

SOUTH AFRICA / JUDGMENT

Moyo v S (A208/2020) [2021] ZAGPPHC 141 (5 March 2021)

[2021] ZAGPPHC 141

COURT

North Gauteng High Court, Pretoria

BEFORE

N. P. Mali, D. Pick

CASE / FILE NUMBER

A208/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A208 /2020

In the

matter between:

TWOMAN MOYO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 5 MARCH 2021 AT 16H00

MALI J:

INTRODUCTION

- [1] The appellant, Mr Twoman Moyo was found guilty in Benoni Regional Court (“trial court”) on three counts; namely Fraud; contravening the provisions of sections 68(3)(a) and 89(1) of the National Road Traffic Act, Act 93 of 1996, therein that he inserted his passport photo on a forged driver’s license; and contravening sections 49(1)(a) of the Immigration Amendment Act, Act 13 of 2002 read with sections 1, 10, 25 and 26 of the Immigration Amendment Act 12 of 2011 therein that he entered and remained in

Republic of South Africa without the legally required documentation.

- [2] The appellant was legally represented and he appeals against sentence. He was sentenced to eight years’ imprisonment on count one, three years’ imprisonment on count 3 and two years’ imprisonment on count four. The sentences were ordered to run concurrently.

FACTUAL BACKGROUND

- [3] The appellant is a Zimbabwean citizen. During December 2017 he pretended to be one Dignity Ngwenya. At the time he rented a flatbed trailer valued at R 35 000, 00. For purposes of the rental transaction the appellant used a fraudulent driver’s license and salary advice. The trailer was never recovered by the rightful owner.
- [4] On his arrest, a counterfeit Temporary Asylum Seeker Permit was found at his place of residence. At the time the trial was heard by the Benoni Regional Court; he was already 12 years illegally in the Republic of South Africa.

AD SENTENCE

- [5] On behalf of the appellant this court is to be persuaded to accept that the trial court misdirected itself in imposing the sentences. This would be because the trial court erred in overemphasizing the seriousness of the offence over the interest of the society whilst the personal circumstances of the appellant were under-emphasised. The other complaint is that the sentence induces a sense of shock and it is harsh, and also that the court did not take into account that the appellant spent three months in custody awaiting trial.

PERSONAL CIRCUMSTANCES

- [6] The appellant’s personal circumstances submitted to the trial court are; he was 32-year-old and a married man with three minor children. One the children is living in Zimbabwe and two of them live in South Africa.
- [7] His highest standard of qualification is Form Four (grade 11). He was employed as a waiter in a restaurant and earned R5000.00 per month. He spent over three months in custody awaiting trial and pleaded guilty to the charge of being in the country illegally.

[8] In considering an appropriate sentence on appeal the court must exercise caution not to erode the discretionary powers of the trial court[1]. It is trite that the power of an appeal court to interfere with sentence is limited.

[9] In *S v Kgosimore* Scott JA said the following with respect to an appeal court's powers to interfere with sentence:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various

tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

[10] Imposing sentence is one of the most difficult tasks which a presiding officer has to grapple with. It has been described as a 'painfully difficult problem' and it involves a careful and dispassionate consideration of all factors. The court must consider the factors referred to in *S v Zinn* being the interests of society, the personal circumstances of the accused and the nature of the offences that have been committed. The court must also consider the recognised objectives of sentencing being prevention, rehabilitation, deterrence and retribution.

[11] The seriousness of the offences, the circumstances under which they were committed and the victim are also relevant factors in respect of the last element of the triad. The personal circumstances of the accused including his age, education, dependants, his previous convictions, if any, his employment and other relevant conduct or activities call for consideration in respect of the second element. An appropriate sentence should also have regard to or serve the interests of society, as the first element of the Zinn triad, which is the protection of society's needs, and the deterrence of would-be criminals.

[12] A sentencing court must not over-emphasise the public interest and general deterrence. *S v Scott-Crossley* 2008

(1) SACR 223 (SCA).

'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.'

The judgment further states at para 35:

‘It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’

As our courts have often said the object of sentencing is to serve the public interest and not satisfy public opinion. In *S v Mhlakaza & another* Harms JA held the following:

It remains the court’s duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.’

Referring to Chaskalson P in *S v Makwanyane & another* paras 88-89 in which the court said the following:

‘Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts. . . This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.’[3]

[13] When considering the personal circumstances of the accused and his age, to impose the minimum sentence for the offence the court must also consider the cumulative effect of the sentences on multiple counts.

[14] We now turn to examine whether the trial court applied the legal principles enunciated above. At page 54 of the judgment of the trial court from line 23 to 25 the following is stated:

“You know Mr Moyo, if I look at your personal circumstances. (sic) You are 32-years-old. You are a Zimbabwean National.....”

[15] The record continues at page 55 from line 2 -25 the trial court took into consideration that he has children, the economic circumstances of Zimbabwe which led him seeking greener pastures in South Africa. It is worth repeating the record from line 6 to 25;

“What I find offensive is the fact that you did come and work here, you got a job as a waiter earning R5000.per month. And still you contributed while you are a mere guest or be it an unlawful guest in this country. You contributed to our vast crime problem. That I find particularly aggravating. And if I look at your SAP 69s it is once again that the justice system fails the public. Because you have got two previous convictions, sir..... Because one of the conditions for an asylum seeker is that you should: “All permit holders are obliged to respect the laws of South Africa”. So you basically disqualify yourself an asylum seekers permit when you commit crime. So you committed already two crimes. Nothing was done. The system is not working, that I know.”

[16] From the above the trial court carefully considered the personal circumstances of the accused/ appellant. The complaint pertaining to the appellant having spent three months in custody awaiting trial is irrelevant. There is no clear legal basis for the said mathematics.

[17] In imposing sentences at page 56 lines 20-24 the trial court said the following:

“To curb the cumulative effect of the sentences keeping in mind your record, mitigation and aggravation the court orders that the

sentences on count 1 and 3 will be served concurrently. So effective sir, I am sending you to jail for 10 years. Thank you, you may stand down.”

[18] From the above, it is concluded that the trial court appropriately applied the legislation in order to decrease the lengthy sentence. There is nothing more expected from the trial court. In the circumstances we find that the trial court did not misdirect itself in sentencing the appellant.

ORDER

1. The appeal against sentence is dismissed.

N. P. MALI

JUDGE OF THE HIGH COURT

I agree

D. PICK

ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

APPEARANCES

FOR THE APPELANT :

Adv Kgagara (Mr)

For THE RESPONDENT :

Adv Krause (Mr).

1. Sv Pillay 2.

[2] S v Kgosimore Scott JA

1. Sv Pillay

2.

[2] S v Kgosimore Scott JA

[3] S v Scott-Crossley 2008

(1) SACR 223 (SCA).

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