THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 732/2011

Not reportable

In the matter between

MICHAEL KAGISO KGANTSI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kgantsi v The State* (732/2011) [2012] 76 (25 May 2012)

Coram: **VAN HEERDEN, MAJIEDT JJA and PETSE AJA**

Heard: **9 MAY 2012**

Delivered: **25 MAY 2012**

Summary: Criminal law – sentence – leave to appeal – reasonable prospects of success – clear misdirection regarding applicability of minimum sentence.

ORDER

On appeal from: North West High Court, Mafikeng (Hendricks J, sitting as court of first instance):

The following order is made:

1. Condonation is granted for the late filing of the record and the appellant's heads of argument.
2. The appellant is granted leave to appeal to this court against the sentences imposed on counts 1, 2 and 3.
3. The appeal is upheld in respect of the sentences imposed on counts 1 and 2.
4. The sentences on counts 1 and 2 are set aside and substituted with the following:
    (i) Count 1: 30 years' imprisonment
    (ii) Count 2: 12 years' imprisonment
5. The appeal against the sentence imposed on count 3 is dismissed.
6. The sentence on count 2 is ordered to run concurrently with the sentence on count 1. The sentences on counts 4 and 5 are ordered to run concurrently with the sentence on count 3. The effective sentence is therefore 37 years' imprisonment.
7. The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 26 April 2005.

JUDGMENT

MAJIEDT JA (Van Heerden, Petse AJA concurring):

[1] The appellant, Mr Michael Kagiso Kgantsi, was convicted in the North West High Court, Mafikeng on the following five counts:

Count 1: murder.
Count 2: robbery with aggravating circumstances.
Count 3: kidnapping.
Count 4: unlawful possession of a firearm.
Count 5: unlawful possession of ammunition.

[2] The appellant pleaded guilty on counts 2, 4 and 5 and not guilty on counts 1 and 3. He was nonetheless convicted on all five counts at the end of the trial. The appellant was sentenced as follows:

Count 1: Life imprisonment (in terms of the minimum sentence prescribed by s 51(1) of the Criminal Law Amendment Act 105 of 1997, ('the Minimum Sentence Act').
Count 2: 25 years' imprisonment (in terms of the minimum sentence prescribed by s 51(1) of the Minimum Sentence Act).
Count 3: 7 years' imprisonment.
Count 4: 3 years' imprisonment.
Count 5: 2 years' imprisonment.

[3] The matter is characterized by several procedural defects. The appellant sought condonation in the court below for the late filing of his notice of application for leave to appeal and for the late prosecution thereof. He also applied for leave to appeal against both his conviction and sentence. Hendricks J dismissed both applications. The learned judge erred procedurally in this regard, since refusal of the condonation application should have resulted in the matter being struck from the roll. The dismissal of the applications led to a further procedural mistake, this time on the part of the appellant, who then approached this court directly on appeal against sentence. He did so in reliance upon this court's decisions in *S v Gopal*[1] and

[1] *S v Gopal* 1993 (2) SACR 584 (A).

S v Moosajee.[2] Those decisions confirmed that there was an automatic right of appeal to this court from a high court sitting as a court of appeal, in matters where the latter refuses an application for condonation.[3] But this is not such a case. As stated, Hendricks J sat as court of first instance. Section 316(8) of the Criminal Procedure Act 51 of 1977 therefore applies and the appellant should have petitioned this court for leave to appeal. The respondent drew the appellant's attention to this procedural flaw and adopted the attitude that, because the appellant was not properly before this court on appeal, the respondent would not file any heads of argument. The Registrar of this court, however, by direction of the presiding judge, informed the parties in writing that the application for leave to appeal and corresponding condonation application were referred for oral argument in terms of s 21(3)(*c*)(ii) of the Supreme Court Act 59 of 1959 and that the parties must be prepared, if called upon to do so, to address this court on the merits. The respondent thereafter duly filed heads of argument and the parties argued both applications and the merits fully before us. Leave to appeal is sought only against the sentence imposed on counts 1, 2 and 3 and condonation is being sought for the late filing of the record and the appellant's heads of argument.

[4] The facts underlying the conviction and sentence are briefly as follows. The deceased, Mr Andrew Ranthate Molefe, and the main State witness, Mr Thomas Masizane, were travelling at night in the deceased's motor vehicle when the driver (the deceased) stopped and offered a lift to a hitchhiker, who later turned out to be the appellant. At some point during the journey the appellant asked to alight from the vehicle and, in the process of alighting, the appellant drew a firearm and shot the deceased in the head. Mr Masizane complied with the appellant's instruction that he should alight from the vehicle. On the orders of the appellant, he started to search the deceased. The

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[2] *S v Moosajee* 2000 (1) SACR 615 (SCA).
[3] The legal position has now changed – in *S v Senkhane* 2011 (2) SACR 493 (SCA) this court laid down that leave to appeal should be sought first from the high court against a refusal by it, sitting as a court of appeal, of a condonation application related to the appeal. If that is refused, an accused person will have further recourse to this court by way of petition (paras 38 and 39).

appellant then told him to move aside, whereafter the appellant searched and removed from the deceased's person a wallet and cellular telephone. The motor vehicle had stalled and the appellant ordered Mr Masizane at gunpoint to walk in front of him for about two to three kilometres towards a nearby village. The appellant later heeded Mr Masizane's anguished pleas to be freed and they parted ways.

