IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: A198/2021
COURT *A QUO* CASE NO:8510/2020

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

7 February 2022
DATE

[redacted]
SIGNATURE

In the matter between:

STEWART LUMKA Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION, PRETORIA Respondent

JUDGMENT

Coram NOKO AJ (BAQWA, VAN DER WESTHUIZEN JJ concurring)

Introduction

[1] This is an appeal against the order and judgment of the Gauteng Division of the High Court, (Millar AJ). The court a quo dismissed the application for the permanent stay of the prosecution on 21 February 2020. This appeal is with the leave of the Supreme Court of Appeal which was granted on 20 December 2020.

Background

[2] The appellant and Elsie Lumka *(complainant)* were married to each other in community of property which marriage was dissolved by divorce on 16 February 2011. Both parties were residing at Crystal Park, Benoni (*property*) at time of the divorce. Prior to the divorce and specifically on 31 March 2008 the complainant and her security guard, Phillip Lima (*Mr Lima*) were accosted on the driveway of the parties' property where they were both shot. Mr Lima succumbed to the fatal shot and the complainant sustained serious gunshot wounds.

[3] The appellant was served with an indictment on 15 June 2018 to appear on 1 August 2018 on a charge of murder, attempted murder, conspiracy to murder and defeating the ends of justice. In view of the delay to prosecute, being the period between 2008 and 2018, the appellant brought an application for a permanent stay of the prosecution.

Before court a quo

[4] It was alleged on behalf of the state that Mr Lima, after the shooting, crawled towards the road where he waived down the vehicles passing by. A certain Mr J Van Wyk stopped and approached Mr Lima who allegedly informed him that he and the

complainant were shot by the appellant. This communication preceded Mr Lima's passing shortly thereafter.

[5] The appellant on the other hand, contended that he had an alibi as he was in Zeerust on the day of the shooting and has in his possession the slips reflecting passing through the Swartruggens toll gate at 19:18 on that day. He further had other slips confirming purchases he made at Spar the same day. He further stated that on his return from Swartruggens, he saw police lights at the main gate of his home, but did not approach to inquire what the problem was. He simply proceeded to the cottage occupied by his son, Mzandile Lumka, which was situated approximately 80 metres from the main house.

[6] The appellant left for East London on the following day. He was alerted through telephone calls that there was a shooting at the parties' property the previous day and that he was a fugitive from justice. He immediately returned to Johannesburg and proceeded to consult with his attorneys, who then scheduled a meeting with the investigating officer. At that meeting he pledged his cooperation with the investigation and further conveyed his dissatisfaction that he was identified in the media as a fugitive from justice. The appellant's attorneys confirmed the consultation with the investigating officer and the said confirmation letter was attached to the appellant's founding papers in the court *a quo*.

[7] The appellant appeared in court, and after a number of postponements, submitted on 3 December 2018 slips as proof of purchases which were made in Swartruggens to the investigating officer. The slips were submitted with an intention to support his defence of an *alibi*. He further requested the investigating officer to investigate his

defence. The investigating officer reverted that it was not the state's responsibility to investigate his defence.

[8] The appellant subsequently brought an application for the permanent stay of prosecution. That application was predicated on the contention that in view of effluxion of time, the appellant has suffered trial-related prejudice, as some evidence to corroborate his defence, was lost. In this regard, the appellant referred to video footage of him passing through Swartruggens tollgate and him doing shopping at the Spar in Swartruggens. Furthermore, that the state has failed to provide a reasonable and acceptable explanation for the delay to prosecute.

[9] The state opposed the application and contended that the delay was not unreasonable. The state's explanation is summarised as follows: The respondent explained that the investigation took place during the period between 2008 and 2011, after which the docket was delivered to the respondent; The docket became lost after being delivered to the NDPP and had to be reconstructed; The complainant suffered a temporary loss of memory; An inquest was also held. All these factors led to the delay in commencing with the prosecution. Furthermore, the submission by the appellant that evidence was lost cannot be substantiated. There is no indication that there was any video recording at both the tollgate and the Spar shop in Swartruggens. Therefore, the contention is subject to supposition and conjecture. During all the mentioned times, the appellant was not indicted, and therefore there was no basis to contend that he suffered any trial-related prejudice.

[10] The court *a quo* considered factors[1] alluded to in *Rodrigues v NDPP and Others*

[1] The length of the delay, reason advanced for the delay, the accused's assertion of a right to a speedy trial, prejudice of the accused and public policy considerations. See Vol 2, p130.

