21/9/2017

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: A 543/2016

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: ~~YES~~ / NO (2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO (3) REVISED. DATE 21/9/2017
SIGNATURE

In the matter of:

Kyle De Klerk — Appellant

And

The State — Respondent

JUDGMENT

Maumela J.

1. This matter came before court as an appeal against sentence only. Before the Regional Court sitting in Pretoria, court *a quo*, two accused persons appeared. Appellant, Kyle De Klerk, was accused number 2. Sheldon Isaacs was accused number 1. The two were legally represented throughout their trial before the court *a quo*. They were charged with two counts each as follows:

   Count 1: Murder read with the provisions of section 51 (2) of the Criminal Law Amendment Act 1997: (Act No

105 of 1997).
Count 2: Attempted murder.

2. The allegations on count 1 were that upon or about the 1st of May 2008, and at or near Eersterust in the Regional Division of Gauteng the two did unlawfully and intentionally kill Ansen Nathaniel Van Der Colf, a male person by shooting him with a firearm.

3. In count II the allegations were that upon or about the 1st of May and at or near Eersterust in the Regional Division of Gauteng the two did unlawfully and intentionally attempt to kill William Mahlangu, a male person by shooting him with a firearm.

4. Before the court *a quo*, the two were given an explanation on the role of assessors. They both opted for the trial to proceed without assessors. They were favoured with an explanation on competent verdicts relevant to the charges put. They were favoured with an explanation on the applicable minimum sentence legislation. Both understood.

5. The two pleaded not guilty to both charges. Explaining his plea accused number 1, Sheldon Isaacs, told court that on the day of the incident, the 1st of May 2008, he and accused number 2, who is the appellant were in each other's company. He stated that they went about drinking. Later as they walked home, they decided to look for a place where they could drink more. While they walked, he discovered that appellant is in possession of a firearm.

6. On count 1 where the charge was murder appellant's co-accused was acquitted while appellant was convicted. On

count 2; Attempted Murder, appellant's co-accused was convicted of the offence of contravening section 257 of the Criminal Procedure Act, in his capacity as an accessory after the fact.

7. Relevant to these appeal proceedings, before the court *a quo,* on count 1, (murder), appellant was sentenced to undergo 18 years of imprisonment. On count 2, (attempted murder), he was sentenced to undergo 8 years imprisonment. Before the court *a quo*, appellant applied for leave to appeal against both conviction and sentence. The court *a quo* refused appellant leave to appeal against conviction and sentence. On petition before this court appellant was granted leave to appeal against sentence only. This appeal is therefore against sentence only.

8. Appellant contends that the court *a quo* erred in imposing the above sentence upon him. The court is to determine whether or not the court *a quo* was correct in imposing upon appellant the sentence it did. It was submitted on behalf of appellant that the court *a quo* erred in imposing a sentence of 18 years imprisonment upon appellant for purposes of the murder count. It was submitted that the court *a quo* ought not to have imposed a sentence in excess of the minimum prescribed.

9. The murder charge against appellant is read with the provisions of section 51 (2) (a) of the Criminal Law Amendment Act 1997: (Act No: 105 of 1997). Section 51 (2) (a) provides 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 of an offence referred to in-*
(a). Part II of Schedule 2, in the case of-

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

10. The court *a quo* found that on both counts, murder and attempted murder, the state proved its case against appellant beyond a reasonable doubt. It found that appellant unlawfully and intentionally shot the deceased in count 1 with fatal consequences. It also found that appellant fired shots at the complainant in count 2, intending to kill him. It found that in both instances appellant did so without justification. Evidence showed that appellant shot at both the deceased and the complainant in count 2 without provocation.

11. In passing sentence the court *a quo* took into consideration that between the two assailants appellant is the one who wielded a firearm during the attack upon the deceased in count 1 and the victim in count 2. It took into consideration that appellant fired no less than 15 bullets at the deceased. It took into account the cold-bloodedness and callousness with which the crimes were committed. The court *a quo* took issue with the fact that appellant demonstrated no contrition for the crimes he committed.

