

SOUTH AFRICA / JUDGMENT

Dauids v S (A 56 / 2024) [2024] ZAWCHC 225; 2025 (1) SACR 650 (WCC) (28 August 2024) [2024] ZAWCHC 225

COURT

Western Cape High Court, Cape Town

BEFORE

Wille, Kusevitsky

CASE / FILE NUMBER

A 56 / 2024

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THE REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case Number: A 56 /
2024

In the matter between:

TARIQ
DAVIDS
Appellant
and
THE
STATE
Respondent
Coram: Wille
et Kusevitsky, JJ
Heard: 16
August 2024
Delivered: 28
August 2024

JUDGMENT

WILLE, J:

INTRODUCTION

- [1] This is an appeal from the lower court against a conviction and sentence of assault with intent to cause grievous bodily harm and the sentence imposed in connection with a conviction on a single count of kidnapping. The appellant was convicted of one count of assault with intent to cause grievous bodily harm and one count of kidnapping. This limited appeal is with us because of a favourable result of a petition by the appellant.[1]
- [2] The appellant was sentenced to five years imprisonment for the kidnapping offence and a period of three years imprisonment for the offence of assault with intent to cause grievous bodily harm. The latter sentence was ordered to be served concurrently with the sentence imposed in connection with the former charge. The offence of kidnapping was defined in the charge sheet in the lower court concerning the minimum sentencing targeted legislation dealing with matters of this nature.[2]
- [3] The appellant was legally represented in the court of the first instance. He pleaded not guilty to the offences as preferred against him by the respondent and elected not to advance any plea explanation. The appellant was initially charged with murder but was acquitted and convicted on the competent verdict of assault with the intent to cause grievous bodily harm. [3]
- [4] Leave to appeal was granted against his conviction and sentence of the offence of assault with intent to cause grievous bodily harm and the sentence imposed for the offence of kidnapping following the prescribed petition procedure. The result of the petition order (and the formulation thereof) thus binds us on appeal.[4]
- [5] Upon reading the record on appeal, I was not convinced that the conviction on the charge of kidnapping was sound, and my colleague shared my concerns about this conviction. We invited the appellant to reconsider its position and consider piloting a further petition concerning the kidnapping charge. The appellant elected not to pursue this further, and the appeal proceeded in accordance with the petition order.[5]

OVERVIEW

- [6] It remains undisputed that the complainant, who was allegedly assaulted and kidnapped by the appellant, subsequently sadly passed away. It is common cause that the deceased was a known thief in the area where the appellant resided. It is also conceded that the deceased stole several items belonging to the appellant's family before the appellant allegedly kidnapped him.[6]

- [7] After the theft, the appellant went to the deceased's home and discovered the stolen items at the residence of the deceased's mother. On the following day, the appellant again went to the same residence to arrest the deceased and take him to the police station. When the deceased saw the appellant, the deceased attempted to run away.[7]
- [7] The appellant apprehended the deceased and testified that he did so intending to take the deceased to the local police station. It is common cause that a scuffle (involving a fistfight) took place between the appellant and the deceased. Further, the deceased suffered some minor injuries when the appellant restrained him. The appellant first went to his parental home (to collect his identification documents), where he left the deceased in the rear of his vehicle. After that, the appellant left with the deceased to transport him to the police station. [8]
- [8] The appellant decided not to take the deceased to the police station because of the fistfight between them and left the deceased in a parking area of a nearby shopping complex. The appellant returned home shortly after that and declared that he had been unable to take the deceased to the police station as the deceased had escaped. The evidence further suggests that sometime after that, the deceased was involved in a fight (or was attacked by unknown assailants) with several unidentified persons who allegedly assaulted him. After that, he was taken to a nearby hospital for treatment. It seems common cause that the deceased succumbed to his injuries while he was on his way to the hospital to receive treatment for the injuries he had sustained when these unidentified assailants assaulted him.[9]

