



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 40/2012

In the matter between:

JOSEPH NTONI

Applicant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J

HEARD ON:

17 SEPTEMBER 2021

DELIVERED ON:

4 MARCH 2022

[1] This is an application for leave to appeal to the Full Court of this Division against the convictions and the sentences of the applicant. The trial served before me.

[2] The applicant was accused 2 of 4 accused persons. On 16 January 2013 all 4 of the accused persons were convicted on the following counts:

Count 1: Escape from lawful custody.

Count 2: Robbery with aggravating circumstances.

Count 3: Murder.

Count 5: Robbery with aggravating circumstances.

Count 6: Kidnapping.

Count 7: Attempted murder.

Count 8: Murder.

[3] On 18 January 2013 the applicant, as accused 2, was sentenced as follows:

Count 1: 10 (ten) years imprisonment.

Count 2: 20 (twenty) years imprisonment.

Count 3: Life imprisonment.

Count 5: 20 (twenty) years imprisonment.

Count 6: 6 (six) years imprisonment.

Count 7: 10 (ten) years imprisonment.

Count 8: Life imprisonment.

I further ordered that all the foresaid sentences were to be served concurrently with one another and furthermore

concurrently with any other sentences which the applicant were serving at the time.

Condonation:

- [4] The applicant is seeking condonation for the late lodging of his application for leave to appeal. In support of the application for condonation, the applicant filed an affidavit in which he set out, *inter alia*, the reasons for the failure to have timeously filed his application for leave to appeal. He also dealt with the grounds for his application for leave to appeal.
- [5] Mr Strauss, who appeared on behalf of the respondent, indicated that the State is not opposing the application for condonation since it considers it in the interest of justice that the merits of the application for leave to appeal be dealt with.
- [6] I duly considered the explanation by the applicant for the delay in the lodging of this application. It is evident that it has been the applicant's intention since the convictions and the imposition of the sentences to lodge an application for leave to appeal. However, due to the lack of funds and subsequent administrative issues experienced at the prison, which were further negatively impacted upon by the Covid 19-pandemic, the applicant was unable to have lodged this application at any earlier stage.
- [7] Without pertinently expressing my views on the applicant's prospects of success with the application for leave to appeal,

it is trite that a full, complete and satisfactory explanation for the delay may excuse weak prospects of success.

- [8] In the circumstances and in the exercise of my discretion I deem it appropriate that condonation be granted for the late filing of the application for leave to appeal.

Ad Merits:

Convictions:

- [9] The grounds for the application for leave to appeal against the convictions of the applicant, are set out in his affidavit as follows:

- "4.1 That the trial court erred in accepting the evidence of Barry Tinte that the escape was premeditated as he was a single witness in this regard.
- 4.2 That the trial court erred in accepting the evidence of Captain Wagner, Warrant Officer Malakwane and Warrant Officer Mofokeng that the leg cuffs were unlocked at the time the applicant alighted the police van.
- 4.3 That the trial court erred in finding that the State proved its case beyond a reasonable doubt as there was no evidence placed on record implicating me in the commission of the offences.
- 4.4 That the trial court erred in finding that the contradictions in the evidence of the State witnesses were not material in nature.
- 4.5 That the trial court erred in finding I formed a common purpose with my pro-accused and aligned myself with the actions which led to the death of Ms Botes."

[10] At the commencement of the trial, all four accused persons pleaded not guilty on all the counts. In respect of the applicant, Ms Kruger, who is also representing the applicant in the present application, handed a written plea explanation on behalf of the applicant, to Court, which was received as Exhibit "A". The relevant part thereof reads as follows:

