

SOUTH AFRICA / JUDGMENT

Dowling v S (A57/2018) [2019]

ZAGPJHC 32 (20 February 2019)

[2019] ZAGPJHC 32

COURT

South Gauteng High Court, Johannesburg

BEFORE

V V Thlapi, L R Adams

CASE / FILE NUMBER

A57/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

APPEAL

CASE NO:	A57/2018
	COURT
	A QUO
CASE NO:	SH297/2016
	DPP
REF NO:	10/2/5/1-(2018/62)
DATE:	20th
	February 2019
	In
the matter between:	
DOWLING:	DANIEL Appellant
	-
	and -
	THE
	STATE Respondent

JUDGMENT

TLHAPI J:

Introduction

[1]. The appellant appeared before the Regional Magistrate in Boksburg on a charge of attempted murder. He pleaded guilty, was convicted and was sentenced to twelve (12) years imprisonment, coupled with an order that he serves two thirds of his sentence before he would be eligible for parole. Leave to appeal sentence was limited to the issue of fixing a non – parole period.

[2]. Subsequently, the appellant filed a notice in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 ('the Act'), requesting this court to interfere with his conviction on grounds that it was not in accordance with justice. This application is opposed by the respondent.

The

Facts

[3]. The appellant's guilty plea explanation was reduced to a written statement and read into the record and for purposes of this appeal the relevant extracts are:

'... ... I am the accused in this matter before this Honourable Court.

I know and understand the nature of the charge the state has preferred against me, which charge is attempted murder.

I plead guilty and make this statement freely, voluntarily, and without any undue influence to do so and in my sound and sober senses.

I admit that upon or about 26 November 2016 I unlawfully and intentionally attempted to kill Anthony Grobelny by stabbing him with a knife.

On the day in question I went out with the complainant's wife (Beverly-Ann). She told me that the complainant is an abusive husband and asked me if I can kill her husband (the complainant). I said to her I can only give him a fright by stabbing him but I won't kill him.

We proceeded to the complainant's house. When we arrived Beverley-Ann said I must wait at the garage until she gets into bed.

After half an hour I went into the house as per our arrangement. I went into their bedroom and stabbed the complainant on his back once. We got into a fight and I cut his hand with the knife. I then ran into the car and left.

At the time of the commission of the offence, I knew that my conduct as explained above was wrongful, unlawful and also accompanied by the necessary intention of attempted murder.

I further knew that the same conduct was also punishable by the applicable law.’

The

Issues

[4]. The issues will be dealt with, as outlined in Counsel’s Heads of Argument, as follows:

1. That the court invokes its power of review in terms of section 304(4) of the Act and sets aside the conviction and sentence;
2. In the event that the above fails, the court is requested to interfere with the sentence imposing a non – parole period on grounds that the appellant was not invited to make submissions regarding a possible non – parole period and that the trial court failed to identify which exceptional factors existed which justify the imposition of such a sentence.

The Law

[5]. Section 304 (4) of the Act provides for the special review of a matter where an accused has been sentenced and it is brought to the attention of a judge at a High Court having jurisdiction or any judge, that the proceedings were not in accordance with justice. In this instance it is common cause that the appellant did not appeal his conviction. Despite his plea of guilty and subsequent conviction, he sought to challenge the conviction in terms of section 304 (4) of the Act, on grounds that the proceedings were not in accordance with justice.

[6]. In his Heads of Argument, Mr Guarneri, who appeared on behalf of the appellant, contended that the application in terms of section 304 (4) of the Act was brought because of an irregularity by the magistrate, who failed to enter a plea of not guilty in terms of section 113 of the Act. It was submitted that there was an ambiguity in the manner in which the plea explanation was couched, in that it did not contain an unequivocal admission of an intention to kill, that it should have been apparent to the court that the appellant did not admit the allegation of intention or that he had incorrectly admitted such allegation.

[7]. As reflected in the record, the appellant admitted that he ‘unlawfully and intentionally attempted to kill’ the complainant. This was further confirmed in the statement where he later said, ‘I knew that my conduct as explained was ... accompanied by the necessary intention of attempted murder’.

[8]. It was however contended that the ambiguity arose where it is stated as follows: ‘She told me that the complainant is an abusive husband and asked me if I can kill her husband I said to her I can only give him a fright by stabbing him but I won’t kill him’. This contention, so Mr Guarneri said, was supported by what the appellant communicated in the pre – sentence report in which it is stated that, ‘it was not his intention to cause serious injury to the complainant and he used one of his knives to stab the complainant’.