12. It is trite that sentencing courts are to heed the sentencing triad as outlined in the case of S v Zinn[1]. In that case the court stated that in imposing sentence courts have to: *"take into consideration, the crime committed, the interests of the accused, and the interest of the community."*

13. Our courts hold the view that sentencing is a matter for the discretion of the trial court. They have held that where an

[1]. 1969 (2) SA 537 (A).

appeal is against sentence, the appeal tribunal should always bear in mind that punishment is pre-eminently a matter for the discretion of the trial court. Appeal courts may interfere with sentences only where the sentencing discretion of the trial court appears not to have been "judicially and properly exercised."

14. The court is to determine whether or not in this case there is cause for interference with the sentence imposed by the court *a quo*. The enquiry is about whether or not in imposing sentence the court *a quo* exercised its discretion "judicially and properly". The court is to look at the nature and gravity of the crime committed, the circumstances of the appellant and the interests of the community.

THE CRIME.

15. The crimes of which appellant stands convicted are serious. They involve the application of grave violence against unsuspecting, and innocent victims. In the case of S v Mnguni[2]; the court stated as follows: *"a cruel and inhuman attack on a helpless unarmed victim is considered to be an aggravating factor."*

16. The deceased in count 1 and the complainant in count 2 did nothing deserving of the attacks they suffered. Concerning the deceased in count 1, appellant literarily emptied the magazine of the firearm in his possession in attacking him. Evidence shows that only three of the bullets may have missed the deceased. It is clear that appellant deliberately fired shots at the deceased so as to ensure that he does not survive.

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[2]. 1994 (1) SA CR 579 (A), at page 583 e.

17. The deceased was unknown to appellant. Appellant could not have known that the deceased's wife is pregnant. He could not have foreseen the full measure of the suffering his unlawful act would bring to bear upon the deceased's family. But it is only fair that the court should consider the impact the crime committed had on the lives of the deceased's relatives and loved ones. The manner in which the murder was committed suggests that appellant would have shot whoever he met. He resolved to commit murder even before he identified the victim upon whom he would commit it.

18. The complainant in count 2 also did nothing to provoke the attack he was subjected to. He just happened to be walking along a path at a place and time where he came within appellant's sight. He does not know why he came under attack. He does not know how he could have avoided coming under attack. In committing murder appellant deprived a family of a loving member, children of a doting father and a wife of a loving husband.

THE INTERESTS OF THE ACCUSED.

19. The accused was 21 years of age at the time he was arraigned. He was 26 years of age at the time he was sentenced. Between conviction and sentence he had spent just over three months in custody. He is a first offender. He is unmarried. He was raised by a single parent. He had neither contact nor relationship with his father.

20. At a young age, appellant started living with his girlfriend. His relationship with his father was not good. He is father to two children whom he maintained before his arrest. His girlfriend is expecting their third child. Before his arrest he was employed at SPAR Supermarket in Johannesburg, earning R 1 300-00

per month. He had stopped taking drugs.

21. It was submitted on behalf of the appellant that at the time of the commission of the offence, he had consumed liquor. He did not testify in mitigation of sentence. He did not express contrition for the crimes committed. It was also submitted that appellant's behaviour was partly a result of an upbringing in which he lacked a role model. The lack of contact with his biological father and the ruined relationship with his biological mother are factors that allegedly contributed in compromising his sense of values, the respect of the law and respect of the human rights of others.

22. The defence contended that the cumulative tally of appellant's personal circumstances sustains a finding that substantial and compelling circumstances are attendant to his person, which justify avoidance of the imposition of a sentence that complies with the relevant minimum sentence legislation.

THE INTERESTS OF THE COMMUNITY.

23. Society deserves to be protected against perpetrators of unprovoked violent crime. Our courts have held the view that those who commit violent crime should be made to account before the law and if found guilty punished. In S v Makwanyane & another[3], the court stated: "*The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is*

[3]. 1995 (2) SACR 1 (CC), at paragraph 117.

necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law. . . ."

24. On an increasing basis, the media has reported incidents of community backlash. Perceptions truly or falsely reflected lack of adequate response by the criminal justice system to acts of criminality, if not the complete absence thereof. The problem with these patterns in communities is that culprits are subjected to mob-justice without leeway for suspects to state their own version. Neither is there any balance between the offence alleged and the punishment exacted. In most cases suspects are subjected to lynching.

