



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
 (3) REVISED **NO**

DATE: 21February 2020.....

SIGNATURE:

Case No. 8510/2020

In the matter between:

STEWART LUMKA

APPLICANT

And

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS, GAUTENG DIVISION PRETORIA**

RESPONDENT

JUDGMENT

MILLAR, A J

1. On 31 March 2008 an incident occurred at the premises where the applicant's estranged wife Ms Elsie Lumka was residing. During the course of the incident she was shot and seriously injured and a security guard who was also there at the time, Mr. Phillip Lima was shot and killed.
2. On 1 August 2018, more than 10 years after the incident, the applicant was indicted on 5 counts¹, 2 of which relate specifically to the incident in question – murder and attempted murder.
3. On 1 April 2008, after the incident had occurred, the applicant learnt of it through the media. He immediately appointed an attorney and made arrangements to meet with the investigating officer. This was done and at the meeting which took place on 14 April 2008, he offered his full cooperation and indicated a willingness to answer any questions put to him. I will deal with the significance of this meeting later in this judgment.
4. For more than 10 years the applicant heard nothing further until on 15 June 2018 when he was summoned and thereafter indicted. It is pursuant to that indictment that the present application has now been brought.
5. The applicant was to go on trial on 3 December 2018 but for various reasons set out in some detail in his application, the matter was not ripe for hearing then and it was postponed on more than one occasion. The prosecution was eventually enrolled for trial on 27 January 2020 and at the commencement thereof the applicant applied for

¹These were for contravention of the Intimidation Act 72 of 1982, contravention of the Riotous Assemblies Act 17 of 1956 as well as murder, attempted murder and assault.

a postponement. It was after the refusal of the postponement that the present application was brought thereby effectively forcing the postponement of the matter until the determination of this application.

6. The applicant advanced two main grounds for the granting of the stay of prosecution. The first was that his right to a fair and speedy trial had been infringed and secondly that he was prejudiced as a result of the delay in indicting him
7. In *Zanner v DPP, Gauteng*² the Supreme Court of Appeal held that the granting of a stay of prosecution is “a *drastic remedy which is granted sparingly and only for very compelling reasons*” and the Constitutional Court in *Sanderson v Attorney General, Eastern Cape*³ that :”*[T]he relief . . . is radical, both philosophically and socio politically. Barring the prosecution before the trial begins and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case is far reaching. Indeed, it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.*
8. In *Rodrigues v NDPP and Others*⁴ the test to be applied in applications such as the present was set out as follows:

[37] *In Bothma v Els the Constitutional Court referred with approval to the approach taken in Sanderson, that in determining relief for a permanent stay of prosecution, the Court was required to engage in a balancing exercise in which the conduct of both the prosecution and the accused were weighed and the following considerations examined:*

² [2006] JOL 17089 (SCA) at paragraph 10;

³ 1998 (2) SA 38 (CC) at 58D-E

⁴ 2019 (2) SACR 251 (GJ) at paragraph 37-38; *Bothma v Els* 2010 (2) SA 622 (CC) at paragraph 36

- a. *The length of the delay;*
- b. *The reasons the government assigns to justify the delay;*
- c. *The accused's assertion of a right to a speedy trial; and*
- d. *Prejudice to the accused.*

[38] *The Court, however, went on to caution that the above factors did not constitute a definitive check list and added a fifth factor - the nature of the offence and the public policy considerations that may be attached to it. This, in my view, also has relevance in these proceedings as the offence in question is the crime of murder allegedly committed during the apartheid era and, in respect of which, there has been considerable legal and policy considerations that sought to guide the new democratic society in its approach to such crimes.*

[39] *A sixth factor may also become important. This relates to the interests of the family and/or the victims of the crime. The role and participation of victims has been a central feature in the approach to dealing with crimes committed in the past. A victim's interests and voice, whilst not dispositive, is an important part of the balancing exercise that Sanderson contemplates." (references omitted)*

9. I propose dealing with each of the 6 considerations set out in Rodrigues in turn and then dealing with the weight to be attached to each in the circumstances of the present application.

10. Firstly, as to the length of the delay, there is no doubt that a period of over 10 years is a long delay. This however cannot on its own and without reference to the other considerations be dispositive of consideration of the application. It has been held that: *“The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial related interests that concern us”*⁵ and so necessarily this factor must be weighed against the others.
11. Secondly, the investigation was conducted to a point where the docket was submitted to the respondent 3 years after the incident in 2011. Thereafter the delays were occasioned by the loss of the docket, the need to reconstruct it, the holding of an inquest and finally further investigation before the applicant was summonsed. The reasons for the delay in the prosecution of the applicant while indicative of a general delay, can by no means be said to have been prejudicial to the applicant, at least during that specific period. I am mindful that *“regard should be had to the imperfections in the administration of criminal justice in our country, including those of law enforcement and correctional agencies. It is acknowledged that they [are] all under severe stress.”*⁶
12. Thirdly, the applicant was indicted during June 2018. The trial was supposed to proceed on 3 December 2018. The reason for the trial not proceeding was because the applicant on 28 November 2018 disclosed to the investigating officer that he had an *alibi*. It was this that resulted in a postponement of the trial. A pre-trial conference was subsequently held on 8 July 2019 and the trial subsequently postponed by agreement to 27 January 2020. The trial was not delayed through the

⁵ Sanderson supra at 55A-B

⁶ Van Heerden v DPP 2017 (2) SACR 696 (SCA) at 712d-e

fault of any of the parties and the delay occasioned by this was ostensibly for the benefit of the applicant so that his *alibi* could be investigated.

