

SOUTH AFRICA / JUDGMENT

## Miya v S (A126/2019) [2023] ZAGPJHC 1340 (20 November 2023)

[2023] ZAGPJHC 1340

COURT

South Gauteng High Court, Johannesburg

BEFORE

Coertse CJ AJ, Makume

CASE / FILE NUMBER

A126/2019

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### Source record

REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NUMBER: A126/2019

DPP REF. NUMBER:

10/2/5/1-(2019/106)

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

In the matter:

MIYA

SIYABONGA DENNIS

APPELLANT

AND

THE

STATE

RESPONDENT

## JUDGMENT

COERTSE CJ AJ

1. The Appellant was convicted on 5 August 2015 in Regional Court for the Regional Division of Gauteng sitting at Lenasia with one count of theft of motor vehicle. The appellant pleaded guilty to the charge and was subsequently found guilty and sentenced to nine [9] years direct imprisonment. The trial court had granted the appellant leave to appeal in respect of the sentence imposed of nine years direct imprisonment.
2. The issue to be determined by the court of appeal concerns the appropriateness of the sentence imposed by the trial court. The test to apply in this respect is set out by the Supreme Court of Appeal in *Director of Public Prosecutions, KwaZulu-Natal v P*, 2006 (1) SACR 243 (SCA) at para 10;

"... The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate. Even in the absence of misdirection, it would still be competent for this court to interfere if it were satisfied that the trial court had not exercised its discretion reasonably and imposed a sentence which was not appropriate."

3. See also *S v Malgas* 2001 (1) SACR 469 (SCA), at para 12.

*"The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the*

former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

4. The court of appeal had to investigate whether there was a material misdirection by the trial court when sentencing? Another question is: can the sentence be described as “shocking”, “startling” or “disturbingly inappropriate”? The court of appeal is of the view that the simple answer to all of these questions is: no, it is not.
5. The trial court, when considering an appropriate sentence, took into account, amongst other things, the appellant’s previous convictions, which appeared to have more or less similar elements to the offence under consideration.
6. The trial court had alluded to the fact that ordering the sentence to be imposed to run concurrently with the sentence the appellant was serving at the time would amount to repeating the chances he was previously afforded and he had abused such by demonstrating propensity to commit crime. My brother Makume asked counsel for the appellant how was it possible for the appellant to have committed this crime under appeal while he was serving sentence at the same time and he could not provide any explanation at all.
7. It is respectfully submitted on behalf of the appellant, that the effect of nine years direct imprisonment for a theft of a motor vehicle is disproportionate and constitute a material misdirection in the sentencing discretion of the trial court. And the court of appeal was referred to *S v Koutandos & another* 2002 (1) SACR 219 (SCA), where those appellants were convicted of five counts of theft and fraud relating to motor vehicles. Their respective sentences of 15 years and 27 years imprisonment were drastically reduced to 10 years imprisonment each. My brother Makume asked the appellant’s advocate how this case could possibly be applicable on the instant appeal and he could not provide a cogent answer and quickly abandoned that submission.
8. It is further submitted that the trial court had misdirected itself on its failure to consider that the sentence of 9 years imprisonment should run concurrent with the sentence the appellant was serving at the time of sentence. My brother Makume asked counsel for the appellants on what basis could this court of appeal order that these two sentences could run concurrently – the one case was decided by another magistrate court in respect of another crime and had nothing to do with the instant appeal. Once again, counsel for appellant could not provide any answer at all and once again abandoned that proposition.
9.
  - 9.1. At para 9 of appellant’s heads, it is stated: “It would appear that at the time of sentencing, the appellant was serving a sentence of 18 months direct imprisonment for a different matter.”
  - 9.2. The trial court was referred to *Zondo v S* 627/2012 [2012] ZA SCA at 51 where the SCA had occasion to pronounce upon this question whether a trial court may order that a sentence imposed in the one matter, be ordered to run concurrently with another matter when the accused was serving sentence already on that matter? It gave very good guidance what trial courts [and I hasten to add, what courts of appeal] should do under these circumstances.

10. In essence it is submitted by the appellant that the sentence of 18 months should run concurrently with the sentence of 9 years. The question then arises: does this failure of the trial court to order this, induce a sense of shock? And the court of appeal is of the view that it does not.
11. The respondent submitted that the following were aggravating circumstances:
  - 11.1. Appellant was not a first offender in that he had two previous convictions of robbery and one of malicious injury to property.
  - 11.2. Appellant was 23 years of age, not married with two minor children. Appellant was gainfully employed as a street vendor before his arrest and he maintained his minor children and he pleaded guilty to the charge of theft of motor vehicle.
12. The trial court did not agree with the submissions that were made on behalf of the Appellant by his legal representative for ordering that the sentence run concurrently with the sentence that was previously imposed on the Appellant.
13. It was submitted by the Respondent that the trial court did not err in not ordering the sentences to run concurrently because the facts in the matter of Zondo's case are totally different from the Appellant's case. The trial court granted leave to appeal against sentence to the Appellant after becoming aware of the precedent that was set in the matter of Zondo v S 627/2012 [2012] ZA SCA at 51.
14. The Court of appeal is of the view that the sentence in the matter where the appellant is serving sentence is 18 months imprisonment. In the instant matter he was sentenced to  
[9] years direct imprisonment.
15. It was submitted by the Respondent that the court of appeal should not interfere with the sentence that was imposed on the Appellant and that the appeal against the sentence be dismissed.
16. Acting Judge Coertse canvassed the aspect of the remorse of the appellant. Neither appellant nor respondent dealt with this aspect at all. Having regard at the documents uploaded to Caselines, it becomes clear that remorse was not mentioned even once. And Counsel for the appellant did not advance anything at all for the court of appeal in respect of remorse.
17. Acting Judge Coertse further had a slight disagreement with appellant's counsel in that theft has an element of dishonesty whereas counsel for appellant disagree strongly about this but did not advance any authority to disagree. It is rather trite that the crime of theft, being furtive, does have an element of dishonesty.

18. On a conspectus of submissions by both counsel for Appellant and Respondent it is clear that the court of appeal is bound by the principles set out above and that the court of appeal cannot interfere in the sentence by the learned magistrate sitting as the trial court and consequently the appeal is dismissed and the sentence is confirmed.

Coertse CJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I agree.

MAKUME JUDGE OF THE

HIGH COURT, GAUTENG LOCAL DIVISION

JOHANNESBURG

FOR THE PARTIES:

FOR THE APPELLANT:

Advocate S. Hlazo on instructions from Legal Aid South Africa Johannesburg Local Office

FOR THE STATE:

Advocate E K MOSEKI Office of The Director of Public Prosecutions Gauteng Local Division,  
Johannesburg

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