

SOUTH AFRICA / JUDGMENT

L.N v S (CA&R: 22/2024) [2024] ZAECKMKHC 85 (12 August 2024)

[2024] ZAECKMKHC 85

COURT

Eastern Cape High Court, Makhanda

BEFORE

Bands, M.W. Nobatana

CASE / FILE NUMBER

CA&R: 22/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No: CA&R: 22/2024

In the matter between:

L[...] N[...]

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

BANDS J:

- [1] In accordance with the provisions of section 112(2) of the Criminal Procedure Act 51 of 1977, the appellant, when appearing in the District Court, East London, pleaded guilty to a charge of assault with intent to do grievous bodily harm. The appellant was convicted on the strength of his plea and sentenced to a period of 18 months imprisonment. It is this sentence that he appeals against, with leave of the trial court.

[2] The common cause facts, as gleaned from the appellant's written statement are uncomplicated. On 8 July 2023, the appellant, following his attendance at a funeral, made his way to an "after tears ceremony"[1] hosted at Gxarha's tavern. Whilst there, the complainant, who was 42 years old, arrived in his vehicle with the appellant's 17-year-old niece ("the minor"). The appellant and his brother, the minor's father, noticed the complainant making advances towards the minor. The appellant

reprimanded the complainant, while the minor's father took her out of the vehicle and escorted her home. According to the appellant, the complainant "did not want to listen" to him. As a result, he removed the complainant from his vehicle and punched him twice in his face, causing him to fall to the ground. He thereafter kicked the complainant once in his head, with a booted foot, and cautioned him to stay away from his niece. The appellant

left the scene.

[3] According to the appellant, in assaulting the complainant, he acted with the intention of causing him grievous bodily harm. Insofar as remorse is concerned, the appellant states that he regrets his actions and that he should have been more civilised. He further implored the court to consider his plea of guilty as a sign of his deep remorse.

[4] The appellant was 33 years old at the time of the commission of the offence. His highest level of education is grade 11. He is the father of 2 minor children, born from 2 separate romantic relationships. His children, who are the recipients of SASSA[2] child support grants, reside primarily with their unemployed mothers. Prior to the appellant's arrest, he performed odd jobs as a taxi driver, earning approximately R1,500.00 per month. It was submitted from the bar, during the sentencing proceedings, that his earnings prior to his arrest were utilised for the support of his children as well as for his own expenses. The appellant has 2 prior convictions. One of housebreaking with the intent to steal and theft, from February 2006, for which he was sentenced to 18 months imprisonment, wholly suspended for a period of 5 years, and the other for murder in April 2016. In respect of his latter conviction, the appellant was sentenced to 3 years' correctional supervision and a further 6 years' imprisonment, wholly suspended for a period of 4 years on condition that he was not found guilty of the same offence committed during the period of suspension.

[5] The nub of the appellant's grounds of appeal is that: (i) the sentencing court overemphasised the seriousness of the offence and the interests of society, whilst attaching too little weight to the personal circumstances of the appellant; (ii) the court ignored the provisions of section 28(2) of the Constitution in that the appellant is the principal breadwinner of his minor children; (iii) the court erred in not finding that the appellant's conduct arose out of provocation by the complainant, which it ought to have considered as a mitigating factor; and (iv) the court overemphasised the appellant's previous convictions.

[6] Whilst the appellant, in his notice of appeal, contended that the trial court ought to have imposed a non-custodial sentence, it was properly conceded, in argument before us, that a sentence of direct imprisonment was appropriate, albeit that the appellant's

counsel suggested a lesser term of 6 months.

[7] Having regard to the brief judgment of the trial court, it is not evident that due consideration was given to all the factors relevant to sentencing when embarking on this often-onerous task. According to the classic Zinn[3] triad, a court is to impose sentences which strike an appropriate balance between the seriousness of the offence; the personal

circumstances of the appellant; and the legitimate expectations and legal interests of the community. In *S v Banda and Others*, [4] Friedman J, in discussing these factors, stated that:

"The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern."

[8] A sentencing court is also required to give due consideration to the four objectives of punishment in the assessment of an appropriate

sentence, these being, its deterrent, preventative, reformatory and retributive aspects.[5]

[9] The trial court, in sentencing the appellant, took into account his personal circumstances and obliquely makes reference to having

considered the facts relevant to the nature of the offence and the extent of the complainant's injuries. As to what facts the trial court considered is not clear. One is left with the impression that this recordal was mechanical, in the way cautioned against in *Banda*. The trial court is further silent on the third leg of the Zinn triad. Accordingly, uncertainty exists as to what consideration, if any, was given to the aforesaid elements. Mindful of this, the appellant's contention that the trial court overemphasised the seriousness of the offence and the interests of society is misplaced.

[10] The above constitutes a material misdirection in that the trial court failed to ensure a judicious counterbalance between the elements

relevant to sentencing. Put differently, the trial court did not exercise its discretion properly and judicially, which entitles this court to consider the question of sentence afresh.[6] Whether or not the trial court's misdirection will lead to an interference with the sentence imposed is a separate enquiry.