"Ek en my mede-beskuldigdes moes op die dag van die voorval in die hof te Harrismith verskyn. Ek en beskuldigde 4 was saam geboei gewees en ons het laaste uit die vangwa geklim. Met die wat ek afklim hoor ek skote wat afgevuur word en het onmiddellik skuiling gesoek onder die vangwa. Beskuldigde 4 het die voetboeie se sleutels by beskuldigde 1 gekry en homself bevry. Hy het daarna die sleutels aan my oorhandig waarna ek myself bevry het. Ek het toe besluit om verder skuiling te soek en het na die hofgebou gehardloop. Ek het nog steeds skote gehoor en het besluit om na buite die hofgebou te hardloop. Ek hardloop in die straat af wat voor die hofgebou beweeg en die volgende oomblik stop 'n Mercedes Benz voertuig langs my. Die voertuig was bestuur deur een van my mede-gevangenes en was daar 'n blanke vrou in die voertuig. Ek weet nie hoe het hy in besit gekom van die voertuig nie. Ek probeer nog weg te kom van die skote en klim in die voertuig in. Net daar klim my mede-beskuldigdes ook in en ons jaag weg. Ek het af gekyk en agter die sitplek weggekuip. Die polisie agtervolg ons en skiet op ons. Ek het op 'n stadium gehoor dat iemand terugskiet, maar kon nie sien wie dit was nie. Die bestuurder het beheer oor die voertuig verloor en teen 'n gebou gebots. Ek het my bewussyn verloor en was in die hospitaal opgeneem. Ek het nie met my mede-beskuldigdes beplan om te ontsnap nie en het probeer om weg te kom van die skote wat geskiet was. Ek het nie gesien hoe die oorledene op aanklag 3 geskiet word nie en dra ook nie kennis van hoe sy vuurwapens hom ontnem is nie. Ek dra ook nie kennis van hoe die ander klagtes afgespeel het nie en ontken derhalwe my betrokkenheid by die voorval. Ek het egter wel gesien dat beskuldigde 1 in besit was

van 'n R5 geweer, maar weet nie hoe hy in besit daarvan gekom het nie.”

[11] The accused persons, together with the state witness, Barry Tinte, and another prisoner, Moselane, was brought as prisoners from the Groenpunt Prison at Vereeniging to Harrismith's Magistrate's Court for purposes of appearing in Court on the day of the incident. The relevant incident occurred when the police van which transported the aforesaid prisoners was parked at the back of the Harrismith Magistrate's Court and the prisoners off-loaded from the police van. The deceased in count 3, Const. Sebekulu, together with Capt. Wagner, transported the prisoners in the police van. In the ordeal which subsequently followed, Const. Sebekulu was shot dead. Ms Botes, who is the deceased in count 8, was an innocent bystander when the four accused persons and Moselane got into her Mercedes Benz vehicle and tried to flee with her in the vehicle. She passed away as a result of the injuries she suffered when the Mercedes Benz vehicle collided with a wall.

[12] I summarised the essence of the dispute between the State and the defence in my judgment on the convictions as follows:

“Die wesenlike respek tussen die Staat en die verdediging, en wat ook 'n essensiële effek op die beoordeling van die verdere gebeure van die dag sal hê, is die vraag wie en welke optrede die skietery by die landdroshof begin of veroorsaak het. Volgens die Staat is die gevangenes wat die skietery begin het, as gevolg van die feit dat hulle wou ontsnap, terwyl dit die beskuldigdes se weergawe is dat die polisie

dit begin het, terwyl hulle as onskuldige persone in die situasie vasgevang was.”

[13] Capt. Wagner, W/O Malakwane, W/O Mofokeng, Barry Tinte, Capt. Maketekete, W/O Mateo, W/O Hlalele, W/O Mokoena and Dr Liebenberg were all called as witnesses in support of the State’s case.

[14] Accused 1, 3 and 4 testified in their own defence, but the applicant elected to remain silent, not to present any evidence in support of his own case.

[15] With regard to the evidence of Capt. Wagner, W/O Malakwane and W/O Mofokeng pertaining to the question whether the leg cuffs of the prisoners had already been unlocked at the time when they alighted the police van, it is evident that they all three testified to that effect. In addition, I found as follows with regard to this issue:

“Hierdie weergawes word op wesenlike wyse gestaaf deur die getuienis van Barry Tinte, synde dat die voetboeie reeds in die vangwa oopgesluit was en bloot liggies ingedruk was om dit te laat lyk of dit nog in takt is. Al hierdie getuies is dit ook eens dat gegewe die vinnige verloop van die gebeure daar nie geleentheid of tyd was vir die gevangenes om nog eers die voetboeie oop te sluit op die toneel soos deur hulle beweerd is.”

