

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

CASE No : AR 615/10

In the appeal of:

NHLANHLA LUCKY BLOSE

Appellant

and

THE STATE

Respondent

JUDGMENT

VAN ZÿL, J.,

1. This is an appeal, with leave of the trial Court, against sentence only.

At the trial the appellant was charged with one count of murder (Count 1) and one count of attempted murder (Count 2), both arising from the events which occurred on 1 December 2005 at or near the Vukaphansi area of Kranskop, KwaZulu-Natal.

2. The appellant, who was legally represented throughout the trial, tendered pleas of not guilty to count 1 (murder), but guilty to count 2 (attempted murder). These pleas were unacceptable to the State and

the trial proceeded, at the conclusion of which the appellant was acquitted on count 1 but convicted as charged on count 2. He was sentenced to twenty (20) years' imprisonment and now appeals against that sentence.

3. The circumstances giving rise to the charges against the appellant tend to elevate the seriousness of the offence of which he has been convicted. He was aptly described by the learned Judge President, who presided over the trial, as a hired assassin. This was against the background that the appellant admitted entering into an agreement to kill the complainant in count 2, namely Mr Sikhalehi Ncenguyise Mzila, in exchange for a payment totalling R5 000-00.
4. In order to accomplish the murder of Mzila the appellant, having received a handgun from the conspirators in Durban, travelled to Kranskop by taxi in the company of one of them. However, upon arrival the intended victim could not be located and the matter stood over until the following day.
5. The next day the appellant was directed to a point along a road which it was anticipated would be used by the intended victim, who was apparently an informal taxi driver by profession. The appellant was in the company of a co-conspirator who eventually identified an approaching vehicle as that of the intended victim. The appellant's instruction was to kill the driver of this vehicle.

6. In order to do so the appellant moved to the side of the road and, pretending to be a potential passenger, together with one other unknown female, awaited the arrival of the complainant's vehicle and signalled to him to stop. The complainant duly complied, alighted from the vehicle, described as a "bakkie", in order to open the tailgate so that the appellant and the woman could board the vehicle.
7. By the appellant's own admission, as the complainant lifted the canopy lid to facilitate his passengers boarding, the appellant produced the handgun and shot the complainant, aiming for his head. According to the appellant the driver screamed and ran into the bush while the appellant, satisfied that he had mortally injured the intended victim and thereby accomplished his task, also departed from the scene to claim his reward. The fact that in the end he only received the initial deposit of R1 500-00 and not the balance of R3 500-00 is irrelevant.
8. At the time of firing the appellant said that he had not noticed whether there were other passengers in the loadbox of the vehicle, but he had noticed two people in the passenger compartment. According to the complainant he had nine passengers on board, two of whom were sitting in the driver's compartment with the remainder in the loadbox, covered by a canopy. The complainant described how he was holding the canopy lid in position and as he looked back over his

shoulder, the appellant fired, hitting him in the neck.

9. It appears from the evidence that the complainant found himself between the appellant and the rear of the vehicle when the fateful shot was fired and that the same bullet which injured him, also hit and killed the deceased in count 1. She was sitting closest to the rear of the vehicle, on its left hand side. The appellant contended that, at the time, he was unaware of the presence of the deceased in the rear of the vehicle. In the circumstances he may have been fortunate to be acquitted on count 1, but that is irrelevant for purposes of this appeal.
10. At the hearing before us Mr Marimuthu, who appeared for the appellant, drew attention to two misdirections he attributed to the trial Court. The first was that all concerned at the time of the addresses on sentence appeared to believe that the offence of attempted murder, of which the appellant had been convicted, fell into the category of offences contemplated in Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and read with the provisions of section 51(2)(a) of the Act attracted a minimum sentence of fifteen (15) years' imprisonment in respect of a first offender and twenty (20) years in respect of a second offender.
11. Part of the debate centred upon the previous conviction admitted by the appellant. Unfortunately the record does not contain a copy of the relevant form reflecting full details of the conviction but from the

discussion contained in the record it is clear that the appellant had been convicted during or about April 1995 of murder, at a time when he was 18 or 19 years of age. Since the attempted murder, the offense presently under consideration, was committed during December 2005, the previous conviction was at the time more than ten (10) years old.

12. In his address in support of the appeal Mr Marimuthu submitted that the offence in fact fell into Part IV of Schedule 2 of the Act and read with section 51(2)(c)(i) attracted a minimum sentence of five (5) years' imprisonment.

13. The second misdirection relied upon by counsel was that the trial Judge had not expressly forewarned defence counsel at the time and who was not the counsel in the appeal, that the court was considering imposing a sentence in excess of the minimum sentence (incorrectly at the time believed to have been fifteen (15) years' imprisonment) and had thus not afforded him the opportunity of making submissions to counter the threat of such an increased sentence.

14. In regard to this misdirection counsel relied upon the authority of *S v Mbatha* 2009 (2) SACR 623 (KZP), as also referred to in *S v Maake* 2011 (1) SACR 263 (SCA). It is, of course, so that a different approach was adopted in *S v Mthembu* 2011(1) SACR (KZP), but this decision was not brought to the attention of and considered by the Court of Appeal when reference was made to *Mbatha*.

15. The present position is therefore that the trial court committed two misdirections or irregularities, as correctly contended for by counsel for the appellant and conceded by counsel for the respondent. As a result we are at large to reconsider and impose sentence afresh upon the appellant. The question then is how to deal with the situation and what the effects of those misdirections have upon the appeal before us.