13. Fourthly, the applicant asserts that he has been irreparably prejudiced by the delay in prosecuting him. He claims this on the basis that he was prepared to co-operate from the beginning. Despite his consulting with the investigating officer on 14 April 2008, he did not disclose his *alibi* then despite his having instructed an attorney and furnished her with evidence relating to the *alibi* before the meeting on 14 April 2008. The *alibi* and the evidence were only disclosed to the investigating officer on 28 November 2018, more than 10 years after he first consulted with the police.
14. The evidence that was available then is still available. The claim of prejudice is that the police did not investigate the *alibi* and obtain further evidence to corroborate it. It is common cause that once the *alibi* evidence was furnished, the police did investigate but that due to the effluxion of time the alleged corroborating evidence no longer existed. This is as a direct result of the applicant's decision to withhold this from the police on 14 April 2008 and it is unbecoming of him to claim any prejudice as a result of this.
15. Fifthly, murder and attempted murder are serious crimes. The taking of a life is conduct which is inimical to civilized society. There can be no doubt that public policy requires that murders and attempted murders be investigated and prosecuted, whatever the time period. It is no coincidence that section 18(a) of the Criminal Procedure Act 51 of 1977 does not provide for any time limit for the institution of prosecutions for such crimes.

16. Sixthly, the applicant criticized the family of Elsie Lumka for attempting to assist the police with their investigation and for remaining dogged in their pursuit for justice. Justice is a right of society, but that right is all the more personal to those who have been victims of crime and in particular violent crime. To my mind the family were well within their right to pursue the matter in the manner that they did. Their right to justice stands separate and distinct to that of the applicant and is subject only to the rights of the applicant not being infringed by the exercise of their right.

17. Consideration of all of the six elements “*must be conditioned by the recognition that we are not atomized individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership of such a society and accept that a criminal justice system such as ours inevitably imposes burdens on the accused.*”⁷

18. During the ten-year period between the incident and the indictment the applicant was at no stage charged or otherwise informed that he was a suspect. He was able to go about his business during that period. While the period is indeed a long one, the fact that the applicant did not suffer any limitation of any of his rights in consequence of the incident during that period is significant. It is not uncommon for criminal investigation to take time and although undesirable that it take such a long time, the explanation furnished while not wholly satisfactory is at least indicative of the fact that the delay in the institution of the prosecution, was not actuated by any desire to prejudice the applicant. The applicant was indicted as soon as the state was in a position to proceed.

⁷ Sanderson supra at 57D-E

19. There has certainly been no delay with the prosecution of the matter once the applicant was indicted. The fact that the trial did not commence on 3 December 2018 was in direct consequence of the disclosure of the alibi to the respondent. It is not explained by the applicant, why, when on his own version he had been branded a “fugitive” in the media immediately after the incident, prompting him to instruct an attorney and meet the investigating officer on 14 April 2008, he did not disclose the alibi then or for that matter when he was indicted. He chose to wait until 5 days before the trial date and then only made the disclosure.
20. The applicant argued that he had suffered irreparable prejudice as a result of the passage of time in that evidence to corroborate his alibi was no longer available. This is a prejudice of his own making and it does not lie in the mouth of the applicant to claim this when he made the advertant decision to withhold the disclosure of the alibi from 14 April 2008 to 28 November 2018. In any event, it is the respondent which bears the onus of proving its case beyond a reasonable doubt and the trial court will consider this in light of the totality of the evidence presented by the respondent.⁸
21. The seriousness of the crimes and the right of the both the family of the deceased as well as Elsie Lumka and her family to have these crimes prosecuted and brought to a conclusion.
22. On consideration of the matter as a whole I am not satisfied that the applicant has made out a case for the stay of proceedings against him.

⁸ The South African Law of Evidence, Zeffert & Paizes, Second Edition, 2009, Lexis Nexis at 163-164

23. Counsel for the applicant invited me to consider the evidence set out in the application in some detail. I find it unnecessary to do so and it suffices to state that I am satisfied that the evidence for the respondent meets “a basic threshold⁹”

24. In the circumstances I make the following order:

24.1 The application is dismissed.

24.2 There is no order as to costs.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 17 FEBRUARY 2020

JUDGMENT DELIVERED ON: 21 FEBRUARY 2020

COUNSEL FOR THE APPLICANT: ADV. DJ COMBRINK

ADV. M DU TOIT

ADV. E TSHOLE

⁹ Rodrigues supra at paragraph 103 - “One has to guard against the temptation to utilise this hearing to determine the strength of the case the Applicant is to meet in the criminal proceedings the State has initiated. This is not the forum for the ventilation of such issues We are satisfied that the evidence intended to be presented at trial, meets a basic threshold and that the applicant has sufficient remedies available to him to deal with the nature and quality of the evidence intended to be presented against him.”

INSTRUCTED BY: MARIUS DU TOIT ATTORNEYS

REFERENCE: MR DU TOIT

COUNSEL FOR THE RESPONDENT: ADV. AJ FOURIE

INSTRUCTED BY: NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS, GAUTENG, PRETORIA

REFERENCE: 10/2/11/1-D62018 A ROOS