THE RESPONDENT'S CASE

MS SAUL

- [9] She testified that on the morning in question, the deceased entered her home and proceeded to prepare a bath for himself. When the appellant arrived at her house, the deceased left her home and proceeded to jump over the wall of an adjacent property. The appellant pursued the deceased, restrained him, and placed the deceased in the rear of his vehicle. The appellant closed the door of the canopy at the rear of his pick-up truck with the deceased inside and drove off. She conceded that the deceased was a known thief in the area and that many people wanted to cause harm to him.[10]

MR HENDERSON

- [10] The deceased was his brother. He was at home when he heard a knock at the door. When the appellant arrived at his mother's house, the appellant informed him that he was looking for the deceased, as the deceased had stolen some of his belongings. The appellant recovered his items from his mother's house and, after that, left the premises. When the deceased returned home later that day, he informed the deceased that the appellant was looking for the deceased because of the items the deceased had stolen from the appellant. He also confirmed how the appellant apprehended the deceased and that a scuffle and fistfight occurred between the appellant and the deceased.[11]

MR VAN DEVENTER

- [11] He is employed in the area. He received information that several people were fighting outside his workplace. He proceeded to the premises, where he found the deceased and asked the deceased what had happened. The deceased informed him that he had been picked up in the morning by about ten people. The deceased said he had been 'hijacked' by these people and that these unknown persons had viciously assaulted him.[12]
- [12] This witness took the deceased to the police station and took photographs of the injuries that had been sustained by the deceased. According to him, it appeared that the deceased had been assaulted with either a stick or a sjambok, as he could see lines across the deceased's back, stomach, legs and arms.[13]

MS HENDERSON

- [13] The deceased was her brother. She received a message from her mother that her brother was at the police station. She proceeded to the police station and found the deceased outside the police station, covered with a blanket. She saw the deceased's body was covered with lines and bruises. She confirmed that the deceased had passed away while they were taking him to the hospital.[14]

MRS HENDERSON

- [14] She is the deceased's mother. She corroborated the testimony by her daughter and confirmed that the deceased informed her that he had been assaulted with sticks and sjamboks. She testified that the deceased's body was covered in blue and black welts (from head to toe) and that the deceased passed away while they were taking him to the hospital. [15]

MR DAVIDS

- [15] He confirmed that on the day in question, when he arrived at the appellant's residence, the deceased was sitting in the back of the appellant's pick-up truck. The appellant informed him that he would take the person in the back of the vehicle to the police station. The appellant then left, and not long after that, the appellant returned home. He asked the appellant what had happened to the person in the back of the pick-up truck, and the appellant informed him that the person had jumped out of the pick-up truck, and he had not taken this person to the police station. He conceded that the appellant returned to his mother's home not long after he had left with the deceased on the same morning.[16]

THE CASE FOR THE APPELLANT

- [16] The appellant testified that his home had been broken into by the deceased and that the deceased had stolen certain items belonging to the appellant and his family. The appellant testified that he drove to the deceased's house alone. When he arrived at the deceased's home, the deceased saw him and ran to the corner of the property to hide away. The appellant proceeded towards the deceased, and the deceased attacked him, and they got involved in a physical scuffle.[17]
- [17] He testified that he restrained the deceased to take him to the police station. On his way to the police station, he stopped at his parents' home to collect his identification documents to exhibit to the police. After that, he decided to leave the deceased at the parking area of a local shopping complex and not take the deceased to the police station. The reason for this was that he and the deceased had been involved in a fistfight, and he did not want this to be an issue when he filed a formal charge against the deceased. He returned home approximately fifteen to twenty minutes after leaving the deceased at the shopping complex. [18]

