
SOUTH AFRICA / JUDGMENT

Mopp v S (CA&R38/2015) [2015] ZAECHGC 136 (25 November 2015)

[2015] ZAECHGC 136

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Goosen, Mbenenge

CASE / FILE NUMBER

CA&R 38/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 38/2015

Date heard: 25 November 2015

Date delivered: 25 November 2015

In the matter between

JEREMY MOPP

Appellant

And

THE STATE

Respondent

Appeal against sentence – principles applicable to appellate jurisdiction restated – failure by trial court to order that sentence imposed to be served concurrently with a previously imposed sentence in terms of s 280 of Criminal Procedure Act not constituting misdirection – court exercising discretion reasonably – no basis for interference with sentence – appeal dismissed.

JUDGMENT

GOOSEN, J.

1. The appellant was convicted of attempted murder in the Regional Court at Port Elizabeth. He was sentenced to 8 years' imprisonment. This appeal is directed against sentence with the leave of the trial court.
2. The appeal is prosecuted on a narrow basis. It is not contended that the period of imprisonment is disproportionate or shockingly inappropriate, having regard to the nature and circumstances of the offence. Nor is it submitted that the magistrate committed a misdirection in this regard. It is submitted that the magistrate erred in not directing that the sentence be served concurrently with a previously imposed sentence which the appellant was serving at the time of being sentenced.
3. During argument on sentence before the magistrate, it was disclosed as common cause that the appellant had been convicted of robbery with aggravating circumstances on 16 August 2010 and sentenced to 15 years imprisonment. That offence was committed on 8 February 2009. The offence for which he was convicted by the magistrate was committed on 5 June 2009. It was accordingly submitted that regard should be had to the cumulative effect of the sentences and that the trial court should direct that the sentence it imposed be served concurrently with the previously imposed sentence.
4. In the judgment the magistrate noted the fact that the appellant was then serving a sentence of 15 years imprisonment. The trial court then dealt with the various factors to be considered in imposing sentence and with the need to strike an appropriate balance between the competing interests. It is clear from the sentence imposed that the magistrate did not exercise his discretion in favour of the appellant by ordering that the sentences be served concurrently.
5. It was submitted on appeal that the magistrate had not considered the effect of the previously imposed sentence and accordingly that the trial court had erred in this respect. The further submission was that the magistrate had therefore imposed "an unduly harsh effective sentence".
6. Section 280 of the Criminal Procedure Act provides as follows:
 - (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence as the court is competent to impose.
 - (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

7. These provisions plainly confer upon a sentencing court the competence to direct that the sentence it imposes is to be served, either in whole or in part, concurrently with the previously imposed sentence. The section however deals principally with the sentencing of a convicted person in circumstances where such person has been convicted of multiple offences by the court. It makes provision for concurrence of sentences.
8. It is well established that the cumulative effect of sentences may be such as to induce a sense of shock. For this reason a sentencing court must always consider the cumulative effect of the sentences it imposes, so as to prevent the accused from undergoing an unduly harsh or disproportionate sentence (*S v Whitehead* [1]). The same consideration applies in relation to a previously imposed sentence.
9. In deciding whether or not to exercise its discretion the sentencing court will consider, inter alia, the nature of the previously committed offence and whether it shares elements with the offence for which the accused is being sentenced; the proximity in time between the commission of the different offences and the circumstances of the previous conviction.

The court will then also consider the overall objects of the sentence it imposes and will seek to achieve a balance between the competing interests at the stage of sentencing. Generally, the court will also tinge its sentence with mercy. All of these factors were considered by the trial court in exercising its discretion in relation to sentence.

10. A court of appeal will only interfere with the sentence of the trial court if the sentence is vitiated by irregularity, a material misdirection or where there is a striking disparity between the sentence imposed and the sentence that the appeal court considers appropriate. This disparity must be such that it can be inferred that the sentencing court did not exercise its discretion reasonably or at all (*Nieuwenhuizen v S* [2]; *S v Grobler* [3]). In *S v De Jager & another* [4] Holmes JA stated that:

It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.

