

SOUTH AFRICA / JUDGMENT

Hlungwani v S (A37/2013) [2013] ZAGPPHC 226 (2 August 2013)

[2013] ZAGPPHC 226**COURT**

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, G Webster

CASE / FILE NUMBER

A37/2013

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Source record**NOT****REPORTABLE****IN****THE NORTH GAUTENG HIGH COURT - PRETORIA (REPUBLIC OF SOUTH AFRICA)****CASE****NUMBER: A37/2013****DATE:02/08/2013****In****the matter between:**

YUZA

RICH

HLUNGWANI.....APPELLANT

and

THE

STATE.....RESPONDENT

JUDGMENT**N V KHUMALO J**

[1] The Appellant was arraigned in the Regional Court in Giyani and convicted of robbery with aggravating circumstances ("Count

1"), 2 Counts of housebreaking with intent to steal and theft ("Count 2 and 3") and unlawful possession of a firearm in contravention of s 3 of Act 60 of 2000 ("Count 5"). He was sentenced to a term of 20 years imprisonment with all counts taken together for the purpose of sentence.

- [2] Notwithstanding the court a quo granting Appellant leave to appeal against sentence only, he has proceeded to challenge his conviction as well, imploring the court to reconsider and-or review it without having petitioned this court for leave. Absent such an Application this court does not have jurisdiction to hear the matter. *S v Gentle* 2005 (1) SACR 420 (SCA). Appellants motivates in his heads of argument for the matter to be considered under the provisions of Section 304 (4) of Act 51 of 1977 ("the Act). The alternative would have been to defer the hearing or determination of the Appeal on conviction until such leave has been obtained.
- [3] s 304 (4) of the Act is normally used by magistrates to initiate review proceedings in terms of that section to have erroneous

convictions and sentences that have come to their notice corrected. The courts have been found to be always prepared to exercise their powers in terms of this section where a defect is brought to their attention by a prosecutor or an attorney *S v Eli* 1978 (1) SA 451 (E) and *S v Mmonchanyana* 1968)1) SA 56 (O). Counsel has also referred us to -the matter of *S v Liau* 2005 (1) SACR 498 (T) a decision of this court by Goodey and Du Plessis JJ when it became apparent to the court that an Appellant who was granted leave to appeal both conviction and sentence was clearly also sentenced erroneously by the magistrate without referring the matter to the High Court, it then posed a question if it was in the interest of justice to hear the Appeal. At that stage the court will hear argument on the Appeal against conviction and consider, If Appeal against conviction must succeed, the Appeal is heard and the conviction and sentence are set aside. If at that stage the court is of the opinion that the Appeal has no prospect of success, it is struck from the roll. In terms of the court's review competency in terms of s 304 (4), the regional court sentence is set aside and an order is made which the regional court should have made.

- [4] In this matter Appellants' Counsel argued that the conviction of the Appellant on the charge of robbery with aggravating

circumstances in Count 1 was erroneous as not all the elements of that crime were admitted in the s 112 statement that was submitted on his behalf. In particular alleged that the statement does not contain an admission so to infer that the assault was aimed at overcoming any resistance with regard to the appropriation of the complainant's property. He further argues that no admission was made as to the presence of a firearm.

- [5] At commencement of the proceedings in the trial court, once Appellant pleaded guilty, his Counsel read Appellant's s 112 statement in explanation of the plea, in which he made the following admissions:

"I admit that I was at Home 14C ON 12 October 2010. On this date I did commit the following offences;

Count 1: I break and open the house of Terra Lesley Sodi. I took Samsung E20, Nike tekkies, three cartons and cash money. My intention was to deprive the owner of his lawful property.

[6] The magistrate then intervened and requested Appellant's representative to discuss and get accused's signature, Counsel did and thereafter read into the statement the following: "on the day in question, I admit that I was at Homo 14 C on 12 October

2010. On this date i did commit the following offences:

4.1. Count 1: Is robbery with aggravating, I admit that I assaulted Terra Lesley Sodi and I took away an amount of R1 200.00, three cartons and Nokia cellphone. I used a firearm to threaten him."