[11] I have previously referred to the personal circumstances of the appellant. He is not an immature youth and accordingly his age, which is a neutral factor, does not serve as a mitigating factor reducing his moral blameworthiness.[7] The appellant's argument that the trial court erred in failing to consider section 28(2) of the Constitution, in that he is the minors' principal breadwinner, is unsustainable for a number of reasons, two of which I deal with below.

[12] Firstly, on a factual level, the trial court gave due consideration to the fact that the appellant has two minor dependants. Secondly, in developing his Constitutional argument, the appellant's counsel sought to place reliance on the Constitutional Court's decision in *S v M*. [8] The court in *S v M* dealt with the sentencing of primary caregivers and not the wider class of breadwinners. This was expressly addressed by the court in paragraph

[28] of its judgment as follows:

"The directions in this matter referred to sentencing of primary caregivers, not to the wider class of breadwinners. Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly protected right of a child to parental care under section 28(1)(b). We are accordingly not called upon in this judgment to deal with delineating the duties of the sentencing court where the breadwinner is not also the primary caregiver. Suffice it to say that, as in all matters concerning children, everything will depend on the facts of the particular case in which the issue might arise."

[13] Accordingly, *S v M* is not authority for the appellant's proposition. Moreover, even in the context of offenders who are primary caregivers, which the appellant is not:[9]

"...a court must sentence an offender, albeit a primary caregiver, to prison if on the ordinary approach adopted in Zinn a

custodial sentence is the proper punishment. The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the Zinn approach, one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them."

[14] In the circumstances of this case, particularly in light of the fact that: (i) the court duly considered the minor children to the extent stated; (ii) the appellant is not their primary caregiver; and (iii) it was conceded that a custodial sentence is appropriate, I need not say more on this aspect.

[15] The appellant's reliance on provocation to serve as a ground for the mitigation of his punishment is unsound – at best he seeks to draw an inference in this respect. In his statement, he does not contend to have acted out of provocation nor does he alleged to have been provoked. Even if the content of his statement contained sufficient particularity to conclude that his aggressive conduct was preceded by insulting or provocative behaviour (by

word or by conduct) on the part of the complainant, which in my view it does not, it cannot be said that there existed reasonable grounds for his anger.[10] Quite clearly, the complainant's conduct was not of such a nature as to have enraged the minor's own father, who remained calm in the circumstances.

[16] It was argued on behalf of the appellant that the trial court overemphasised the appellant's previous convictions. I do not

agree. The appellant's conviction of murder, being an offence involving an element of violence, is of relevance and the trial court was correct to have regard thereto. The trial court can also not be faulted for taking both prior convictions into account to the limited extent that it gave consideration to the nature of the prior sentences imposed, and their reformatory effect.

[17] The offence for which the appellant was convicted is of a serious nature and bears a high degree of violence. Due to the assault on him, the complainant suffered from swelling of the periorbital region of the left eye; subconjunctival bleeding of the left eye; diffuse swelling of the nasal bridge; chipped mandibular molars; and teeth marks to the left lateral aspect of his tongue.

[18] Society is entitled to look to the courts for protection against violent attacks. The sentence imposed should not only serve to rehabilitate an accused but should also seek to strike a balance between all four objectives of punishment. This is crucial to fostering confidence in the criminal justice system.

[19] Having regard to the above, what remains to be considered is what to do with the appellant's sentence. On a conspectus of the evidence before the trial court, and notwithstanding the commission of a material misdirection, I am of the view that the imposition of 18 months direct imprisonment is appropriate, just, and proportionate. Accordingly, the appeal cannot succeed.

[20] In the premises, the following order is issued:

1. The appeal is dismissed.

I BANDS

JUDGE OF THE HIGH COURT

M.W. NOBATANA AJ:

I agree.

PP

M.W. NOBATANA

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Appellant: Mr Sojada Instructed by: Legal Aid South Africa For the Respondent: Ms Phikiso Office of the Director of Public Prosecutions, Eastern Cape Heard: 31 July 2024

Judgment:

12 August 2024

- [1] Often described as a get together held after a person's funeral to commemorate their legacy.
- [2] South African Social Security Agency.
- [3] S v Zinn 1969
- (2) SA 537 (A) at 540G-H.
- [4] 1991
- (2) SA 352 (B) at 355A-B/C.
- [5] As set out in Director of Public Prosecutions, KwaZulu-Natal v P 2006
- (3) SA 515 (SCA).
- [6] S v Mtungwa en 'n ander 1990
- (2) SACR 1 (A); State v Romer (412/10) [2011] ZASCA 46 (30 March 2011).
- [7] S v Matyityi 2011
- (1) SACR 40 (SCA) para 14.
- [8] 2008
- (3) SA 232 (CC).
- [9] S v M para [39].
- [10] Van Niekerk 1972 SALJ 169 at pp 173 and 174.

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