

SOUTH AFRICA / JUDGMENT

Jojo v S (CA&R06/2014) [2014] ZAECMHC 30 (28 August 2014) [2014] ZAECMHC 30

COURT

Eastern Cape High Court, Mthatha

BEFORE

FBA Dawood, Dunwya

CASE / FILE NUMBER

CA&R06/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION: MTHATHA)

CASE

NO. CA& R: 06/2014

In

the matter between:

BUYISANDE

JOJO

APPELLANT

AND

THE

STATE

RESPONDENT

APPEAL

JUDGMENT

DAWOOD, J:

1. The Appellant herein was convicted of murder and sentenced to 15 years imprisonment. He was declared to only be eligible for parole after the expiry of 12 years of his imprisonment. The court also declared the Appellant unfit to possess a firearm in terms of section 103 of the Firearms Act 60 of 2000.
2. The Appellant was granted leave to Appeal against the sentence of 15 years imprisonment imposed by the court a quo.
3. **FACTUAL BACKGROUND**
 - a) The State conceded that the learned Magistrate incorrectly stated to the Appellant that the minimum sentence of life imprisonment was applicable in respect of the murder charge.
 - b) The State conceded in this regard that there was no evidence of a pre-meditated murder and nor was the Appellant informed that it was upon this basis that the minimum sentence of life imprisonment was applicable.
 - c) The State accordingly conceded that there was a misdirection on the part of the Magistrate in applying section 51 (1) of the Criminal Law Amendment Act 105 of 1997.
 - d) The State conceded that the applicable section was section 51 (2) of the aforesaid Act which provides for a mandatory sentence of not less than 15 years imprisonment in respect of a first offence for murder.
4. The power of the Appeal court to interfere with a sentence is circumscribed. A sentence is pre-eminently a matter for the discretion of the trial court. The court of Appeal may only interfere if the sentence is vitiated by misdirection or is startlingly inappropriate or where there is a striking disparity between the sentence imposed and the sentence the court of Appeal would have imposed[1].
5. In this case it is evident that the court a quo misdirected itself when it sentenced the Appellant. The Magistrate based his decision on the erroneous belief that the applicable sentence was life imprisonment unless there were substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment.
6. This court may interfere with the sentence imposed if it is vitiated by a misdirection on the part of the learned Magistrate.

7. A misdirection is not in itself sufficient to entitle the Appeal Court to interfere with the sentence. The misdirection must be of such a nature, degree or seriousness that it shows directly or inferentially that the Court did not exercise its discretion at all or exercised it improperly or unreasonably[2].
8. In this case the Appeal court is entitled to interfere because the sentence is vitiated by the misdirection in that:
 - a) The court a quo's starting point was that it considered life imprisonment to be the appropriate sentence.
 - b) The sentence imposed was based on an erroneous belief that life imprisonment was the appropriate sentence unless substantial and compelling circumstances were found to be present.
 - c) The sentence imposed was based on this premise and demonstrates that the discretion was not properly exercised in arriving at an appropriate sentence considering the applicable Minimum Sentence Legislation.
9. The minimum sentence legislation was nonetheless applicable in this case but in the Appellant's case the prescribed minimum sentence was 15 years since he was a first offender.
10. The Supreme Court of Appeal in *S v Malgas*[3] held:

"[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary -

A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment

and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which

the Legislature has provided.”

10.1 In *S v Jimenez*[4] Lewis AJA directed as follows:

“There is no doubt that in the exercise of the sentencing discretion a court should have regard to public policy and the public interest.

The expression of policy in a statute – as in the Criminal Law Amendment Act is most certainly a factor that should be taken into account. Indeed, that statute shows the disquiet experienced by the public, represented through the Legislature at the prevalence of certain offences and their effect. The imposition of minimum sentences is a clear indication of what is perceived to be in the public interest. It is trite that the public interest, or the interest of the community as it is often put, is a factor that should be considered when the sentencing discretion is exercised. In

an oft-cited dictum Rumpff JA said in *S v Zinn* 1969 (2) SA 537 (A) 540 at G - H that what must be considered is the triad consisting of the crime, the offender and the interests of society.

The provisions of the Act inform courts of the attitude of society to crimes of a particular nature, specified in a schedule to the Act”...

