THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No:107/2016

In the matter between:

AMBROSE MONYE **FIRST APPELLANT**
ANDRE GOUWS **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Monye v S* (107/16) ZASCA 111 (02 September 2016)

Coram: Bosielo, Zondi and Van der Merwe JJA and Schoeman and Potterill AJJA

Heard: 18 August 2016
Delivered: 02 September 2016

Summary: Sentence - Appeal against sentence of life imprisonment for murder - appellants the middlemen in contract killing - only co-operated with police and admitted guilt after conviction - no true remorse - no substantial and compelling circumstances to depart from minimum sentence - sentences confirmed on appeal.

ORDER

On appeal from: Gauteng Division, Pretoria (Kruger AJ sitting as court of first instance)

The appeals of both appellants are dismissed and the sentences of life imprisonment of both appellants are confirmed.

JUDGMENT

Schoeman AJA (Bosielo, Zondi and Van der Merwe JJA and Potterill AJA concurring)

[1] The two appellants, Messrs Ambrose Monye and Andre Gouws, were charged with the murder of Ms Chanelle Henning (the deceased) as well as offences related to the possession of unlicensed firearms. The murder was committed on 8 November 2011. Both appellants pleaded not guilty and after a trial they were convicted of murder and acquitted of the other crimes.

[2] During the sentencing proceedings both admitted to their respective roles in the murder of the deceased and conceded their guilt. They were subsequently sentenced to life imprisonment. Their appeal against sentence only is with the leave of the trial court.

The facts

[3] On the morning of 8 November 2011 two men, Messrs Martin Pieterse and Petrus Gerhardus du Plessis, followed the deceased's motor vehicle on a motorcycle from her home to the crèche which her four year old son attended. Pieterse was the driver of the motorcycle while du Plessis was his passenger. Having left her son at the crèche the deceased started to drive off in her motor vehicle; du Plessis approached her and shot her twice at point blank range. Pieterse and du Plessis left the scene on the motorcycle. The deceased died as a result of the wounds inflicted on her.

[4] Five people were arrested for the deceased's murder viz Pieterse, du Plessis, Monye, Gouws and a person who supplied the firearm. The murder charge against the latter was withdrawn. The other four were charged with the murder of the deceased. Pieterse and du Plessis entered into plea and sentence agreements with the state in terms of the provisions of section 105A of the Criminal Procedure Act 51 of 1977. They were each sentenced to undergo 18 years' imprisonment in terms of the plea bargain. Both Pieterse and du Plessis testified in the trial against the appellants.

[5] After the appellants' change of stance during the sentencing proceedings, it became common cause that Gouws instructed Monye to find someone to kill the deceased. Monye arranged with Pieterse and du Plessis to execute the contract killing. Gouws thereafter pointed out to Pieterse and du Plessis (a) the deceased's security complex; (b) the deceased's son's crèche; and (c) the school where the deceased worked. Gouws provided the registration number of the deceased's motor vehicle to them and warned them not to shoot the deceased while her son was

with her in the motor vehicle. It is clear from the post-conviction statements of Gouws and Monye that both Monye and Gouws worked as middlemen to have the deceased killed and the roles of both were pivotal in the eventual death of the deceased.

[6] This was clearly a premeditated murder. In terms of the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (s 51(1)*(a)* read with Part I of Schedule 2) the trial court was obliged to impose life imprisonment unless there were 'substantial and compelling circumstances' present, in which event, in terms of s 51(3)*(a)*, a lesser sentence could be imposed. Furthermore if:

'[T]he sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'[1]

[7] In *Malgas* it was set out that the circumstances expressed by the phrase 'substantial and compelling' need not be exceptional but must provide 'truly convincing reasons'[2] or 'weighty justification'[3] for deviating from the prescribed sentence and imposing less than life imprisonment. Furthermore, the specified sentences should not be departed from for flimsy reasons[4] and should ordinarily be imposed.

[8] Therefore, to determine whether there are substantial and compelling circumstances it is necessary to analyse the facts with reference to the criminals, the crime and the interests of society.

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[1] *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) para 25.
[2] Paras 8 and 25.
[3] Paras 18 and 25.
[4] Para 25(D).

The first appellant's circumstances

[9] The personal circumstances of Monye were the following at the time of passing of sentence. He was 39 years old and had two unrelated previous convictions, which were not taken into consideration when sentencing him. Monye matriculated in Nigeria. He was an accomplished sportsman who represented Nigeria at the World Athletics Championships in 1993. His parents and siblings still reside in Nigeria. He came to South Africa in 2001 and has a son who was nine years old when sentence was passed. Monye owned a security company and earned an income of between R40 000 and R50 000 per month.

