

SOUTH AFRICA / JUDGMENT

Davids v S (CA64/2019) [2024] ZANWHC 175 (10 July 2024)

[2024] ZANWHC 175

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana, Joubert

CASE / FILE NUMBER

CA64/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: CA64/2019

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In the matter between:-

LUCKY

MOSES DAVIDS

Appellant

And

THE

STATE

Respondent

Coram: Mfenyana J et
Joubert AJ
This judgment was handed
down electronically by circulation to the parties'
representatives via email. The date for hand-down is deemed to
be 10 July 2024.

ORDER

1)

The late filing and prosecution of the appeal is
condoned.

2) The appeal is

upheld in respect of the sentence on count 1 and count 2.

2)

The order of the court a quo is set aside and
replaced with the

following:

'(i)

The accused is sentenced to six years imprisonment in respect of
count 1.

(ii) The accused

is sentenced to six years imprisonment in respect of count 2.

(iii) Three years of the

sentence in count 2 shall run concurrently with the sentence in count
1'.

JUDGMENT

MFENYANA J

[1] The appellant was convicted by the Regional Court, Klerksdorp on two counts of assault with
intent to do grievous bodily harm following

his plea of guilty, in terms of Section 112 of the Criminal Procedure Act (CPA)[1] in respect of both
counts. With regard to count 1, the complainant was 13 years old. The charge against the
appellant was thus read with the provisions of Section 51(2) of the Criminal Law Amendment Act
(CLAA)[2]. He was sentenced to 8 years imprisonment in respect of each count. Four years of the
sentence in count 2 was to run concurrently with the sentence in count 1. Effectively, the
appellant was sentenced to twelve years imprisonment. He brought an application for leave to
appeal only against the sentence imposed. Leave to appeal was granted by the court a quo.

[2] Incorporated in the present appeal is an application for condonation

for the late filing and prosecution of the appeal. After considering the explanation proffered by
the appellant, which was predominantly

due to delays and administrative glitches at the offices of Legal Aid, Mmabatho, we were of the
view that it would be in the interests

of justice that the late filing and prosecution of the appeal be condoned. The matter thus proceeded on the merits of the appeal on sentence.

- [3] The issue that arises from this appeal is whether the court a quo misdirected itself in imposing sentence, particularly in respect of the following:
- a) In its application of a prescribed minimum sentence of 15 years.
 - b) in imposing an effective term of imprisonment of 12 years.
 - c) In failing to order the sentences to run concurrently.
- [4] In his statement in terms of Section 112(2) of the CPA, the appellant states that on the day the offences were committed he met the complainant in count 1, a 13 year old boy while on his way to the tuck shop. He approached the complainant and asked him for his cell phone. When the complainant told him he did not have one, the appellant hit him in the face with a clenched fist and stabbed him on the wrist with a knife. The complainant in count 2 intervened and tried to grab the knife, but he too, was stabbed on the chest by the appellant.
- [5] The appellant contends that the court a quo misdirected itself in respect of the minimum sentence applicable, in failing to order both sentences to run concurrently, and in imposing a sentence which induces a sense of shock in the prevailing circumstances in which the offences were committed.
- [6] In his notice of appeal, the appellant avers that a sentence of six years in respect of each count, alternatively eight years in respect of each count, to run concurrently in terms of Section 280(2) of the CPA should have been imposed. Effectively, the appellant would serve a term of imprisonment of six or eight years, which according to him, would be appropriate in the circumstances.
- [7] In sentencing the appellant, the court a quo held that in respect of count 1, the prescribed minimum sentence is fifteen years. The appellant avers that the court a quo erred in this regard as Section 51(2)(b) prescribes a minimum sentence of ten years for a first offender of such an offence. Flowing from this, Mr Maree argued on behalf of the appellant that this misdirection has a link in the ultimate sentence imposed by the court a quo. Consequently, he embarked on a calculation of what the court a quo would have imposed had it correctly applied the correct prescribed minimum sentence. He argued that having sentenced the appellant to a sentence almost half of what the trial court perceived to be the prescribed minimum, albeit incorrectly, it should follow that an appropriate sentence should be half of the correct prescribed minimum sentence of ten years. In argument, he however submitted that a sentence of six years would have been suitable in respect of count 1.

- [8] In opposing the appeal, Ms van Niekerk contended on behalf of the respondent that this Court may only interfere in as far as the court a quo misinterpreted the prescribed minimum sentence to be 15 years instead of 10 years. She conceded that this amounts to a material misdirection which vitiates the sentence and warrants the interference of this Court.
- [9] Ms van Niekerk however averred that a custodial sentence is still the appropriate sentence to be imposed, if regard is had to the serious nature of the offences committed by the appellant. In the circumstances, she recommended a sentence of eight years imprisonment in respect of each count, which sentences should run concurrently.
- [10] She contended that the point of departure should however be the fact that the sentence imposed by the trial court, is still less than the prescribed minimum sentence of 10 years and should not affect the sentence imposed by the trial court.
- [11] With regard to the concurrency of the sentences, Ms van Niekerk averred that it was within the discretion of the trial court to order the sentences to run concurrently as the offences committed by the appellant pertained to two victims. Consequently, the cumulative sentence of twelve years is not inappropriately shocking, she concluded.
- [12] The primary issue for consideration is whether the court a quo misdirected itself in its sentencing of the appellant.
- [13] It is an established principle that sentencing is pre-eminently within the discretion of the sentencing court. This principle extends to an order whether sentences should run consecutively or concurrently. Section 280(2) is thus not authority for the proposition that sentences should, as a matter of course, run concurrently. To the contrary, the provision states that where several punishments have been imposed, they shall commence after the expiration of the other, unless the court directs that such sentences of imprisonment shall run concurrently.[3] There is thus no merit to the appellant's contention that the entire period of imprisonment should have been ordered to run concurrently.
- [14] It is trite that a court of appeal will not interfere lightly with the trial court's exercise of its discretion.[4] In *E du Toit et al Commentary on the Criminal Procedure Act*[5], the learned authors note that:
- "A court of appeal will not, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court..."*[6]
- [15] Regarding the approach to be followed by a court of appeal, the Constitutional Court affirmed in *S v Bogaards*[7] that a court of appeal can only interfere with the sentence imposed by a trial court,