Appellant was at that point asked if he confirms his plea of guilty on that charge and all the charges against him and his reply was " Yes I admit your worship". He was further asked if he confirms the statement that his attorney has read out in terms of Section 112 of the Criminal Procedure Act and his reply was "Yes I confirm".

[7] The Appellant was very much alive to the amendment made to his initial statement and further that he was admitting to assaulting and using a firearm to threaten the complainant with an intention to deprive him of his property. It was apparent that he committed the offence as charged and the admissions therefore appropriate to the charge. The word "evidence", to a charge is said to include answers furnished by an accused in terms of s 112 (1) (b). See *S v Andrews* 1984 (3) SA 306 (E) and *S v Adam* 1993 (1) SACR 444 (ECG). There was therefore enough evidence on the charge upon which the court a quo returned a verdict of guilt.

[8] The same complaint was proffered with regard to the 2nd and 3rd Count of housebreaking with intent to steal. The Appellant clearly admitted to breaking and opening the house of Solane Sylvia Ngobeneni and Johanna Tiyane taking an amount of R1 200.00 and R1 100,00

respectively, Nokia cellphone and used a firearm to threaten. His aim being to deprive the owner her property. The Appellant argued that there was no averment relating to entry into the house. The admission clearly indicates that after breaking the house he obtained from therein the stolen goods intending to deprive the owner of its possession. It is evident that the goods were obtained from the house, so there is no doubt that he gained entry after

breaking into the house. He also made his intention known that he intended to deprive the owner of his or her property.

[9] The Appellant lastly challenged his conviction on the last count on the basis that there is no admission if the object referred to in Appellant's statement is a fire arm. The statement on that count reads: "Possession of a firearm: I admit I was at Homo 14 C on 4 February 2011. I was found in possession of a 9 millimeter Parabellum and I did not have a licence thereof. He makes reference to the type of firearm that was found in his possession that can hardly be referred to as failure to indicate if what is described is a firearm. Appellant is really clinging on straws.

[10] It is therefore clear that there was enough evidence before the court that established Appellant's guilt beyond reasonable doubt on all the charges for the court a quo to convict. The submission on behalf of Appellant is devoid of merit.

[11] Furthermore, Appellant is appealing against the globular sentence of 20 years imprisonment imposed by the trial court as shockingly

inappropriate alleging that the court a quo emphasized the seriousness of the offences and failed to identify certain mitigating

factors* in favour of the Appellant that reduces his moral blameworthiness.

[12] It is trite that punishment is within the trial court's province to pronounce upon and the Appeal Court will not interfere

unless there has been a misdirection or an abuse of the discretion. In *S v Rabie* 1975 (4) SA 855 (A) at 857D-F, the Appeal Court is cautioned not to erode the discretion of the trial court and to alter the sentence imposed by the court only if the discretion has not been judicially and properly exercised.

[13] The scope of discretion that the courts enjoy in imposing punishment has now been curtailed by the implementation of the mandatory minimum sentencing provisions in the Criminal Law Amendment Act 105 of 1997 ("the Amended Act"), that warrants departure therefrom only if the trial court were to find that there were substantial and compelling circumstances. A judge's failure to abide by these sentencing guidelines in issuing a sentence would constitute an abuse of judicial discretion. The Act might be limiting but has not eliminated the court's discretion in imposing sentence in respect of those offences. So all the factors traditionally taken into account continue to play a role (whether or not they diminish moral guilt) to arrive at a proportional sentence as confirmed by a statement in *S v Malgas* 2001 (2) SA 1222 (SCA) that:

"The proportionality of a sentence cannot be determined in the abstract, but only upon a consideration of all material circumstances of the

particular case, though bearing in mind what the legislature has ordained and the other strictures referred to."

[14] To avoid any misdirection and to be fair to the offender and to society when considering a sentence, a court, must then give due consideration to all relevant factors, blended with a measure of mercy, strike a balance between all the mitigating and aggravating

factors to come to a just and a proportionate sentence that a particular offender deserves and meet the interest of society.

[15] In *S v Sometha* 2001 (1) All SA 456 (EC) the court stated that:

“An appropriate sentence should thus reflect the severity of the crime while at the same time give full consideration to all the mitigation and aggravating factors surrounding the person of the offender”

taking into account the triad referred to in *S v Zinn* 1969 (2A) SACR at 537 (A) that is, the crime, offender and the interests of society. The interest of society is served by taking the main purpose of sentencing, which is deterrence, rehabilitation, prevention and retribution, into consideration; see *S v Swanepoel* 1945 AD 444 at 455 and *S v Whitehead* 1970 (4) SA 4243(A).

[16] The emphasis or degree of emphasis to be placed upon any of the factors is a matter within the discretion of the trial court, to be exercised judicially as well. If the degree of emphasis is disturbingly inappropriate, in that it cannot be said that the sentencing court exercised its discretion judicially, the court of appeal will interfere; See *S v Makhaye* 2011

(2) SACR 173.

[17] The court a quo in sentencing the Appellant, confirmed its duty to approach sentence with great care, to look at the Appellant's

personal circumstances, the offence committed as well as the interest of the community; the Zinn approach. With regard to his personal

circumstances the court took note that he is a first offender, 25 years old, only passed Standard 5 and was employed generating an income of R400 per month and noted to his credit his plea of guilt, even though it inferred that the plea was not motivated by remorse but due to being found in possession of the stolen goods most of which were recovered.

[18] Then again, correctly so, the court took into account as well, the seriousness of the offences that Appellant has committed, the use of a firearm and that he was on a criminal spree (all offences committed in one day) depriving people of their property and the prevalence of the offences as aggravating. In balancing these factors, it arrived at a conclusion that the element of violence did not reduce the moral guilt of the Appellant and therefore could not find any substantial and compelling circumstances that

justify the deviation from the prescribed minimum sentence as per the Act. It alluded to the fact that if the matter is as serious as this the status or persona! circumstances of Appellant need not be the most important in determining sentence, clearly persuaded by the seriousness of the offence and its nature not to deviate from the minimum prescribed sentence. It confirmed sending a message of intolerance of such crimes to offenders but at the same time not destroying the person and the need to balance the sentence with mercy.

[19] The court's stance was endorsed in *S v Vilakazi* 2009 (1) SACR 552 SCA ON P547 by a statement that:

“Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again.”

[20] it is clear that the personal circumstances gain a weighty consideration for the purpose of sentence to determine if the offender is rehabilitative which the trial court I believe was sensitive to, evident from its confirmation that its sentence is not meant to destroy the person but also to reflect the element of mercy and for that purpose having considered the imposition of a globular

sentence for all 4 charges even though all had an element of violence with force or threat of violence being used. Clearly recognising the guidance in *S v Luke and Others* 2012 ZAWC HC 9 16 Feb 2012 WCHC where Gamble J with reference to Holmes JA in *Rabie* at 861-2 reminded:

“judicial officers of the importance of being fair to both the accused and to society in handing down sentence. Justice, it was said, includes the element of mercy which is the hallmark of a civilized and enlightened criminal justice system.”

[21] I therefore find that there is no “weighty justification” (to borrow from Gamble J’s language in *S v Vilakazi*) to interfere with the sentence of the court a quo. The sentence is fair to the Appellant and society.

[22] Under the circumstances I propose the following order:

[22.1] Appeal is dismissed

JUDGE OF THE NORTH GAUTENG HIGH COURT I agree and it is so ordered

N V KHUMALO JUDGE IN THE HIGH COURT

I AGREE.

G WEBSTER JUDGE IN THE HIGH COURT

Date of Hearing : 29 July 2013

Counsel for the Appellant : AdvVZNel

Legal Aid SA

Counsel for the Respondent : AdvJJKotze

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