[10] Monye's personal circumstances were presented to the court from the bar, during sentencing proceedings, after which Gouws testified in mitigation and exposed Monye's role in the death of the deceased. Only after an adjournment did Monye change his version and admitted his complicity in the death of the deceased. In a written affidavit by Monye, which his counsel handed in on his behalf, it transpired that Gouws informed him that he would be paid an amount of R50 000 immediately after the 'job is done' and further amounts later on. Monye's affidavit concluded with the following:

'Today, as I look back, I am ashamed of what I did, having been part of all this, I regret it and am sorry. In the rough world where I was working, I lost sight of reality'.

The second appellant's circumstances

[11] At the time of sentencing Gouws was a 49 year old first offender. He matriculated and was a member of the South African Police Services for a period of five years. Thereafter, he inter alia worked as an insurance broker and in transport. He also worked in the United States of America for some time and returned to South Africa in 2007. Since his return he

had worked as a debt collector and also owned a guesthouse. He has a son who was 10 years old at the time of sentencing.

[12] From Gouws' affidavit that was handed in, and his testimony, it transpired that according to Gouws, Mr Nico Henning, the husband of the deceased, and the deceased were embroiled in an acrimonious divorce. Initially Henning asked Gouws, his friend of 24 years, to follow the deceased and see what information he could gather that would reflect badly on the deceased as Henning feared that he would not be granted custody of their son. Later, he asked Gouws to plant drugs on the deceased and have her arrested. These plans did not materialise. In the end Henning promised to pay Gouws R1 million to have the deceased killed and asked Gouws whether he would be prepared to shoot the deceased. Gouws was unwilling to do it himself, but unbeknown to Henning, he instructed Monye to get somebody to do the killing. In turn, Monye contracted with Pieterse and du Plessis. Thereafter Gouws pointed out the deceased's security complex to du Plessis and Pieterse.

[13] The main contention regarding the personal circumstances of the appellants advanced in their heads of argument, although not persisted with in argument, is that they have shown remorse for their actions and through owning up to their complicity have started the process of rehabilitation. Due to the argument that the volte-face of the appellants amounted to a substantial and compelling factor in respect of the interests of the community, I am of the view that their complete change of direction should be examined in all its facets.

[14] Whether the accused has true remorse is a question of fact.[5] In *S v Matyityi*[6] the following was said:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.' (footnotes omitted)

[15] The only expression of remorse by Monye is the statement he made in the affidavit referred to above. It is necessary to set out how and when his remorse was first mentioned. This only came after a trial where he pleaded not guilty and testified under oath. According to his testimony in the trial prior to his conviction his interaction with Pieterse and du Plessis was mainly to supply them with drugs and their employment by him as bouncers. When he was in their presence and with Gouws, the latter three would converse in Afrikaans and he did not understand what was being discussed. Although they were in each other's company on the day of the deceased's murder, he was not told that Pieterse and du Plessis were involved in the killing. Monye attempted to exonerate himself and to justify his actions while placing as much space between him and the murder as possible. After his conviction and before sentence his counsel intimated to the trial judge that he was going to appeal his conviction.

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[5] *S v Volkwyn* [1994] ZASCA 175; 1995 (1) SACR 286 (A) at 289*h.*
[6] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 13.

[16] I am of the view that the surrounding actions of Monye point to the fact that he has shown no real remorse: he failed to reveal his complicity to the police in the whole year before the trial commenced; and during the trial, for a further period of a year, he persisted with his denial of any involvement. After the sentencing proceedings had commenced he placed his personal circumstances on record from the bar. It was only after Gouws subsequently revealed the extent of Monye's role in the commission of the crime, that the latter changed his version. Even after that he failed to testify under oath and subject himself to cross-examination to enable the State to test whether he has shown true remorse. This failure must be seen in light of the fact that his role was not peripheral to but essential and central to the tragic end result. Through his planning and intervention the shooter was brought into the conspiracy. The ineluctable inference is that Gouws' damning evidence was the motivation for his change of heart

[17] Gouws agreed to change his version after he came to an agreement with the State that he would reveal the whole plot, on condition that the State would ask for 20 years' imprisonment. He displayed no remorse in the affidavit he presented to court, while his testimony during sentencing was also devoid of any mention of remorse. His change of heart did not constitute remorse if the surrounding facts are taken into consideration. As with Monye, he did not demonstrate any remorse for the duration of the period prior to the commencement of the trial and for the year of the trial. In his testimony prior to conviction he emphatically denied instructing anybody to kill the deceased. It was only after conviction that he capitulated.

