicted of contravening sections 2 and 36 of Act 75 of 1969.

[9] It is clear from sections 153 and 154 of Act 60 of 2000 read with Schedule 3 that the Act repealed the whole of Act 75 of 1969, including sections 2 and 36, as from the date on which it commenced, 1 July 2004. Act 60 of 2000 did not purport to repeal any provisions of Act 75 of 1969 before that date, notwithstanding the fact that certain provisions of Act 60 of 2000, including the penal provisions, commenced before 1 July 2004. Sections 2 and 36 of Act 75 of 1969 therefore remained in force despite the commencement of the penal provisions of Act 60 of 2000 on 1 June 2001. Until Act 75 of 1969 was repealed on 1 July 2004 the penal provisions of Act 75 of 1969, including sections 2 and 36, and those of Act 60 of 2000 existed side by side. Accordingly, between 1 June 2001 and 1 July 2004 it was possible for a person to contravene the penal provisions of both Acts. This is perfectly consistent with Item 8 of the Transitional Provisions contained in Schedule 1 of Act 60 of 2000. Because Act 60 of 2000 did not repeal any of the provisions of Act 75 of 1969 before 1 July 2004 section 11 of the Interpretation Act does not apply. The appellant's counsel's first argument therefore cannot be upheld.

[10] Appellant's counsel's second argument seems to suggest that it is axiomatic that if an accused contravenes a provision of an Act which is in force when the contravention takes place but which has been repealed when the prosecution commences the conviction is unlawful or invalid. He did not refer to any authority in support of the proposition

and I have not been able to find any. The issue is dealt with in section 12(2) of the Interpretation Act 33 of 1957 which reads as follows –

> ‘(2) Where a law repeals any other law, then unless the contrary attention appears, the repeal shall not –
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> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
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> (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
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> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
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> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
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> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,
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> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.’

It is clear from the provisions of sections 12(2)(b), (c), (d) and (e) of the Interpretation Act that the criminal liability of an accused is not affected by the repeal of an Act unless the contrary intention appears. See ***S v Makape and Another*** **1989 (2) SA 753 (T)** at 754G-755E: ***S v Sithole*** **1988 (4) SA 177 (T)** at 181B-C.

[11] The question is whether Act 60 of 2000 intended to exclude the operation of sections 12(2)(b), (c), (d) and (e) of the Interpretation Act. Section 153 of Act 60 of 2000 provides that subject to Schedule 1, the laws mentioned in Schedule 3 are repealed to the extent mentioned in the third column of Schedule 3. Schedule 3 states that the whole of Act 75 of 1969 is repealed. However Schedule 1 contains transitional provisions of which only those in item 8 are relevant. They read as follows –

> ‘8. Matters pending under the previous Act –
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> (1) Subject to subitems (2) and (3), this Act does not affect any proceedings instituted in terms of the previous Act which were pending in a court of law immediately before the date of commencement of this Act, and such proceedings must be disposed of in the court in question as if this Act had not been passed.
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> (2) Proceedings contemplated in sub-item (1) must be regarded as having been pending if

the person concerned had pleaded to the charge in question.

(3) No proceedings may continue against any person in respect of any contravention of a provision of the previous Act if the alleged act or omission constituting the offence would not have constituted an offence if this Act had been in force at the time when the act or omission took place.

(4)(a) Despite the repeal of the previous Acts, any person who, before such repeal, committed an act or omission which constituted an offence under that Act and which constitutes an offence under this Act, may after this Act takes effect be prosecuted under the relevant provisions of this Act.

(b) Despite the retrospective application of this Act as contemplated in paragraph (a), any penalty imposed in terms of this Act in respect of an act or omission which took place before this Act came into operation may not exceed the maximum penalty which could have been imposed on the date when the act or omission took place.'

[12] In my view none of these provisions can be understood to exclude the operation of section 12(2) of the Interpretation Act. On the contrary, they indicate an intention that prosecutions for contraventions of Act 75 of 1969 may continue if the accused has already pleaded before Act 60

of 2000 commenced and that if the act which constituted the offence is also an offence under Act 60 of 2000 the accused may be prosecuted for contravening the relevant section of Act 60 of 2000. These provisions indicate an intention that people who commit crimes under Act 75 of 1969 are not to escape liability because of the repeal of the Act. They are silent about prosecutions for contraventions of Act 75 of 1969 after its repeal. Although the prosecution could take place under Act 60 of 2000 if both Acts created the same offence that would not preclude prosecution under Act 75 of 1969. The convictions for contravening sections 2 and 36 of Act 75 of 1969 were therefore in order.

[13] The issue is whether the sentence of 15 years imprisonment in respect of count 3 (as amended) is a proper sentence. The court *a quo* did not pertinently state its reasons for imposing a sentence of 15 years imprisonment in respect of count 3. The appellant was unlawfully in possession of two firearms and an unknown quantity of ammunition. Section 39(2)(a)(i) of Act 75 of 1969 provided for a penalty of imprisonment for a period not exceeding ten years for unlawful possession of more than one firearm. It was therefore not competent for the court *a quo* to impose a sentence of more than 10 years imprisonment. As pointed out in ***S v Khonye supra*** the minimum sentence provided for in Act 105 of 1997 was not applicable. In my view a sentence of 6 years imprisonment was appropriate.

Order

[14] 1. The appeal is upheld to the extent that the sentence of 15 years imprisonment imposed in respect of count 3 is substituted with a sentence of 6 years imprisonment.

2. In terms of section 282 of Act 51 of 1977 the substituted sentence of 6 years imprisonment imposed in respect of count 3 is deemed to have been imposed on 29 October 2004.

3. Subject to the aforementioned orders the appeal is dismissed.

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B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

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A.A. LOUW
ACTING JUDGE OF THE HIGH COURT

I agree

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W.A.J. VAN ZYL
ACTING JUDGE OF THE HIGH COURT

CASE NO: A48/2007

HEARD ON: 17 September 2008

FOR THE APPELLANT: ADV. F.J. VAN DER WESTHUIZEN

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. V.L.N. DAVHANA

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 25 September 2008