16. The nature of the misdirections to be relied upon by the appellant were apparent from counsel's written heads of argument, which were delivered well in advance of the appeal hearing. In the light of the gravity of the offence it became apparent to me that this court may well, in sentencing the appellant afresh, consider sentence in excess of the prescribed minimum sentence.

17. In fairness to counsel for the appellant and in order not to perpetuate the irregularity, I contacted counsel well in advance of the appeal hearing. This was in order to forewarn him that this court may well, if it were to sentence afresh as was to be contended for on behalf of the appellant, consider imposing a sentence well in excess of the prescribed minimum. In this regard and in particular I advised counsel that, speaking for myself, I could find little wrong with the sentence of twenty (20) years' imprisonment as imposed by the trial court and that he needed to prepare to address us accordingly.

18. Before us counsel for the appellant sought to emphasise those factors he submitted were mitigating relevant to sentence. These included that the appellant had pleaded guilty to the offence, had cooperated with the authorities following his arrest, had remorse for his actions, was the father of and supported a young child and was the eldest male child in his family. Factors personal to the appellant were that he was 29 years of age at the time of sentencing and possessed only a Standard 3 level of education.

19. Counsel also submitted that despite the appellant's previous conviction (during 1995) of murder, he technically remained a first offender in respect of the offence of attempted murder and that, in any event, the previous conviction had occurred just more than ten(10) years prior to the present offence.

20. Counsel for the state conceded the irregularities relied upon by the appellant and that we were at large, insofar as sentencing the appellant was concerned. However, Ms Maphalala sought to emphasise the aggravating features of the offence and contended that the sentence to be imposed by this court should reflect not only the gravity of the offence, but the revulsion of society for hired killers, even where they are unsuccessful. She further submitted that the sentence should also act as a deterrent to other would be offenders.

21. Whilst a deliberate attempt to take the life of another is always a serious matter, in my view the offence is rendered all the more serious where the failed attempt to kill flows from an assassination attempt at the hands of a hired killer. For someone to agree to kill a stranger, in cold blood in exchange for a monetary reward, is particularly chilling.

22. In the present instance the appellant was also not a first offender, having a prior conviction for murder, although more than ten(10) years had elapsed between the commission of the two offences. But the fact is that he had deliberately taken a life on a previous occasion and had been convicted and punished. Despite that he agreed, in the instant matter, to kill again in return for a monetary payment. Not only did he willingly enter upon the agreement, but he went about preparing to give effect thereto. He collected the gun and travelled from Durban to Kranskop the day thereafter. Upon his arrival the intended victim could not be found, so that he remained there in order to try again the following day. He furthermore had to wait in ambush for some time before the intended victim made his appearance. When the latter came into view the appellant used guile by pretending to be a waiting passenger in order not to alert the victim. Once the complainant stopped and alighted from his vehicle, the appellant kept up the pretence until he was in a position to produce the gun and fire at the complainant at close range. The fact that the complainant survived, whilst an innocent passenger in the taxi died, was through no lack of trying on the part of the appellant.

23.The actions of the appellant speak of a man unmoved by the loss of the life of another. The appellant had ample time for reflection and reconsideration before attacking the complainant. Nevertheless he did not waiver. He also did not, as defence counsel at the trial conceded, have remorse to the extent that he surrendered himself to the authorities after the attack upon the complainant. He merely cooperated after his arrest. That, to my mind does not signify true remorse and may merely indicate a desire to try and mitigate the unfortunate consequences of being apprehended and charged.

24.Had the complainant died, instead of being left injured with a degree of apparently permanent disability, there would in my view have been a strong argument for a sentence of imprisonment for life, even ignoring the provisions of the Act. Where, as here, the minimum sentence (on the basis that the appellant was a first offender), is a mere five(5) years' imprisonment in terms of Part IV of Schedule 2 read with section 51(2)(c)(i) of the Act, there is to my mind no question that the minimum sentence is woefully inadequate in all the circumstances of this case and I suggested as much to counsel for the appellant during the course of argument.

25.As also indicated to counsel during the course of argument and again speaking for myself, I considered that the sentence of twenty (20) years' as imposed by the trial court, despite the irregularities referred

to earlier in this judgment, represented a fair balance between the aggravating circumstances and mitigating factors relevant to the crime. It also satisfies the so-called traditional approach to sentencing which requires the court to consider the triad consisting of the crime, the offender and the interests of society' (S v Zinn 1969 (2) SA 537(AD) at 540G) and it evinces due regard for the purposes of punishment which include deterrence, prevention, reformation and retribution. (Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA) at paragraph 13).

26. That retribution and deterrence are well recognised factors in punishment was also recognised by Nugent JA in S v Swart 2004 (2) SACR 370 (SCA) where the learned Judge of Appeal stated in paragraph 12 that:

“[12] What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.”

(See also: S v B 1985 (2) SA 120 (A), Viljoen JA at page 123)

27. In all the circumstances and in view of the misdirections already referred to, I am of the view that this court is at large with regard to sentence. However, I respectfully consider that the sentence as imposed by the trial court was nevertheless an appropriate one.

28. I would therefore propose that the following order be made:-

The appeal against sentence is dismissed and the sentence of twenty (20) years' imprisonment as imposed by the trial court is confirmed.

VAN ZÿL, J.

I agree.

SEEGOBIN, J.

I agree.

GCABA, A.J.

APPEARANCES:

For the Appellant	:	Mr P Marimuthu Instructed by the Justice Centre, 20 Otto Street, Pietermaritzburg.
For the Respondent	:	Adv Ms N Maphalala Instructed by the Director of Public Prosecutions, Pietermaritzburg.
Date argued	:	6 April 2011
Delivered	:	14 TH March 2012