[5] As stated, the appellant admitted his guilt on the aggravated robbery and unlawful possession of a firearm and ammunition charges. In this regard a written plea explanation was handed in. In respect of the murder charge the appellant averred in the plea explanation that he had accidentally shot the deceased, after the latter had ignored his request to stop the vehicle so that he could alight. He denied having held Mr Masizane captive, alleging instead that Mr Masizane had voluntarily walked with him. The trial judge rightly rejected these allegations, which were repeated in the appellant's oral testimony, as false beyond reasonable doubt. The version that he had accidentally shot the deceased is at variance not only with Mr Masizane's evidence, but also with the appellant's confession before a magistrate (admitted as evidence at the trial by consent) in which the appellant stated that he had shot the deceased because he was 'frightened'.

[6] The respondent did not oppose the condonation application and it can be disposed of in brief terms. The appellant's explanation for the delay in timeously filing the record and heads of argument is simply this: he had immediately furnished his legal representatives with instructions to pursue an appeal against sentence and was (incorrectly) advised that, because his condonation application had been refused, he had an automatic right of appeal to this court. The delay was caused by the procurement and preparation of the trial record and the leave to appeal and condonation proceedings in the high court. As regards the merits of the appeal, he says that there are reasonable prospects of success inasmuch as the sentence imposed by the court below is so 'outrageous' that another court will reduce it.

He also contends that the trial judge overemphasized the gravity of the offences, failed to consider the cumulative effect of the sentences, erred in not finding substantial and compelling circumstances warranting a lesser sentence than the minimum prescribed by law and finally, on the aggravated robbery charge, erred in sentencing him as if he was a third and not a first offender in respect of such an offence.

[7] It can be accepted for present purposes that the delay in filing the record and heads of argument within the prescribed time limits is due to the incorrect advice furnished to the appellant. Since there were clearly reasonable prospects of success in the appeal against the sentence on count 2 (robbery with aggravating circumstances), we granted the condonation application and also the application for leave to appeal at the hearing and proceeded to hear the appeal on the merits. The sentence of 25 years' imprisonment on count 2 was imposed purportedly by virtue of the provisions contained in s 51(2)(*a*)(iii), read with Part II of Schedule 2 of the Minimum Sentence Act, ie as if the appellant was a third offender for robbery with aggravating circumstances. That he plainly was not, as will presently appear. This material misdirection alone constitutes reasonable prospects of success.

[8] I turn to the merits of the appeal against sentence. It will be recalled that the appellant is appealing against the sentence imposed on counts 1, 2 and 3 only. On the murder charge, the minimum sentence provisions were not mentioned in the indictment, nor had the appellant's attention been drawn to them during the trial. The trial judge canvassed this aspect with the appellant's counsel for the first time during argument in mitigation of sentence. Counsel were agreed that, on the facts of this case, this constituted a material misdirection. The sentence on the murder charge must therefore be set aside and considered afresh and outside of the minimum sentencing regime. The reprehensibility of the murder is unquestionable. The appellant was given a lift by the deceased for no consideration, since the appellant did not have three rand which the deceased asked him to pay for the lift. This act of benevolence

was met with a callous execution. The postmortem report indicates that the deceased was shot at almost point blank range in the back of his head. The trial judge cannot be faulted in his finding that the motive for this shocking act appears to be robbery. This finding is supported by Mr Masizane's evidence that the appellant told him that he had shot the deceased as a means to create a better life for himself. The deceased was a well-known traffic officer in that area with five children, at least three of whom were his dependants.

[9] In respect of the robbery with aggravating circumstances, as stated, Hendricks J purportedly imposed sentence in terms of s 51(2)(*a*)(iii), read with Part II of Schedule 2 of the Minimum Sentence Act. In terms of those provisions a third offender for robbery with aggravating circumstances must, in the absence of substantial and compelling circumstances, be sentenced to a minimum of 25 years' imprisonment. There are two material misdirections in the imposition of this sentence. First, counsel again agreed that, on the facts of this case, the failure to alert the appellant to the minimum sentencing provisions, either in the indictment, or at the plea stage or during the trial constituted a material misdirection. The second misdirection is that the appellant had not previously been convicted of robbery with aggravating circumstances. His two previous convictions were for theft and for housebreaking with the intent to steal and theft. The trial judge erred in concurring with the prosecutor's submission that the minimum sentence of 25 years' imprisonment applied in view of the fact that the appellant was a third offender in respect of aggravated robbery. The appellant was in fact a first offender in respect of that particular offence. This court has held that a previous conviction of robbery with aggravating circumstances (and not merely for robbery) is a jurisdictional requirement necessary to trigger the provisions in s 51(2)(*a*)(ii) and (iii).[4] As in the case of the sentence for murder, the sentence on aggravated robbery must therefore be set aside and considered *de novo*, outside the parameters of the Minimum Sentence Act.

[4] *S v Mokela* 2012 (1) SACR 431 (SCA) para 6.

[10] In respect of the sentence for kidnapping, the position is different. The provisions of the Minimum Sentence Act did not apply to this conviction. The test on appeal is well known, namely whether there has been a material misdirection or whether the sentence is shockingly inappropriate. On behalf of the appellant it was submitted that the latter is indeed the case, since the appellant did not injure Mr Masizane and freed him after heeding his frantic pleas.

[11] By virtue of the material misdirections outlined above, this court is at large to exercise its sentencing discretion in respect of counts 1 and 2 and it is convenient to deal with these two counts together. The aggravating circumstances have already been outlined as far as the murder charge is concerned. In respect of the robbery, it is aggravating (over and above the fact of course that a firearm had been used) that the appellant had instructed Mr Masizane to search the deceased while the latter must have been dying. When Mr Masizane reluctantly started to do so, the appellant told him to move aside and continued the search himself. This is further indication of his callousness. There can be no question that the appellant is deserving of severe punishment on counts 1 and 2. There is a distinct absence of remorse on the appellant's part, notwithstanding his plea of guilty on some of the offences. His lack of contrition is manifested by his untruthful plea explanation and testimony in respect of the murder – both directly at odds with his confession before the magistrate. I am of the view that the appellant should be afforded the benefit of remorse as mitigating factor only to a very limited extent on the aggravated robbery charge, to which he had pleaded guilty. Genuine remorse in respect of this and the other charges would have entailed the appellant taking the trial court into his confidence so that it could have 'a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked [his] change of heart and whether [he] does indeed have a true appreciation of the consequences of those actions'.[5]

[5] Per Ponnan JA in *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13.

[12] In respect of the kidnapping, an aggravating circumstance is that Mr Masizane had been marched at gunpoint at night over a distance of some two to three kilometres for nearly two hours. It must have been a terrifying experience, particularly since Mr Masizane had just witnessed the deceased being shot in the most callous fashion and he no doubt feared that a similar fate would befall him. The appellant only relented, some two hours later, after Mr Masizane pleaded for mercy and alluded to the fact that he was the father of small children.

[13] The appellant's personal circumstances are unremarkable and are comprehensively outweighed by the numerous aggravating circumstances and by the gravity of the offences. The appellant was 27 years old at the time of sentencing, single with two children aged six and two respectively, self-employed as a welder who earned five hundred Rand on 'a good day' and a tuberculosis sufferer. He has had two previous brushes with the law, as set out above. There are no striking mitigating features save, to a limited extent, his plea of guilty on the aggravated robbery charge.

[14] Having given the matter careful consideration, I am of the view that a sentence of 30 years' imprisonment would be appropriate on the murder charge. Such a sentence would give recognition to the justifiable abhorrence evoked by the callousness of the deed, while at the same time blending the sentence with an element of mercy and affording the appellant a chance at rehabilitation. On the robbery with aggravating circumstances, a sentence of 12 years' imprisonment would similarly meet the sentencing objectives in my view. The sentence of 7 years' imprisonment on the kidnapping charge is severe indeed, but not shockingly excessive. The appellant's conduct, outlined above, deserved severe punishment. There are no grounds warranting interference with the sentence on appeal. In order, however, to ameliorate the cumulative effect of the sentence on the various counts, I intend ordering that the sentence on count 2 run concurrently with the

sentence on count 1 and that the sentence on counts 4 and 5 run concurrently with that on count 3.

[15] The following order is made:

1. Condonation is granted for the late filing of the record and the appellant's heads of argument.
2. The appellant is granted leave to appeal to this court on the sentences imposed on counts 1, 2 and 3.
3. The appeal is upheld in respect of the sentences imposed on counts 1 and 2.
4. The sentences on counts 1 and 2 are set aside and substituted with the following:
    a. Count 1: 30 years' imprisonment.
    b. Count 2: 12 years' imprisonment.
5. The appeal against the sentence imposed on count 3 is dismissed.
6. The sentence on count 2 is ordered to run concurrently with the sentence on count 1. The sentences on counts 4 and 5 are ordered to run concurrently with the sentence on count 3. The effective sentence is therefore 37 years' imprisonment.
7. The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 26 April 2005.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for appellants	:	ADV. N L SKIBI
Instructed by	:	Legal Aid South Africa, Mafikeng Justice Centre Bloemfontein Justice Centre
Counsel for respondents	:	G S MAEMA
Instructed by	:	The office of the Director of Public Prosecutions Division of the North West High Court Mafikeng