The crime

[18] The deceased was an innocent young woman who was killed because she allegedly insisted on the custody of her son in divorce proceedings. Due to her death her child is without a mother and her parents have also lost a daughter. The murder by the two appellants in this instance was a callous and cruel deed, committed purely for greed. Monye agreed to become involved when he was promised an amount of R50 000 while Gouws was swayed by his friendship with Henning and the promise of an amount of R1 million. The trial court found that without the monetary carrot it was unlikely that Gouws would have agreed to the killing of the deceased.

[19] Due to the nature of the crime of assassination, or contract killing, the objectives of deterrence and retribution emerge in the forefront of the process in imposing punishment for such crimes.

Interests of society

[20] In *S v Karg*[7] Schreiner JA emphasised the interest of the community when he said:

'It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.'

[21] The community interests are of paramount importance when sentencing hired killers. Our Courts have in a whole series of judgments

[7] *S v Karg* 1961(1) SA 231 (A) at 236B-C.

sentenced contract killers and persons who acted in concert with them severely. In *S v Mlumbi en 'n Ander*[8] it was stated that it is uncertain which is the worse, a contracted killer who kills someone else for money as he does it for greed or the contracted killer who kills another without payment as he is clearly without a conscience. I quote from the headnote where the following translation from the judgment is found:

'[A] contract assassination was a heinous offence which has from early times filled people with horror. It was also the kind of offence which held deadly danger for any community and was in fact the kind of atrocity which gave a particularly sombre meaning to the age-old expression '*homo homini lupus*' [a man is a wolf to another man] . . . [T]he present South African society was seriously threatened by such conduct, and dared not tolerate it.'

In *S v Dlomo*[9] Goldstone JA said that offenders must be made aware that, except in exceptional cases, the courts will impose severe sentences on them.

[22] In *S v Kgafela* [10] Friedman JP said (paras 83 and 84) that:

'Assassination contracts contain profound dangers and are a type of atrocity to be combatted, and the Courts have a duty in the discharge of its function to visit such perpetrators with the severest punishment. . .

In consequence of the aforegoing, the hiring of assassins has been treated as a serious aggravating factor.'

In *S v Ferreira and Others*[11] the court said when confirming the imposition of life sentence:

'Having regard to the nature of the crime they committed - killing for money - and the limited extent of the mitigating factors referred to, the condemnation expressed in previous cases of contract killing applies unrestrictedly to them. There are, on the

[8] *S v Mlumbi en 'n Ander* [1990] ZASCA 153; 1991 (1) SACR 235 (A).
[9] *S v Dlomo & others* [1991] ZASCA 94; 1991 (2) SACR 473 (A) at 477h to 478b.
[10] *S v Kgafela* 2001 (2) SACR 207 (B).
[11] *S v Ferreira and Others* [2004] ZASCA 29; 2004 (2) SACR 454 (SCA) para 53.

Malgas test, no substantial and compelling circumstances which justify a lesser sentence in their cases.'

There, the hired killers were 22 and 20 years old respectively and they pleaded guilty.

[23] It was argued that the fact that the appellants were willing to testify against the alleged instigator of the murder was in itself a substantial and compelling circumstance and therefore the prescribed sentence of life imprisonment was unjust in the circumstances of this case. However, Pieterse and du Plessis demonstrated when and how co-operation with the relevant authorities should have taken place to derive the benefit from such co-operation. The actions of the appellants smack of opportunism. It was only when the writing was on the wall for both of them that they made an about-turn. It was not to benefit society or to enable the deceased's family to have closure and not relive their trauma, but to benefit themselves.

[24] I am of the view that it would not be in the interests of society that the appellants be allowed to use such a volte-face as an escape route to avoid a sentence peremptorily prescribed by the Legislature. That would send out a wrong message and ignore the elements of deterrence and retribution that are so important in cases of this kind. I am not satisfied that in the circumstances of this case their about-turn is so weighty as to qualify as a substantial and compelling circumstance and to justify a sentence less than imprisonment for life.

[25] The trial judge did not misdirect himself. Therefore there are no reasons to interfere with the imposed sentence.

The appeals of both appellants are dismissed and the sentences of life imprisonment of both appellants are confirmed.

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I Schoeman

Acting Judge of Appeal

APPEARANCES

For Appellants:	J van Wyk (Heads of argument prepared by D H Mostert) Instructed by: Pretoria Justice Centre Bloemfontein Justice Centre, Bloemfontein
For Respondent:	G C Nel (and A Rossouw) (Heads of argument prepared by G C Nel) Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein