

SOUTH AFRICA / JUDGMENT

Brown v S (CA & R 2/21) [2022] ZANCHC 15; 2022 (2) SACR 194 (NCK) (18 March 2022) [2022] ZANCHC 15

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Eillert

CASE / FILE NUMBER

CA & R 2/21

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IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division, Kimberley)

CASE NO: CA & R 2/21

DATE HEARD: 08/03/2021

DATE DELIVERED: 18/03/2022

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

BENNIE NEVILLE BROWN

Appellant

and

THE STATE

Respondent

Coram: MAMOSEBO, J et EILLERT AJ

CRIMINAL APPEAL JUDGMENT

Eillert AJ:

INTRODUCTION

1. The Appellant was charged in the Regional Court for the district of Postmasburg, held at Postmasburg with one count of attempted murder and one count of discharge of a firearm in a built-up area or public place in contravention of the provisions of the Firearms Control Act[1]. He was convicted in the court a quo on both counts and sentenced on 16 September 2019 to direct imprisonment of six years, the court a quo taking both counts together for purposes of sentence.
2. The court a quo refused the Appellant leave to appeal the convictions and the sentence. Leave to appeal was granted on petition to the Judge-President of this Division on sentence only.

THE GROUNDS OF APPEAL

3. The Appellant attacked the sentence imposed by the court a quo on five grounds, which can be summarised into three, in that the trial court had erred:
 - a) in under emphasizing the personal circumstances of the Appellant and overemphasizing the seriousness of the offences thereby imposing a sentence that induces a sense of shock and that can be described as disturbingly inappropriate;
 - b) In finding that the appellant did not show remorse by smiling throughout the proceedings; and
 - c) in imposing a sentence on the second count that exceeds the maximum penalty prescribed in section 121 read with Schedule 4 of the Firearms Control Act.
4. What stands for determination by this court are two issues:
 - 4.1 whether the 6-year sentence imposed for both the offences of attempted murder and discharging of a firearm in a built-up area or public place induces a sense of shock or is disturbingly inappropriate.
 - 4.2 whether the court ought to have considered imposing the sentence in the firearm conviction separate from the attempted murder count instead of imposing a globular sentence.
5. In *Mthembu v The State* (525/2019) [2019] ZASCA 160 (28 November 2019) at para 13, Dlodlo JA, writing for the unanimous court, considering the submission that the sentences were inappropriate, remarked:

“[13] ... But the trite principle of our law is that sentence is the prerogative of the trial court. This court, in S v Snyders reaffirmed the principles that a court of appeal will not interfere with a sentence imposed by a trial court, unless it is of such a nature that no reasonable court ought to have imposed it, or it is out of proportion to the gravity or magnitude of the offence, or it induces a sense of shock or outrage, or it is grossly excessive or inadequate, or there was an improper exercise of its discretion by the trial

court, or the interests of justice requires it. The mere fact that a court of appeal would have imposed a lighter sentence if the punishment were within its discretion, is not in itself sufficient reason for it to intervene.”

WHETHER THE COURT A QUO MISDIRECTED ITSELF IN EXERCISING ITS SENTENCE DISCRETION

6. A major thrust in the submissions made by Mr Nel on behalf of the Appellant was the suggested extent to which the court a quo in its judgment on sentence elaborated on some of the factors influencing its sentence, compared to the brevity with which the

court a quo dealt with other relevant factors. However, as we know, the extent to which a court in its reasons for judgment spends on the evaluation of a factor influencing its judgment, or the fact that a court is silent on a certain aspect in its reasons, does not per se mean that one factor weighed more heavily with the court than another, or that a factor was overlooked, and that therefore the court a quo misdirected itself. In this regard this court encapsulates the ground by the appellant that the trial court did not consider the complainant's attitude that he forgave him.

7. As stated in *S v Pillay* 1977 (4) SA 531 (AD)[2], it is for the trial court, in its sentence discretion, to assess the value to be attached to each factor to be taken into account and further, that no judgment can ever be perfect and all embracing[3]. But, as was also pointed out in *Pillay*, when it appears to a court of appeal that a trial court ought to have paid regard to certain factors and that it failed to do so, or that it ought to have assessed the value of the factors differently from what it did, to such an extent that the nature, degree or seriousness thereof shows, directly or inferentially, that the trial court did not exercise its sentence discretion at all or exercised it improperly or unreasonably; it would constitute a misdirection entitling the court of appeal to interfere with the sentence.
8. It is regrettable that one factor which the court a quo had regard to was the court's observations of the demeanour of the Appellant, and that the court a quo concluded from the smile of the Appellant that he displayed arrogance and a lack of remorse, without the accused ever being questioned

about it. This is precisely what the Supreme Court of Appeal warned against in *S v Makhudu* 2003 (1) SACR 500 (SCA)[4] when it said that a court should be slow to jump to conclusions regarding an accused's character and reaction to punishment

when such conclusions are based solely upon the accused's demeanour and behaviour in court.

9. Even so, and having thoroughly considered the record, judgment and reasons of the court a quo, I cannot find that in weighing the factors that the court a quo took into account, the court a quo exercised its sentence discretion improperly or unreasonably or misdirected itself in this respect.

WHETHER THE SENTENCE OF THE COURT A QUO WAS A COMPETENT SENTENCE

10. The ground of appeal that is tabulated in paragraph 3(c) above is a different matter. Ms Jansen, on behalf of the State, concurred with the Appellant that the court a quo should not have taken the different counts together for sentencing purposes and that six years imprisonment on the second count is not a competent sentence, since it exceeds the maximum sentence prescribed by the Firearms Control Act, namely 5 years imprisonment.
11. In terms of section 121 of the Firearms Control Act, read with Schedule 4 of such Act[5], the Appellant's sentence on the second count could not exceed that of a fine or imprisonment for a period of more than five years. In *S v Leigh* 1972 (4) SA 262 (CPD) Corbett J (as he then was) stated at 262 H – 263 B that “when a court imposes such a globular sentence it is in effect decreeing that the single sentence imposed is to be regarded as the punishment for each of the singular offences of which the accused is convicted. If that be so, then it would seem to follow that it is not competent to impose such a sentence where the severity thereof is such that it exceeds the jurisdiction of the court in respect of one or more of the counts which have been taken together for purposes of sentence.”
12. Wessels AJ in the judgment of this division in *S v Hayman* 1988 (1) SA 831 (NK) at 832 J found that “alhoewel ’n landdros of Regter klagtes kan saam neem vir doeleindes van vonnis, is hy nie bevoeg om n vonnis wat ten opsigte van misdaad geoorloof is en ten opsigte van ’n ander misdaad ongeoorloof is, op te lê ten opsigte van die twee tesame nie.” The learned Justice, citing the Appellate Court decision of *S v Ntuli* 1975 (1) SA 429 (A), concluded that the sentence of the court a quo in Hayman was a nullity.[6]
13. In *Trencon Construction v Industrial Development Corporation*[7] Khampepe J stated as follows:

“[83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellant court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.”

“[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised –

... 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles’”
14. In casu, whilst the sentence of the court a quo was a competent sentence in respect of the first count, it was not in respect of the second count. In imposing the sentence in the manner that it did, the court a quo misdirected itself to such a degree that it vitiated its decision on sentence. On this ground, the sentence of the court a quo should be set aside.

APPROPRIATE SENTENCE

15. It therefore falls on this Court to impose an appropriate sentence. The facts at trial, in summary, were these. On the evening of 23 January 2016 a brawl occurred outside a certain Laru's Tavern in Postdene, Postmasburg. The Appellant, who at the time was a constable with the Ekurhuleni Metro Police Department, had attended a funeral in the area and drove to Laru's Tavern to drop off members of his family and friends. The fight started between Ms Pakisa Omar Musa, also known as Kabouter, who was one of the persons dropped off by the Appellant, and Marco Jakob Louw, the complainant.

After the Appellant involved himself in the fight, the complainant hit him five times with a glass bottle on the back of his head. A person by the name of Beau intervened and stopped the fight, upon which the Appellant and his companions left the scene in the

Appellant's vehicle.

16. The complainant and his companions were walking away from Laru's Tavern when the Appellant returned and found them. The Appellant alighted from his vehicle and asked where the guy was who had hurt him so badly. He then took out a 9mm Parabellum pistol and proceeded to cock it. As a result, the complainant and his companions fled,

whereupon the Appellant fired a number of rounds at the complainant. It was the evidence of the complainant that he had heard eight shots being fired, but this is doubtful in light of the evidence of the police officer that, in total, five spent cartridges, and four live cartridges, were found at the scene.

17. The Appellant fired the firearm in the neighbourhood of Postdene and therefore within a built-up area. One of the rounds fired hit the complainant in his lower leg and the complainant fell. The Appellant thereupon went to the complainant and remarked that he was not dead yet. He lifted the complainant up and fired another round past the complainant's head. He also started hitting the complainant with the firearm, inflicting injuries on one of his eyes or eyebrows, his chin, the back of his head, and breaking his arm. As a result, the complainant bled profusely and lost consciousness. After the assault, the Appellant drove away from the scene, all the way to his home in Sharon Park, Johannesburg. According to the Appellant, he reported the incident at the Dunnottar Police Station.
18. Following the assault, the complainant was first taken to hospital in Postmasburg, and soon thereafter transferred to the Kimberley Hospital. The complainant's evidence, that was unchallenged, was that he suffered from a brain haemorrhage, injuries to an eye, his chin, his lower neck. A bullet was removed from his lower leg and a pin was inserted therein. The incident resulted in complainant being hospitalised for a week and has left the complainant permanently disabled, causing him to mobilize with a crutch.