10.2 In *S v Obisi*[5] the learned judge stated that the fact that an accused is a first offender is always assessed against other factors such as the gravity of the offence.

10.3 In *S v N*[6] it was held

"Section 51(1) read with s 51(3) does not create a mandatory sentence, for a measure of discretion is permitted to the Court to find that substantial and compelling circumstances exist which justify the imposition of a sentence less severe than that of life imprisonment. This discretion is narrower than that permitted in earlier legislation where the finding of mere 'circumstances' was sufficient to justify departure from a prescribed sentence. The Legislature has not seen fit to describe what factors may or may not be considered, consequently a Court is, in my view, still able to have regard to all the factors which would traditionally have been considered in imposing sentence. Moreover, in my view, a Court should not consider each factor in isolation but view them cumulatively and, if on doing so, the Court forms the view that bearing in mind all the factors, aggravating as well as mitigating, a sentence of life imprisonment would be grossly disproportionate to the crime committed or, to put it differently, startlingly inappropriate or offensive to its sense of justice, then it should find that substantial and compelling circumstances exist for departing from the prescribed sentence of life imprisonment. I do not believe that in such circumstances a Court would be substituting its own discretion for that of the Legislature for I do not believe that the Legislature intended that unfair or grossly disproportionate sentences should be imposed."

The qualification, to which Borchers J was fully alive, is this: a Court must bear in mind that the very reason for the enactment of a prescribed minimum sentence is to act as a deterrent. It would accordingly not be proper for the Court simply to have regard to previous sentences in comparable cases, without taking this factor into account - for to do so, would be to ignore the views of Parliament. As Stegmann J said in *S v Mofokeng and Another* 1999

(1) SACR 502 (W) at 522j-523b:

"In my view, it would not be proper to conclude that the mere fact that the severity of the sentence prescribed by Parliament exceeds the severity of the sentence that, but for Parliament's intervention, the Court would itself have regarded as appropriate having regard to the criteria usually applied by the Courts, may be regarded as a 'substantial and compelling circumstance' justifying a departure from the sentence prescribed by Parliament. To take that approach would simply be to emasculate the legislation."

In similar vein, Squires J said in *S v Madondo* (supra):

"Such a law inevitably results in some inequalities of punishment and it may well produce a crop of unforeseen difficulties as its enforcement proceeds. But on the face of it, this must be regarded as a situation where Parliament has decided to emphasise the deterrent aspect of punishment to reduce the incidence of these offences at the expense of the offenders who commit them (regardless of any inequality in the ordinary circumstances of the offence and the offender) unless they amount to a substantial and compelling reason."

On the other hand, it is not the function of the courts slavishly to give effect to public opinion, whether expressed through the Legislature, or otherwise. In *S v Makwanyane and Another*[1995] ZACC 3; 1995

- (2) SACR 1 (CC); 1995 (3) SA 391 (CC); 1995 (6) BCLR 665, which concerned the constitutional validity of the death penalty, the Constitutional Court noted (at para [88] that whilst public opinion did have some relevance:

"(I)n itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution."

' The correct approach to the exercise of the discretion conferred on a Court in s 51 of the Act, as I see it, may be summarised as follows:

- (1) The starting point is that the prescribed minimum sentence must be imposed.
- (2) It is only if a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, that it may do so.
- (3) In deciding whether substantial and compelling circumstances exist, each case must be decided on its own facts. The Court is required to look at all factors - mitigating and aggravating - and consider them cumulatively.
- (4) If the Court concludes in a particular case that the minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate - bearing in mind that the Legislature perceives the necessity for sentences emphasising the deterrent component, but equally bearing in mind that this does not necessarily lead to an automatic increase of sentences previously imposed - it is entitled to impose a lesser sentence.

If the Court is of the view that application of this test would result in the imposition of a sentence less than the prescribed minimum in most cases, it should set in train the process necessary for a Constitutional Court to adjudicate upon the constitutionality of the legislation in question."

11. In this case the learned Magistrate intended and did in fact deviate from the prescribed minimum sentence that he believed to be applicable. He based this on the basis of the fact that the Appellant was [.....] years of age at the time of the commission of the offence and that he was a first time offender.