2019 (2) SACR 251 (GJ) and came to the conclusion that though the delay was lengthy, other factors militated against the permanent stay of prosecution. The application was therefore dismissed.

On appeal

[11] The grounds for the appeal were detailed in the notice of appeal lodged with this court. The appellant's complaint is that the court *a quo* did not properly apply its mind to all the contentions raised by the appellant, and therefore failed to conclude that the delay of a period of 10 years was lengthy and unreasonable. In view of the inordinate delay, the appellant will suffer trial-related prejudice as the video footage at the filing station, Spar receipts, tollgate tax invoices, cell phone spider map of the appellant's movements were lost and these would have corroborated his defence of an alibi. The nature of the offences, whilst they are serious, should be considered against the state's weak evidence that is presented on the documents before the court. The court *a quo* should further have concluded that the delay infringed upon his right to a speedy trial as contemplated in section 35(3)(d). The court, so the argument went, also erred in placing more weight on the interests of the family and underplayed the appellant's right to a speedy trial.

[12] The appellant further contended that the respondent has failed to give a coherent account on why there was a delay in deciding to prosecute. The period of three years, between 2008 and 2011, was not accounted for, whereas the period between 2012 and 2018 was accorded a very scanty explanation which was unreasonable in the circumstances.

[13] The state responded by explaining that before 2011 the docket was still with the investigating team and not yet with the prosecuting team. There were no charges which were proffered against the appellant during that period. In addition, after 2011 the docket went missing and it took a while for the docket to be reconstructed. The affidavit by the complainant's daughter further confirmed that the complainant was unable to remember the events of the day when she was shot.[2] It would therefore have been a self-defeating exercise under those circumstances to summon the complainant to court to testify in instances where her capacity to testify was not satisfactory. Further, an inquest was held and all those circumstances provided a basis for contending that there was a reasonable explanation for the delay. The state submitted that all those factors should displace the possible conclusion that the appellant has put up a persuasive case warranting an order for a permanent stay of prosecution.

[14] The respondent further contended that the grounds upon which the appellant's submissions were centered are not relevant for the purpose of adjudicating upon the application to stay the prosecution. The appellant's analyses of the evidence in possession of the respondent to indicate that the case levelled against him, has no merit. Furthermore, the appeal court is the wrong forum to examine that evidence extensively and it is for the trial court to consider. In this regard, the respondent submitted further that there were specific factors which were to be considered in the adjudication of an application for the stay of prosecution. Having regard to the complexity of the matter a period of 10 years should not be considered unreasonable.

The applicable legal principles and analysis.

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[2] The appellant also deposed to an affidavit stating that complainant was put under curatorship subsequent to the shooting. See Vol 1, p , para 26 of the record.

[15] From judgments dealt with below, there are factors which require consideration when the court is called upon to determine an application for a permanent stay of prosecution. The courts emphasized the importance of the rights of an accused that are enshrined in the Constitution, and at the same time emphasising that the court should be slow to prescribe the time limits which should apply for criminal cases to be tried.

[16] The Constitutional Court held in *Wild and Another v Heffert No and Others* 1998 (2) SACR (1) CC (*Wild case*) at para 11, that denying the state an opportunity to prosecute by granting a permanent stay of prosecution is an extra ordinary remedy. It was also emphasised in *Sanderson v AG Eastern Cape* 1998 (1) SACR 227 CC (*Sanderson case*) that whilst it is noted that it is an extra ordinary remedy, the court should exercise a balancing act in considering the following factors, namely, nature of the crime, systematic delay, the effectiveness of the police investigation or prosecution and delays due to congested court rolls. The court further noted that "*[T]he courts will apply their experience of how the lapse of time generally affects the liberty, security and trial related interests that concern us. Of the three forms of prejudice, the trial related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice that s25(3)(a) seeks to diminish.*"[3]

[17] The Supreme Court of Appeal held in *Zanner v DPP, Johannesburg* 2006 (2) SACR 45 SCA (*Zanner case*) that the court should have regard to the trial-related

[3] Sanderson at para 30.

prejudice which includes unavailability of witnesses or fading memories.[4] On the other hand, the court in *Bothma v Els* 2010 (1) SACR 184 CC (*Bothma case*) confirmed that the factors should be weighed on a case-to-case basis with reference to the significance of the offence.

