

27/11/12



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: A397/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES
26 Nov 2012	
DATE	SIGNATURE

IN THE MATTER BETWEEN:

MAX ZIKHALE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

DE KLERK, AJ

[1] The appellant was one of 5 accused arraigned on charges of

- 1.1 robbery with aggravating circumstances (2 counts)
- 1.2 murder
- 1.3 attempted murder
- 1.4 unlawful possession of fire arms
- 1.5 unlawful possession of ammunition
- 1.6 escaping from lawful custody.

The crimes referred to in the first five sub-paragraphs were all committed on the 16th April 2001 at SINOVILLE in the Pretoria-North district, whilst the five accused escaped from the cells at the Pretoria-North Magistrate's Court during one of their postponements, on the 29th November 2001.

- [2] On the 16th April 2001 the five accused robbed two employees of the Action Pub and Grill at SINOVILLE, Jennifer Malan and Nadine Madgwick, shot one Jaoa de Oliveira in his leg in an attempt to kill him and shot and killed one Suzie Tels Goncalves, using unlicensed fire arms and ammunition. Ms Malan's golden necklace was robbed after the robbers had assaulted her, whilst Ms Madgwick's NOKIA 7110 was robbed.

As the robbers exited from the premises they shot and killed the late Ms Goncalves whilst Mr De Oliveira grappled with and hit one of the robbers, but was shot in the leg when he gave chase after the robbers.

The robbers crossed the street in front of the premises, jumped into a Mazda 626 and drove away from the scene of crime.

- [3] Mr and Mrs Gouws were passing by when they heard two shots being fired; saw the four robbers emerging from the Wonderwaters Shopping Centre where the Action Pub and Grill is situated, where the crimes were committed; saw them crossing the street in front of the Gouws' vehicle; getting into the Mazda and saw the Mazda speeding off in the direction of Pretoria North. Mrs Gouws phoned the police and supplied the vehicle's registration number to them whilst Mr Gouws was pursuing the Mazda. They lost sight of the vehicle at one stage and turned back, but noticed the vehicle again in Phoenix Street and waited till the police arrived. There the previous accused number 3 and the accused who escaped (number 5) were arrested by the police.

- [4] On information received, two of the policemen proceeded to Reiger Street where three persons alighted from the Mazda and there Sergeant Moodie arrested accused numbers 1 and 4, whilst inspector Terblanche arrested the appellant, the former accused number 2.

- [5] When giving evidence and attempting to exculpate himself, the erstwhile accused number 3 who drove the Mazda motor vehicle, implicated all of the other accused, including the appellant and corroborated the State witnesses as to the route he followed, dropping off accused numbers 1 and

4, as well as the appellant and from there proceeding to Phoenix Street, where he and accused number 5 were arrested.

- [6] The trial court carefully analysed the evidence of all the witnesses and the accused, including evidence of an identification parade, and convicted all four accused (who stood trial) of the two counts of robbery, murder, attempted murder and escaping from custody. Accused number 3 was also convicted of the offences relating to unlawful possession of the fire arms and its ammunition.
- [7] The conviction of the appellant was attacked on very general grounds and legal principles and his counsel's heads of argument did not deal at all with the damning evidence of accused number 3, who placed all five accused on each and every scene attested to by the State witnesses. Identity was therefore no issue as far as appellant was concerned. Details of the crimes and the participation of each accused were supplied by the testimony of the various state witnesses. Each accused was identified either by the clothing he wore or at the identification parade on that day, as photos were taken on the day of their robbery spree.
- [8] As is required by *S v K* 1972 (2) SA 898 (A) 902 B the trial judge supplied full reasons for his findings and ultimate convictions of all four accused, including the appellant.
- [9] This court, after having read the record and counsels' heads of argument and having heard argument by both counsel for the appellant and counsel for the respondent, has to decide appellant's appeal along the guidelines laid down in *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) 705-706, which has been followed constantly by the Supreme Court of Appeal over the past 64 years. As recent as December 2010 it was also followed by the Constitutional Court in its judgment reported as *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) 120-1 (paragraphs [105] and [106] thereof).
- [10] I am of the view that the appellant has not succeeded in convincing the court that the trial judge has misdirected himself on the facts of the appellant's case or that inferences which he drew from

the evidence in relation to the appellant have not properly been drawn, as required by cases such as *Rex v Blom* 1939 AD 188 at p. 202 and *Rex v De Villiers* 1944 AD 493 at pp. 508-9. He was steeped in the atmosphere of the trial, he saw and heard all the witnesses, as well as the appellant, and he had the opportunity to observe their demeanour, appearance and whole personality. I am not left in any doubt as to the correctness of the trial Judge's conclusions, which should be upheld. His reasons were satisfactory and he did not overlook any facts or probabilities.

I am satisfied that the trial Judge correctly found that the respondent had proved the appellant's guilt beyond reasonable doubts, as required by cases such as *S v Glegg* 1979 (1) SA 34 (A). In coming to this conclusion I have been mindful of especially the quotation in paragraph [105] of *Bernert v Absa Bank Ltd*, taken from SARFU III, being *President of the Republic of South Africa v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

In my view, the appellant's appeal against his conviction should be dismissed.