12. In this case the Act itself makes provision for first offenders so this factor does not need to be considered as a further mitigating

factor.

13. The Magistrate accepted that youthfulness played a role in the commission of the offence.

13.1 In *S v Mohlobane*[7] the learned judge held that whether or not youthfulness constituted a mitigating factor depended on the facts and also the nature of the offence.

13.2 In *S v Ndlovu*[8] the court held inter alia that the Appellants youthfulness, he was 20 years old, was a factor that the regional magistrate ought to have considered more

seriously.

14. *S v Matyityi*[9] it was held that:

“It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.”

15. In this case, more could have been argued to demonstrate that his immaturity operated as a mitigating factor. However the following

factors are not in dispute in this matter:

15.1 That the Appellant and the deceased were not on good terms even prior to this incident.

15.2 That the deceased had previously seriously injured the Appellant.

15.3 That they had both been drinking on the day of the incident.

15.4 That this incident happened on the spur of the moment with the Appellant being angered at the very sight of the deceased.

15.5 That the Appellant demonstrated a lack of insight expected of a mature adult and appeared instead to be susceptible to the follies of youthfulness and immaturity, by reacting violently to the presence of the deceased.

15.6 That his youthfulness together with his consumption of liquor played a role in him acting in such a reckless manner, demonstrating a wanton disregard for human life and the consequences of his actions.

16. The Magistrate appears to have accepted that his age was a mitigating factor and I am disposed to accept, as did the Magistrate who observed the Appellant during the trial, that the Appellant's immaturity should be regarded as a mitigating factor in this case.

17. I accordingly accept that the Appellant's youthfulness does constitute a substantial and compelling factor warranting a deviation from the prescribed minimum sentence.

18. This is however a serious and prevalent offence and accordingly the sentence imposed should send out a clear message to the Appellant and like-minded offenders that these offences will not be tolerated and perpetrators will be appropriately punished.

19. In *S v Abrahams*[10] the court held that even where the prescribed minimum sentence is deviated from, the sentences the act prescribes creates a legislative

framework that weighs upon the exercise of the sentencing courts discretion and as such the sentence imposed should be heavier than before.

20. Accordingly having regard to the triad consisting of the crime, the offender and the interest of society a sentence of 12 years

imprisonment is considered to be an appropriate sentence to be imposed upon the Appellant, in this case.

21. The order pertaining to the Appellant being declared unfit to possess a firearm was not challenged on Appeal, and in any event appears to be a proper order.

22. ORDER

23.1 The following order is accordingly made:-

i) The Appeal against the sentence is upheld.

ii) The sentence of 15 years imprisonment imposed by the court a quo and the declaration that the Appellant would only be eligible for parole after the expiry of 12 years of his imprisonment is set aside, and replaced with the following sentence:

(a) The Appellant is sentenced to undergo 12 (twelve) years imprisonment and such sentence to operate retrospectively from the date of sentencing in the court a quo being the 20th of May 2012.

- (b) The Appellant is declared unfit to possess a firearm in terms of section 103 of the Firearms Act 60 of 2000.

____FBA DAWOOD

JUDGE OF THE HIGH COURT

I Agree:

DUNWYA A.J

ACTING JUDGE OF THE HIGH COURT

DATE HEARD:

09 MAY 2014

JUDGMENT

DELIVERED:

28 AUGUST 2014

FOR THE APPELLANT:

ADV HOBBS

FOR THE RESPONDENT:

ADV JOUBERT

1. S v Kgosiimore 1999 (2) SACR 238 (SCA) at paragraph 10.

[2] S v Christodoulou 1979 (3) SA 523 (A) at 529 (B)

[3] 2001(1) SACR 469 (SCA) at paragraph 25

[4] 2003(1) SACR 507 (SCA) at page 512 F - I

[5] 2005 (2) SACR 350 (W) at paragraph 12

[6] 2000(1) SACR 209 (W) at 224 A - 225 C

[7] 1969 (1) SA 561 (A) at 565 C

[8] 2007 (1) SACR 535 (SCA) at paragraph 13

[9] 2011

(1) SACR 40 (SCA) 47 E – 48 B

[10] 2002 (1) SACR 116 (SCA) at paragraph 25

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