[16] With regard to my acceptance of the evidence of Barry Tinte, who was a single witness with regard to my finding that the escape was premeditated, I specifically dealt with this aspect

in my judgment and found that essential corroboration existed for his version:

“Die feit is egter dat wat Barry Tinte se getuienis met betrekking tot die beplanning van die ontsnapping as sodanig betref, is daar geen weerspreking daarvan nie, behalwe die beskuldigdes se eie ontkenning daarvan. Daarteenoor is daar wesenlike stawing vir sy weergawe wat betref hoe die ontsnapping beplan is, aangesien die gebeure soos dit afgespeel het, wesenlik ooreenstem met dit wat hy beweer beplan is.

Nog meer kontemporêre stawing vir sy weergawe met betrekking tot die beplanning om te ontsnap is geleë in die getuienis van Kapt. Maketekete, wie bevestig dat Barry Tinte hom inderdaad vooraf omtrent die beplande ontsnapping ingelig het en ten opsigte waarvan hy op 1 April 2011 'n aantekening in sy dagboek gemaak het, welke dagboek ook steeds beskikbaar is.

Van die detail van die beplanning, soos dit reeds op daardie stadium deur Barry Tinte aan hom oorgedra was, stem ook ooreen met hoe die gebeure eventueel plaasgevind het, synde dat hulle beplan het om 'n vuurwapen by 'n polisiebeampte by die hof af te neem”.

[17] As indicted earlier in this judgment, the applicant elected not to testify in support of his own defence. I consequently found as follows in my judgment:

”Aangesien beskuldigde 2 verkies het om nie getuienis ter weerlegging van die *prima facie* staatsaak teen hom as deel van die groep gevangenis aan te bied nie, het dit tot gevolg dat die Staat se weergawe ook ten opsigte van hom en teen hom aanvaar word. Op sodanige aanvaarde weergawe van die Staat is dit na my mening bo redelike twyfel bewys dat die beskuldigdes beplan het om te ontsnap en deurentyd in die uitvoering daarvan met gemeenskaplike opset opgetree het tot en met hulle arrestasie.”

- [18] In my view the applicant does not have reasonable prospects of success on appeal and his application for leave to appeal against his convictions, can consequently not be granted.

Sentences:

- [19] The grounds for the application for leave to appeal against the sentences imposed, are set out in the applicant's affidavit to be the following:

- "5.1 In finding that there are no substantial and compelling circumstances present to deviate from the respective prescribed sentences.
- 5.2 That the effective sentence of life imprisonment is shockingly harsh and disproportionate.
- 5.3 That by imposing an effective sentence of life imprisonment, I am not afforded an opportunity to rehabilitate."

- [20] In the amended indictment it was indicated that counts 3 and 8 were to be read with the provisions of section 51(1) of Act 105 of 1997. It was furthermore indicated that counts 2 and 5 were to be read with the provisions of section 51(2) of the said.

- [21] With regard to the personal circumstances of the applicant, I recorded as follows in my judgment on sentence:

"Beskuldigde 2 is op 13 Maart 1979 gebore en is tans 33 jaar oud. Hy is getroud en het twee kinders van 7 en 4 jaar onderskeidelik, wie by sy vrou woonagtig is. Beide sy ouers leef nog en is woonagtig te Qwa Qwa. Hy het ook twee getroude susters. Hy het matriek geslaag en

hom daarna as skrynwerker bekwaam. Beskuldigde 2 is ook sedert Augustus 2011 'n gevonnisdde prisonier en derhalwe was hy ook korter as 3 maande verhoor-afwagtend op die onderhawige saak.”