19. It is clear from the account given above that the attempted murder on the complainant was severe with a high degree of harmfulness. As to the second count, the risk of harmfulness of firing four rounds, and potentially another five rounds, of ammunition in a residential area, is also very high. It is fortunate that no other persons were injured

during the unfolding of the events. The appellant was clearly on a frolic of his own and very far removed from his usual duties and obligations as a law enforcement officer.

20. The favourable personal circumstances of the Appellant must be balanced against the gravity of the offences. These circumstances have been well documented in the judgment of the court a quo and it is not necessary to repeat them here.
21. It bears specific mention that Mr Nel argued that the fact that the Appellant supposedly acted under provocation should be regarded as a mitigating factor. Whilst a reasonable person in the position of the

Appellant would arguably also have lost his temper after being assaulted by the complainant in the manner that he was, the distinction in casu is that there was a break in the sequence of events, during which the Appellant had time to come to his senses. It cannot therefore be found that the retaliation by the Appellant was reasonable in the circumstances and that the Appellant should be regarded as morally less blameworthy in acting in the manner that he did.

22. The aggravating factors that count against the Appellant is that one would not have expected the Appellant to act in the manner that he did, given his age of being in his forties, as against the youthful age of the complainant, being in his twenties, the fact that the Appellant was an experienced and trained metro police constable; that

the Appellant had time to come to his senses after the brawl, yet chose to still engage the complainant thereafter; and that on the Appellant's version he is a responsible citizen, involved family man as well as involved with his church.

23. The factors mentioned in paragraph 22 above cause serious concern when considering a sentence that will serve the interest of society.
24. Having considered all the submissions made by counsel for both parties, the authorities to which the court was referred as well as additional comparative case law, this court is of the view that the appropriate sentence in the circumstances is the following: as to the first count of attempted murder, six years imprisonment, and as to the second count of unlawful discharge of a firearm in a built up area or public place, three years imprisonment. The sentences will be ordered to run concurrently.

SECTION 276(1)(i) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

25. Mr Nel requested this court to consider imposing a sentence in terms of section 276 (1)(i) of the Criminal Procedure Act. Because the court intends imposing the sentences set out in paragraph 24 above, which would therefore exceed a period of five years, this court is as a result of the provisions of section 276 A (2) prevented from considering such a sentence option.

ANTEDATING OF THE SENTENCE^[8]

26. In so far as it is necessary, it will be ordered that the sentences be antedated to 16 September 2019.

ORDER

27. In the premises the following order is made:

1. The appeal succeeds to the limited extent set out above;
2. The sentence of the court a quo is set aside;
3. The Appellant is sentenced as follows:

3.1 in respect of count 1, of attempted murder, six years imprisonment;

3.2 In respect of count 2, of discharging of a firearm in a built up area or public place, 3 years imprisonment;

4. The sentences set out above shall run concurrently;
5. The sentences are antedated to 16 September 2019.

EILLERT AJ

ACTING JUDGE

NORTHERN CAPE DIVISION

I concur,

MAMOSEBO J

JUDGE

For the appellant: Adv. I.J. Nel

(oio Lofty-Eaton Attorneys)

For the respondent: Adv. C. Jansen

(oio The DPP)

^[1] Act 60 of 2000. The charge sheet stated the relevant provisions as section 120 (7) read with sections 1, 103, 120 (1) (a), section 121 read with Schedule 4 and section 151.

- [2] At 534 H – 535 G
- [3] Citing *R v Dhlumayo and Others* 1948 (2) SA 677 (AD)
- [4] At [8]
- [5] Section 121 provides: “Any person convicted of a contravention of or a failure to comply with any section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section.” Schedule 4 Penalty for a contravention of s 120(7) is five years.
- [6] Also see *S v Van Zyl* 1974 (1) SA 113 at 114E and SS Terblanche, *Guide to Sentencing in South Africa*, Third Edition, LexisNexis, p 203
- [7] 2015 (5) SA 245
- [8] It was my intention to release this judgment without delay, however, due to circumstances beyond my control, the judgment has taken more time than was anticipated. The delay is regrettable.
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