“...where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have

imposed it.”[8]

[16] In the specific facts of this case, it is common cause that although the appellant had previous convictions, including one for assault with intent to do grievous bodily harm, the appellant’s previous conviction fell within the ambit of Section 51(2)(b)(i) of the CLAA which prescribes a minimum sentence of ten years imprisonment for any person convicted of assault with intent to do grievous bodily harm on a child under the age of 16 if that person is a first offender for that offence. (our emphasis). It is only in the case of a second offender that the CLAA prescribes a minimum sentence of fifteen years.

[17] It is further common cause that the trial court duly considered the personal circumstances of the appellant and concluded that substantial and compelling circumstances existed for it to deviate from the prescribed minimum sentence. The factors considered by the court a quo were inter alia that the appellant had been in custody for over a year, as he was not admitted to bail; that he was under the influence of alcohol at the time he committed the offences; that the injury sustained by the minor complainant was not serious, and that he pleaded guilty to the charges.

[18] It appears however that the court a quo erroneously considered the appellant’s previous convictions to trigger the applicability of Section 51(2)(b)(ii), which prescribes a minimum sentence of fifteen years for a second offender as it held that the appellant was not a first offender. Where it went wrong is in failing to appreciate that the appellant was a first offender for the offence of grievous bodily harm on a child under the age of 16. From a reading of the record, it is clear that the court a quo took into account the appellant’s previous convictions when it remarked:

“The accused was not a first offender, he has a number of convictions.”[9]

...

There is a number of convictions for house, for housebreaking with intent to steal and theft. And also the previous conviction of assault with intent to do grievous bodily harm.”[10] (sic)

[19] The question is whether the misdirection is of such a nature that the sentence is vitiated. In *S v Mpuqe*[11] the Supreme Court of Appeal (SCA) noted that the overriding factor will always be whether there has been unfairness or prejudice.[12] Both counsel are in agreement that the misdirection is a material one. We agree. The prejudice to the appellant lies in the

fact that while the appellant was released on parole on 25 October 2019, his period of parole expires on 25 June 2025.

- [20] Mr Maree submitted that this has a direct effect on the appellant's rights and the conditions of his parole, particularly if the appeal is determined in his favour. We agree.
- [21] While it was contended on behalf of the respondent that because the sentence imposed is still less than the prescribed minimum of ten years, and would not have much effect on the appellant, there can be no doubt that the fair trial rights of the appellant were negatively impacted by the said misdirection. In our view, this warrants interference by this Court. In this regard, the appeal should therefore succeed.
- [22] It is worth a mention that while no misdirection can be found in the order of the court a quo regarding the concurrency of the sentences, in that although the offences committed by the appellant are related in time and place of occurrence, the sentence of eight years imposed in respect of count 2 is excessive in the prevailing circumstances. The court a quo did not provide any reasons for such a finding and dealt with it in conjunction with count 1, where a prescribed minimum is applicable. The reasoning in respect of count 1, as could be gleaned from the record, indicates that the learned regional court magistrate could not have intended this result. It was a direct result of the misapplication of the prescribed minimum sentence and is out of sync with other decided cases in similar circumstances.
- [23] In *S v Lungisa*[13], the Supreme Court of Appeal (SCA) confirmed a sentence of three years for assault with intent to do grievous bodily harm where the appellant hit the complainant with a glass jug full of water as a result of which he sustained serious injuries.
- [24] The words of Trollip JA in *S v Pillay*[14] ring true in the circumstances of the present case. The learned Judge of Appeal noted:

"... the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially..."[15]

- [25] In the result the following order is made:

3) The order of the court a quo is set aside and replaced with the following order:

'(i) The accused is sentenced to six years imprisonment in respect of count 1.

(ii) The accused is sentenced to six years imprisonment in respect of count 2.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTHWEST DIVISION, MAHIKENG

I agree.

DJ JOUBERT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: G V Maree Instructed by: Legal Aid South Africa Mmabatho For the respondent: L van Niekerk Instructed by: Director of Public Prosecutions, Mmabatho Date reserved: 27 November 2023 Date of judgment: 10 July 2024

[1] Act 51 of 1977 as amended.

[2] Act 105 of 1997.

[3] Section 280 provides: Cumulative or concurrent sentences (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose. (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[3] Section 280 provides:

Cumulative or concurrent sentences

(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[4] See in this regard: *S v Hewitt* 2017 (1) SACR 309 (SCA); *S v Livanje* 2020 (2) SACR 451 (SCA).

[5] (Jutastat, RS 66, 2021), ch30-p42A.

[6] See also in this regard: *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Mathekga and another* 2020 (2) SACR 559 (SCA).

[7] 2013(1) SACR 1 (CC).

[8] Para 41.

[9] Record, page 29, Ln 21 to 22.

[10] Record, page 31, Ln 3 to 6.

[11] (53/2021)

[2022] ZASCA 37 (4 April 2022).

[12] Para 16.

[13] 2021

(1) SACR 1 (SCA).

[14] 1977

(4) SA 531 (A).

[15] Para 553E.

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