11. As indicated the only basis for challenge on appeal is that the sentence is unduly harsh in its cumulative effect.
12. Attempted murder is a very serious offence. In this instance the victim died as a result of gunshot wounds. The post mortem report reflects four gunshot wounds, namely a close-range perforating gunshot wound of the right cheek; a contact, penetrating gunshot wound

of the head; a perforating gunshot wound of the penis, scrotum and right femoral artery; and a perforating gunshot wound of the left forearm. The accepted evidence was that the appellant had fired two shots at the deceased at a stage when there was a scuffle between the deceased and the appellant. After these shots were fired the deceased was placed in a taxi, along with several other people and driven from one place to another. All the while the deceased, in his injured state, was in the taxi. No

attempt was made to secure medical assistance for him. The evidence was that the deceased was then bleeding from his groin. Later he was driven to a field where the appellant and one other person walked away with the deceased. They returned without the deceased. His body was later discovered. Two cartridge cases were recovered from the scene. The trial court found that the state had not proved beyond a reasonable doubt that the wounds inflicted by the gunshots fired by the appellant had caused the death of the deceased. It was on this basis that the trial court found that appellant was not guilty of murder but rather of attempted murder. The trial court however, considered the particular circumstances in which the offence was committed to be seriously aggravating. The court, in my view, rightly characterized the manner in which the offence was committed as brutal.

13. In relation to the previous sentence it was placed on record that the robbery involved the use of violence inasmuch as the victim was apparently stabbed several times. Nothing more however is known about the nature and circumstances of the previous offence. All that is known is that the court which convicted the appellant saw fit to impose the prescribed minimum sentence in respect of the offence.
14. It appears from the judgment that the trial court considered the aggravating features as outweighing the personal circumstances of the appellant. It was necessary, the court observed, that the interests of those offended by the criminal conduct and the interests of society in general should not be taken lightly.
15. It cannot be said that the trial court did not consider the fact that the appellant is serving a previously imposed sentence and therefore did not consider the cumulative effect of the sentences to be served by the appellant. In *S v L* [5] it was held:

Soos opgemerk in vorige uitsprake van hierdie Hof (wat ek nie nodig ag om aan te haal nie) dui die blote versuim om 'n besondere feit of aspek van die saak pertinent in 'n uitspraak te opper, nie noodwendig daarop dat dit nie oorweeg is nie.

16. In that matter the court was concerned with the question as to whether consideration had been given to corrective supervision as a possible sentence. The court remarked that magistrates routinely deal with consideration of such sentences and that there was no indication from the judgment considered as a whole that the option had not been considered. See also *Imtiaz Mohamed Ebrahim v The State* [6] where Plasket J similarly considered it necessary to give consideration to the judgment read as a whole.

17. Similar considerations apply here. The question of directing the sentence to be served concurrently with the previously imposed sentence was pertinently raised in argument before the magistrate and reference to this aspect is made in the court's judgment. It was conceded by the defence attorney, and rightly so, that the only appropriate sentence was one of direct imprisonment. The only alternative sentencing option which was under consideration at the stage of sentencing was that an order be made in terms of s 280(2) of the Act. Significantly the court remarked that it was necessary to "look at other available options of sentencing to consider which sentence would be appropriate". In context and when the judgment is read as a whole it is apparent that the magistrate here had in mind s 280 (2) of the Act. The magistrate's conclusion was that he did not consider it appropriate to make an order in terms of s 280(2), having regard inter alia to the seriousness of the offence for which a sentence was to be imposed and the fact that both offences involved the use of violence. I therefore find that the magistrate did indeed exercise his discretion in this regard.
18. The only further question is whether it can be said that the discretion was not reasonably exercised. The test, as noted in *De Jager*, is whether the sentence imposed, having regard to the cumulative effect of the two sentences, induces a sense of shock. In my view it does not. That the appellant is required to serve a period of 23 years' imprisonment for two separately committed offences involving violence and in which one of the victims lost his life is not, in my view, a shockingly inappropriate or disproportionate punishment. An order directing that the appellant should serve the whole or even a part of the sentence imposed for attempted murder concurrently with the previously imposed sentence for robbery would render the punishment for the former offence trivial.
19. In the circumstances I am of the view that there is no basis for this court to interfere with the sentence imposed by the trial court.
20. I therefore make the following order:

The appeal is dismissed.

G. GOOSEN

JUDGE OF THE HIGH COURT

MBENENGE, J.

I agree.

S. M. MBENENGE

Appearances: For the Appellant

Adv. M. Solani

Grahamstown Justice Centre

For the Respondent

Adv. D Els

Director of Public Prosecutions

- [1] 1970 (4) SA 44 (A) at 438F – 440
- [2] (20339/14) [2015] ZASCA 90 (29 May 2015) at para 5 & 6
- [3] 2015 (2) SACR 210 (SCA) at par 5
- [4] 1965 (2) SA 616 (A) at 628H-629
- [5] 1998 (1) SACR 463 (A) at 468c-d
- [6] Unreported judgment ECHC Case no 20 /2014, delivered 9 September 2014 at par 10

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