CONSIDERATION

CONVICTION

- [18] It seems to me that the judicial officer in the lower court was materially misdirected by not taking into account the entirety of the evidence presented during the trial and neglected the fundamental principle in criminal proceedings that the respondent had to prove its case beyond a reasonable doubt. The trial court failed to recognise that the appellant was not obligated to prove the truth of his explanation and that the burden of proof of guilt beyond a reasonable doubt rests on the respondent. Put another way, if there was a reasonable possibility that the appellant's evidence 'might be reasonably possibly true', he should be acquitted. The evidence submitted by the appellant must redound to the appellant's favour. More importantly, the trial court was obliged to consider all the evidence in its totality.[19]
- [19] The issue in the appeal before us was whether the respondent had met its burden of proof of the appellant's guilt beyond reasonable doubt on the evidence presented before the trial court. No medical evidence was submitted in connection with the alleged injuries inflicted on the deceased by the appellant. In this connection, no supporting evidence from other sources was available to validate any aspect of the alleged assault on the deceased by the appellant.[20]
- [20] First, the respondent did not provide any evidence to support the claim that the appellant was with the deceased when several other unknown men assaulted him. Second, the appellant testified that he was involved in a fistfight with the deceased because he was attacked by the deceased. No further evidence was advanced in this connection. This presents a significant difficulty in the case, impacting on the interpretation of the medical evidence and its relevance to the findings by the trial magistrate.[21]

- [21] I am unable to find anything in the evidence presented in this case that could be viewed as independent support for the conviction of the appellant of assault with intent to inflict grievous bodily harm (or any of the competent verdicts to it). When the evidence is weighed in its totality, it raises doubt about the appellant's guilt. Where there is a reasonable possibility that the appellant's version is authentic, he is entitled to the benefit of the doubt. [22]
- [22] Notably, the judicial officer in the trial court did not sufficiently engage with the uncontested evidence that the appellant returned fifteen to twenty minutes after leaving his parental home, after which he spent the entire day at his parental home. I say this because a factual finding was made that it was common cause that the appellant was the last person to be seen with the deceased. In this connection, it was not common cause that the appellant was the last person seen with the deceased, as the uncontested evidence demonstrated the opposite. The deceased informed one of the witnesses for the prosecution that approximately ten assailants had hijacked him and assaulted him, and that is why he had been badly injured. [23]

SENTENCE

- [23] The appellant testified in mitigation of his sentence. It is common cause that two professional sentencing reports were commissioned after the appellant was convicted. Both reports recommended that the appellant be sentenced to correctional supervision through house arrest.[24]
- [24] The appellant was married with two minor children and self-employed when he was sentenced. The appellant enjoyed a stable background and had no brushes with the law before this incident. The appellant was and is a first offender. One of the professional reports highlights the minimal risk of the appellant re-offending. More importantly, after the appellant was convicted and sentenced, he spent two months in prison before being released on bail pending the outcome of the petition and, according to it, this appeal.[25]
- [25] The appellant testified in mitigation of his sentence that (a) he was twenty-eight years old at the time of the incident, (b) he had been married for ten years and had two minor children, (c) a financial institution had gainfully employed him, where he had earned thirty-five thousand rands per month, (d) because of the charges against him he had to find alternative employment and could no longer work in the financial sector, (e) at the time of his conviction he had obtained alternative employment and was now only earning twelve thousand rands per month, (f) he supports his mother who is a pensioner, and (g) he has resorted to also working at night to supplement his income.[26]

- [26] Further, he has been involved in community-based projects, preparing and distributing food for the less privileged. He has received commendations from his local community for this charitable work. Finally, he testified that he regretted the incident with the deceased and exhibited deep remorse for the fact that he did not manage to take the deceased to the police station as he initially had intended to do. He conceded that he made a mistake.[27]
- [27] The facts in this case were peculiar and unique. The appellant is an asset to the community, was a first offender and gainfully employed. It is so that kidnapping is a severe offence and regretfully has become a prevalent offence. The facts of this case must, however, be distinguished. The trial court needed to consider the unique facts of this case sufficiently. The sentence of direct imprisonment imposed upon the appellant had a devastating effect on the appellant, his family, dependents and his children.[28]
- [28] The sentence imposed in these circumstances was disproportionate and, unfortunately, amounted to a misdirection by the trial court. I say this also because the minimum sentencing regime found no application. The respondent conceded this much. The trial court also needed to distinguish between two types of offences when evaluating and considering the possible sentencing options. The first is where an offender should be removed from society through imprisonment, and the second is that type of offence where the offender should not be removed from society.[29]
- [29] A sentence may be suspended only conditionally and, therefore, is by its very nature a composite measure. The sentence imposed must always be appropriate, and it makes no difference that it, or any part of it, remains suspended. It must also be borne in mind that the condition imposed in any suspended sentence cannot be part of the sentence itself. In formulating the appropriate sentence, I have considered that the appellant has already served two months of his sentence.[30]