- [11] As far as sentence is concerned, the respondent's counsel reminded the court that the appellant was sentenced in 2002 when the Correctional Services Act, Act No 8 of 1959 was still in force, as the new Correctional Services Act No 111 of 1998, as amended, only commenced on the 31st July 2004.

In terms of the Correctional Services Act, 1959, in particular in terms of section 32 (2) (a) of the Act, the prison sentences imposed on other counts than the murder count (on which a sentence of life imprisonment was imposed) will be served concurrently with a sentence of life imprisonment. The same provision appears in section 39(2) (a) (ii) of the Correctional Services Act, Act No 111 of 1998, as amended.

Appellant was sentenced to the minimum prescribed sentence of life imprisonment in terms of Schedule 2 Part 1 (c) (ii) as it was part of their robbery spree. As far as that count is concerned, no

substantial and compelling circumstances existed, for the minimum sentence of life imprisonment not to have been imposed.

Counsel for appellant found himself unable to advance any argument that the sentences imposed on the counts other than the murder count were in themselves shocking or disproportionate.

It is my considered view that those sentences were appropriate, having regard to the particular facts and they should be confirmed.

Our sister drew my attention to the decision of *S v Makena* 2011 (2) SACR 294 (GNP) regarding the following comment and recommendation of the trial judge:

'Die effektiewe vonnins wat beskuldigdes 1, 2 en 4 aanbetref is een van lewenslange gevangenisstraf, plus 'n verdure 35 jaar gevangenisstraf. Die effektiewe vonnis wat beskuldigde 3 opgele is, is een van lewenslange gevangenisstraf, plus 'n verder 41 jaar gevangenisstraf.

Dit word aanbeveel dat die Departement Korrektiewe Dienste nie die beskuldigdes op parool of andersins sal vrylaat alvorens hulle ten minste 40 jaar gevangenisstraf van hulle opgelegde vonnisse uitgedien het nie.'

Paragraph [12] of the decision of the full court of this division in the *Makena*-matter is applicable to the trial judge's recommendation:

'Given the doctrine of separation of powers under the present Constitution, I am of the view that it is best left to the Department of Correctional Services, which forms part of the executive arm of government, to determine when the accused should be released on parole without any suggestion or recommendation in this regard from the court. The Correctional Services Department, which functions under the executive branch of government, may not influence, nor seek to do so, the courts in their pursuit of the administration of justice. Likewise, the courts may not influence Correctional Services in their own duties and functions. It is indeed so, and perhaps only human, that a court may view the facts in a

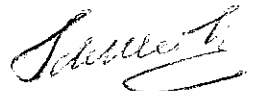
case so seriously that it may be of the considered view that its abhorrence and desire to protect society from the accused's conduct should be conveyed to Correctional Services. Whilst that may find favour with the intellect, it overlooks the fundamental independence of Correctional Services which, to my mind, does not operate from the premise that those convicted by the courts and channelled to it are incorrigible and beyond redemption from a life of crime, and beyond rehabilitation. It is my considered view that a recommendation along the lines in the sentence on count one should be avoided, and left uninfluenced in the hands of the appropriate department.'

[12] The following order is made:

12.1 The appeal against conviction and sentence is dismissed, and the conviction and sentence are confirmed.

12.2 The sentence of the trial court is altered as follows:

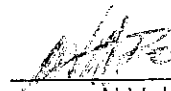
'Die effektiewe vonnis wat beskuldigde 2 aanbetref, is dat hy 35 jaar gevangenisstraf samelopend met lewenslange gevangenisstraf sal uitdien.'



L.S. DE KLERK

Acting Judge of the North Gauteng High Court

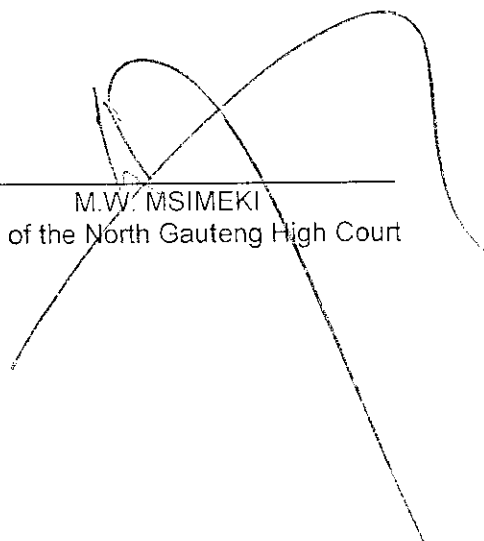
I agree



N.V. KHUMALO

Acting Judge of the North Gauteng High Court

I agree (and it is so ordered)



M.W. MSIMEKI

Judge of the North Gauteng High Court

CASE NO: A397/2012

HEARD ON: 14 November 2012

FOR THE APPELLANT: ADV. L.M. MANZINI

INSTRUCTED BY: Polokwane Justice Centre

FOR THE RESPONDENT: ADV. P.C.B. LUYT

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 27 November 2012