25. In the case of R v Karg[4], The Court stated: *"In assessing an appropriate sentence, the Court must have regard for the feelings of the community and must bear in mind that if sentences for serious crimes are too lenient, the demonstration of justice may fall into disrepute and that persons may be inclined to take the law into their hands."*

26. Courts will be failing in their duties if they fail to protect the rights of all to walk the streets freely and at will. Among others, punishment of those who are proven to have rendered streets to be unsafe can deter would be perpetrators of random attacks on unsuspecting victims.

27. Before the attacks upon the deceased in count 1 and the complainant in count 2, no harsh or friendly words were exchanged. There is nothing the victims could have done or refrained from doing to avoid the attack. It would be remiss of courts if they fail to respond to acts of wanton criminality like these with fitting sentences.

28. To that end, it is immaterial whether or not, given the same set of evidence, this court would have imposed a similar or a different sentence as compared to what the court *a quo* did. What the court has to consider is whether or not the court *a quo* erred or misdirected itself in imposing the sentence it did.

29. In the case of S v Hadebe and Others[5], the court stated as follows: *"In the absence of demonstrable and material misdirection by the trial Court, its findings of fact were presumed to be correct, and would only be disregarded if the*

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[4]. 1961 (1) SA 231 (A), at page 236 A – B.
[5]. 1997 (2) SACR 641 (SCA), at page 645 e – f.

recorded evidence showed them to be clearly wrong."

30. Regarding count 1, the gunshot wound found in the post-mortem report to have proven fatal was inflicted in the deceased's back of the neck. This shows that at the time he was shot, the deceased could not have been advancing towards appellant. This rules out completely any possibility that the appellant could have been under attack from the deceased at the time he killed him.

PRESCRIBED MINIMUM SENTENCE.

31. In count 2 appellant was convicted of attempted murder. The court *a quo* found that appellant shot and wounded the complainant in count 2 on his leg with a firearm. Appellant submits that for purposes of this count section 51 (2) (c) of the Criminal Law Amendment Act 1997 has to apply for purposes of determining a fitting sentence.

32. Section 51 (2) (a) of the Criminal Law Amendment Act of 1997 provides for 15 years imprisonment as the prescribed minimum sentence. It reads as follows:

S (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 of an offence referred to in-*

(a). Part II of Schedule 2, in the case of-

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

Appellant submits that this is the sentence the court or should have imposed for purposes of the murder in count 1.

33. Appellant submits further that for purposes of attempted murder in count 2 the court *a quo* should have imposed 5

years imprisonment in accordance with section 51 (2) (c) of the Criminal Law Amendment Act. This section reads 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 of an offence referred to in-

(c). Part IV of Schedule 2, in the case of-

(i). a first offender, to imprisonment for a period not less than 5 years."

34. It is submitted on behalf of appellant that for purposes of sentence in this case, the court *a quo* did not apply its mind to considerations of substantial and compelling circumstances that may be attendant to the person of the appellant as provided for under subsection 3 of section 51 the Criminal Law Amendment Act.

35. Subsection 3 reads as follows: *"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."*

36. Appellant submits that the court *a quo* erred in imposing sentences in excess of the prescribed minimum. He contends that in count 1 the court *a quo* should have found that substantial and compelling circumstances are attendant to his

person which justify the imposition of a sentence lesser than the prescribed minimum.

37. It is clear that in enacting the prescribed minimum sentence legislation, it was not the intention of the legislature to do away with the sentencing discretion of the trial court. It, (the intention), was much more to indicate a range or ranges below which the sentencing court is not expected to reach in imposing sentence for particular offences unless there are acceptable reasons for it to do so. It is for that reason that the offences in mind stand listed under respective Parts, within Schedules.

38. It was clearly not the intention of the legislature to prevent sentencing courts from exceeding the prescribed minimum sentence if they deemed it fitting to do so, given due consideration of the applicable triad as indicated in the Zinn[6] case above. Therefore the argument that the court *a quo* erred by exceeding the prescribed minimum sentence cannot be sustained unless the sentence meted out proves that the court *a quo* did not exercise its sentencing discretion "properly and judicially, or that the court *a quo* misdirected itself."

39. In this context misdirection was defined among others in the case of S v Pillay[7] where the court stated the following: *"Now the word "misdirection" in the present context simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a*

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[6]. Supra.
[7]. 1977 (4) SA 531 (A), at page 535 F.

Mngadi AJ.
Acting Judge of the High Court of South Africa.