CONCLUSION

- [30] For all these reasons, the sentence of direct imprisonment imposed on the appellant amounted to a misdirection by the trial court. In addition, for the reasons enumerated in this judgment, the appeal against the conviction in respect of assault with the intention to do grievous bodily harm (and the competent verdicts to it) must also succeed.[31]

ORDER

- [31] The following order is made:

1. The appeal against the appellant's conviction (and therefore sentence) on the charge of assault with intent to cause grievous bodily harm (count 2) is upheld and is, with this, set aside. The appellant is acquitted.
2. That the appeal against the appellant's sentence on the charge of kidnapping (count 1) is upheld and substituted for the following sentence:

“...On the charge of kidnapping, the appellant is sentenced to twelve months imprisonment. Ten months of this twelve-month sentence is entirely suspended for five years on the condition that the appellant is not found guilty of kidnapping or a competent verdict during the suspension period. This substituted sentence is antedated in terms of section 282 of the Criminal Procedure Act, 51 of 1977 to the 4th of October 2023.

3. Any bail the appellant paid must be repaid to him.

SUMMARY

(The appellant has served two months of his sentence in connection with the kidnapping conviction (count 1), and thus the remaining portion of this sentence is entirely suspended)

WILLE, J

I agree:

KUSEVITSKY, J

- [1] The appellant was given leave to appeal against his conviction of assault and his sentence on the kidnapping charge.
- [2] It was conceded that the minimum sentencing legislation found no application in this case.
- [3] This was because the “complainant” subsequently passed away.
- [4] This court could not deal with the merits of the conviction on the kidnapping charge.
- [5] The appellant declined the opportunity to apply to the Supreme Court of Appeal concerning the kidnapping conviction.
- [6] A plastic table, six chairs used by the appellant’s children and a mountain bike.
- [7] The deceased was restrained by the appellant to take him to the local police station.
- [8] The appellant was intent on preferring criminal charges against the deceased.
- [9] This evidence was not the subject of any real dispute by the respondent.
- [10] She essentially confirmed the evidence of the appellant.
- [11] He confirmed a fistfight and a scuffle between the deceased and the appellant.
- [12] He confirmed that the deceased had been the subject of a vicious assault.
- [13] The injuries suffered by the deceased were serious injuries.
- [14] She confirmed the nature and extent of the injuries suffered by the deceased.
- [15] The deceased’s body was covered in welt-like injuries.
- [16] The appellant returned within about 15 to twenty minutes later.

- [17] They were involved in a fistfight and the deceased suffered some minor injuries.
- [18] He was concerned that he may be charged with assaulting the deceased.
- [19] S v van der Meyden 1999 (1) SACR 447 (W).
- [20] The injuries in the postmortem report and the photographs were not linked to injuries inflicted by the appellant.
- [21] The “medical evidence” could not be considered as evidence against the appellant.
- [22] S v V 2000 (1) SACR 453 (SCA).
- [23] The deceased was in the company of Miranda, Mr van Deventer and allegedly many other people before he passed away.
- [24] In terms of section 276(1) (h) of the Criminal Procedure Act 51 of 1977.
- [25] The appellant was processed as a convicted prisoner and served two months in prison and a sentenced offender.
- [26] He prepares food and sells it a night to supplement his income.
- [27] The appellant showed genuine remorse for his actions.
- [28] The appellant was sentenced without considering the peculiar and unique facts of this case.
- [29] S v R 1993 (1) SACR 209 (A).
- [30] The sentence and the suspended portion have specifically been formulated to consider “time served” by the appellant.
- [31] This is so because the version by the appellant is reasonably possibly true.

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