[18] The appellant provided documentary proof in support of the *alibi* defence and which documents were submitted to his attorneys in April 2008. The burden on proof of the defence is on a balance of probabilities. With such evidence being accepted by the trial court, it would follow that the state may be the party to suffer prejudice, rather than the appellant. The argument that there is real evidence somewhere, is speculative and as the authorities[5] have directed, it should not be a basis for the alleged trial-related prejudice.

[19] The court held further in Zanner at para 21, that "*[T]he nature of the crime involved in another relevant factor in the inquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal system, including those close to the accused, as well as those distressed by the horror of the crime. (See S v Jaipal 2005 (4) SA 581 CC para 29.) It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. (See s 18 of the Criminal Procedure Act 51 of 1977). Clearly, in a case involving a serious offence such as the present one, the societal demand*

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[4] *[T]rial-related prejudice refers to prejudice suffered by` an `accused mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his or her trial"* para 12 of Zanner.

[5] See Zanner's case in para 19 below.

to bring the accused trial is that much greater and the Court should be that much slower to grant a permanent stay."

[20] The SCA further stated in *Zanner* at para 16 "*[I]n establishing facts substantiating his claim, vague and conclusionary allegations of prejudice resulting from passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice, and in what specific manner missing witnesses would have aided the defense*". (My emphasis) The appellant cannot substantiate the assertion that there was video recording either at the spar shop or at the tollgate, and therefore bases his allegation on speculation or conjecture.

[21] The court in Bothma at para 46 stated that *"It would be unfortunate, then, if the courts were in effect to usurp the legislative role and impose what amounted to a judicial statute of limitations by staying prosecutions simply because the effluxion of time had seen much evidence vanish."* It therefore follows that the court cannot prescribe the time lines for the prosecution of matters. This should not however be used as a ploy for the respondent to frustrate the realisation of the rights enshrined in the Constitution to a speedy trial.

[22] The court further stated in Bothma[6] that *"in Naidoo v National Director Public Prosecutions the Cape High Court refused to grant a stay, holding that trial-related prejudice is not easy to establish and that it borders on the impossible for this court [court other than the trial court] to determine the impact of the loss of a witness, or the effect of the lapse if time on the reliability of the recall of events by witnesses.... The State faces the same prejudice and the extent of the prejudice can only be properly measured by the*

[6] At para72

trial court hearing all that relevant evidence. The submissions by the appellant in fact demonstrate that the prejudice, if any, may be suffered by the state.

[23] The authorities have emphasised that the seriousness of the crime should also be considered. If the crime is serious the court should be slow to stay the prosecution in contrast to where the crime was less serious.[7] The charges against the appellant relate, inter alia, to loss of life and the dictate of fairness demand that the matter should be thoroughly interrogated in a trial court to finality.

[24] The contention by the respondent that the appeal court cannot be engaged in depth into the veracity of the evidence has merits. This exercise should be left to the trial court. This submission resonates with the judgment by Sachs J in Botma[8] where it was held that "*At this stage we do not know where the truths lies. Indeed, the issue before us is whether she should be stopped from giving her account to enable a criminal court to decide.* The court went further at 84 that "*[I]n my view, the claim of delay-induced unavailability of evidence should have been seen not as establishing irrefutable proof of irremediable trial prejudice, but rather as constituting a significant factor that the trial court will be obliged to take into account when considering the guilt or otherwise …*".

Conclusion

[25] The contentions raised by the appellant related to possible loss of evidence. All is not lost as the appellants still has slips of purchases which could still be used to support

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[7] The court held in *Bothma* at para 7 *And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to repair the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us Molato ga o bole" (Setswana) or "ical' aliboli (IsiZulu) – there are some crimes that do not go away.*

[8] At 78

the defence of an alibi. If such evidence is accepted by the trial court, it could create doubt in the state's case and work to the benefit of the appellant. If anything, the delay may have weakened the state's case.

[26] It is trite that an appeal court can only interfere with the findings of the court *a quo* if the appellant can demonstrate that the court *a quo* misdirected itself having regard to the total conspectus of evidence presented before that court.

[27] The appellant has failed to demonstrate that the trial court has misdirected itself and this court is not persuaded to come to a different conclusion.

[28] I grant the following order:

The appeal is dismissed with costs.

NOKO AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

I AGREE **VAN DER ESTHUIZEN J**

I AGREE AND IT IS ORDERED **SELBY BAQWA**
J

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 7 February 2022.

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