[9]. In the event that it is found in the appeal on sentence only, that the proceedings at the trial court were not in accordance with justice, the procedure to be adopted is to postpone the appeal hearing on sentence to enable the appellant to obtain leave from the Supreme Court of Appeal. In that regard see: *S v Pieterse*, 2017 JDR 0748 (GJ); and *S v Van der Merwe*, 2009 (1) SACR 673 (C). Mr Guarneri contended that although the Pieterse case is distinguishable from this matter, the appellant should not be precluded from being able to seek a review of his conviction.

[10]. Mr Rampyapedi, Counsel for the State, contended that, since the appellant had never appealed his conviction, this appeal was confined to what was before the court, that being the appeal on sentence limited to the issue relating to the imposition of a non – parole period. He contended that the element of intention was clearly set out in the plea explanation. Furthermore, the appellant was legally represented during the trial; there had been no language barriers; and his legal representative had confirmed his instructions.

[11]. What needs to be determined now is whether there are prospects of success in this appeal or even of a higher court finding that the proceedings were not in accordance with justice and that the conviction and sentence should be set aside.

[12]. It is my view that the allegation in the plea explanation about only giving the complainant a fright precedes the actual commission of the offence and is not relevant to what actually happened at the scene. The appellant was given access to the house by the complainant's wife. He waited for half an hour in the garage before proceeding to the bedroom where the complainant, who was not aware of his presence, lay asleep. There is no indication of how he intended to frighten or how he frightened the complainant before or when he inflicted the first stab wound. In my view the admission of intent is clear and can therefore not be misunderstood.

[13]. The appellant's explanation in the pre – sentencing report, regarding his intention, was stated after conviction and in mitigation of sentence. The complainant testified in aggravation and he was not cross examined on his version of how the incident occurred. He testified that he had been asleep for about three and a half hours and was awoken when he felt a 'massive blow' to his back. This evidence remains uncontested. I am therefore of the view that there are no prospects of success in the section 304 (4) application.

[14]. In as far as the appeal on the sentence is concerned, Mr Rampyapedi submitted that the legislature in section 279B of the Act did not provide for the forewarning by the sentencing court of the possibility of a non – parole period being imposed. He however conceded that in *S v Jimmale and Another*, 2016(2) SACR 691 (CC), failure by a court to invite the parties to make submissions was considered to be a 'material misdirection'. The Constitutional Court cited with approval the judgment in *S v Strydom*, 2015 ZASCA, at para 16, where it was held that a non – parole period be imposed only in exceptional circumstances.

[15]. In *Strydom* (supra) the determination of exceptional circumstances had to entail an investigation into all factors that have relevance to the decision for the imposition of a non – custodial sentence and, there has been a concession that this was not followed by the trial court. Such fact is apparent from my reading of the record.

[16]. The personal circumstances of the appellant appear in the pre – sentencing report and I do not intend dealing with the entire report. Of importance is that he pleaded guilty; he was self – employed and earned a good income; he was single and had no dependants; and he was a first offender. The aggravating circumstances were that the crime was preceded by an amount of planning. The complainant was attacked whilst he was fast asleep and he sustained serious injuries. He spent four days in the intensive care unit and he has permanently lost the use of one hand; the family had to go through the trauma of the suicide of his wife after the incident occurred.

[17]. In my view the appellant has not made out a case for the reduction of the sentence of twelve years direct imprisonment. The aggravating circumstances far outweigh the mitigating circumstances. However in light of the *Jimale* and the *Strydom* decisions (supra) it follows that the order by the sentencing court imposing a non – parole period has to be set aside.

Order

Accordingly, I make the following order:-

1. The appellant’s appeal against the sentence imposed on him by the court below succeeds in part and is upheld.
2. That part of the sentence of the Regional Magistrate’s Order of the 31st August 2017 that the appellant serves two thirds of the sentence of twelve years direct imprisonment imposed upon him, is hereby set aside, and in its stead is substituted the following:

‘The appellant is sentenced in respect of the attempted murder conviction to a period of twelve years direct imprisonment.’

3. The sentence is antedated to the 31st August 2017.

V V THLAPI

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree,

L R ADAMS

Gauteng Local Division, Johannesburg

HEARD ON: 31st January 2019

JUDGMENT

DATE: 20th February 2019 FOR THE APPELLANT: Adv E A Guarneri INSTRUCTED BY: Legal Aid South Africa FOR THE RESPONDENT: Adv M Rampyapedi INSTRUCTED BY: The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg

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