[22] With regard to the previous convictions of accused 2, I found as follows:

“Wat beskuldigde 2 se vorige veroordelings betref blyk dit dat hy aanvanklik homself van misdaad weerhou het totdat hy in 2009 ook uiters ernstige misdrywe gepleeg het wat insgelyks baie relevant is ten opsigte van die oorweging van 'n gepaste vonnis in die huidige geval. Wat insiggewend is, is dat dit blyk dat hy toe al saam met beskuldigde 1 as misdadiger opgetree het deurdat dit uit die MAS-nommer blyk dat dit dieselfde voorvalle is as waarvoor beskuldigde 1 skuldig bevind en gevonnisd is.

... Die SAP 69 [vermeld] dat hy, onder andere, skuldig gevind is aan roof, maar het Me Kruger nou aangedui dat beskuldigde 2 erken dat dit inderdaad roof met verswarende omstandighede was. Beskuldigde 2 is gevolglik ook gedurende Augustus 2011 ten opsigte van misdrywe gepleeg in 2009, skuldig bevind op een aanklag van roof met verswarende omstandighede, drie aanklagte van poging tot moord en twee aanklagte ten opsigte van die onwettige besit van ammunisie, waarvoor hy effektiewelik tot 25 jaar gevangenisstraf gevonnisd [is].

Me Kruger het egter teenoor my aangedui dat die aangeleentheid op appèl gedien het en het sy ook die appèl uitspraak beskikbaar gehad in die hof, waaruit dit dan blyk dat die skuldigbevindings ten opsigte van die ammunisie, synde aanklagte 5 en 6, tersyde gestel is en is die effektiewe vonnis derhalwe verminder tot 20 jaar gevangenisstraf.”

[23] In my judgment on sentence I also dealt in detail with the nature and seriousness of the respective convictions, especially considered against the background of the applicable circumstances during the commission thereof. I

also dealt with the interest of the community in my consideration of an appropriate sentence.

[24] In so far as the applicant relies on the element of rehabilitation, I explained in my judgment why the elements of retribution, deterrence and prevention come to the forth in circumstances such as which prevailed in the present matter:

“Die vergeldingselement van straf tree ook in hierdie omstandighede sterker na die voorgrond. Die beskuldigdes is duidelik gevaarlike misdadigers met geen respek vir ’n ander se lewe nie en moet die gemeenskap teen hulle beskerm word. Dit is ook essensieel om in so ’n geval soos die onderhawige, ’n duidelike boodskap van afkeur en afskrikking aan ander voornemende sodanige oortreders uit te stuur, anders sal ek my plig as regterlike beampte van hierdie hof versak.”

[25] I duly and in detail dealt in my judgment on sentence with all the relevant mitigating and aggravating factors and found that the aggravating factors completely overshadowed the circumstances to such an extent that there were almost no mitigating factors present.

[26] I also dealt with the fact that the applicant was a second offender with regard to counts 2 and 5, the robbery with aggravating circumstances counts, and that the prescribed minimum sentence was consequently 20 years imprisonment on each count, as opposed to 15 years imprisonment for a first offender. As previously indicated, the applicant was also a second offender with regard to count 7, attempted murder.

- [27] In the circumstances I am of the view that my findings that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence than the relevant prescribed minimum sentences and that no injustice would be done should the prescribed minimum sentences be imposed, were duly substantiated.
- [28] In my view there are no reasonable prospects that a different court may (or would) come to a different conclusion with regard to the appropriateness of the imposed sentences.
- [29] The application for leave to appeal against the imposed sentences can consequently also not succeed.

Order:

1. Condonation is granted to the applicant for the late filing of the application for leave to appeal.
2. The applicant's application for leave to appeal against the convictions on 16 January 2013 and sentences imposed on 18 January 2013, is dismissed.

C. VAN ZYL, J

On behalf of the applicant: Ms S Kruger
Instructed by:
Legal Aid South Africa
BLOEMFONTEIN

On behalf of the respondent: Adv. M Strauss
Instructed by:
Director of Public Prosecutions
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