

SOUTH AFRICA / JUDGMENT

Ndlovu and Another v State (149/2016) [2017] ZAGPPHC 1295 (13 September 2017) [2017] ZAGPPHC 1295

COURT

North Gauteng High Court, Pretoria

BEFORE

L Vuma, J Raulinga

CASE / FILE NUMBER

149/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

APPEAL

NO: 149/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

DATE:13

September 2017

In

the appeal of:

MTHOKOZISI

NDLOVU

1ST APPELLANT

KHULEKANINDEBELE

2ND APPELLANT

and

THE

STATE

JUDGMENT

VUMA AJ

- [1] This is an appeal against sentence by both appellants. On 26 November 2013 both appellants were convicted in the Regional Court, Atteridgeville, on one count of robbery with aggravating circumstances where the provisions of section 51(21) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Regime Act) became applicable. Each appellant was sentenced to (twelve) 12 years direct imprisonment.
- [2] After being denied leave to appeal against their sentence only, both appellants petitioned the Judge President for leave to appeal against their sentence, which application was granted. Thus, the only issue before this court is the question of sentence imposed on each appellant.
- [3] Both appellants were legally represented and pleaded not guilty to the charge mentioned above.
- [4] On behalf of both appellants it was submitted that despite the fact that the trial court did not impose a statutory minimum sentence of fifteen years imprisonment sentence, the twelve years was still disproportionate given the facts of the case. It was further submitted that the trial court did not attach sufficient weight to the facts before it namely:
- 4.1 The value of the complainant's cellphone was R3 500-00;
- 4.2 The cellphone was recovered;
- 4.3 The complainant was not injured;
- 4.4 The appellants were first offenders; and
- 4.5 The appellants were 30 years and 27 years respectively at the time of sentencing.
- [5] In both its submissions and Heads of Argument, the respondent conceded that the sentence imposed by the trial court was disproportionate which warrants an interference by this court.
- [6] The facts of the case are the following:

The complainant was accosted by the appellants during day time, with one of them being armed with a knife whereas the other was not armed. They demanded money which she didn't have and they then went on to demand her cellphone which she gave to them. She requested them to give back her simcard and they obliged. Within minutes of the complainant's departure from the scene, both appellants were apprehended and the complainant's cell phone was recovered in their possession.

- [7] It is common cause that a court of appeal will interfere with a sentence of a trial court in a matter where the sentence imposed was disturbingly inappropriate or when the court, when imposing the sentence, committed a misdirection (see *S v Salzwedel and Another* 1999 (2) SACR 685 (SCA) para 10). Since *S v Rabie* 1975 (4) SA 855 (A) at 8658-C it has consistently been held that the discretion to impose a sentence is pre-eminently that of the court imposing the sentence and that an appeal court should be careful not to erode such a discretion. The test then is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate (see *S v Rabie* at 857D-F).
- [8] In *S v Salzwedel* at 591G the Supreme Court of Appeal held that an appeal court can only interfere with a sentence of a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.
- [9] The enquiry regarding the imposition of sentence on appeal is not whether the sentence is right or wrong but whether the court acted reasonably or properly in the exercise of its discretion (see *S v Obisi* 2005 (2) SACR 350 (W) para 8). The question whether the trial court exercised its discretion reasonably depends on whether, considering all the circumstances of the case, the trial court could have reasonably imposed the sentence which it did (see *S v Obisi* para 8).
- [10] It is common cause that at the time of sentencing the appellants were aged 30 years and 27 years respectively. It is further so that the complainant was not physically assaulted but rather threatened with a knife in order to subdue her into robbing her. The complainant did recover her cellphone.
- [11] Counsel for the appellants referred to the matter of *S v Fortune* 2014 (2) SACR 178 (WCC) where the appellant was convicted in the regional court of robbery with aggravating circumstances and was sentenced to fifteen years imprisonment. On appeal, it was held that criminal courts have the duty when approaching sentence, to treat each case on its individual merits and to be mindful of the need to apply the minimum sentence legislation in a manner that did not result in the punishment that was disproportionate, having regard to the peculiar circumstance\$ of the offender. The appeal court set aside the fifteen years sentence and substituted it with eight years imprisonment.
- [12] It is my view that taking into account the factors in this matter and what was held in *S v Fortune* supra, I am persuaded that the trial court misdirected itself in not properly considering the prospects of rehabilitation of the appellants, the low value of the item robbed, the fact that no violence was used as well as the fact that the complainant recovered her cellphone. Coupled with the appellants' respective ages and the fact that both are first offenders, it is my view that both appellants can be rehabilitated.

[13] I conclude that in the light of the circumstances of this case, both appellants succeed in their appeal against sentence and that for each appellant, a sentence of eight (8) years imprisonment would be appropriate.

[14] In the result I make the following order:

ORDER:

1. The appeal is upheld.
2. The sentence imposed by the Pretoria Regional Court is set aside and replaced with the following:

"Each accused is sentenced to eight (8) years imprisonment."

3. In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentence is antedated to 26 November 2013.

L VUMA

Acting Judge of the High Court

I agree

J RAULINGA

Judge of the High Court

Heard on: 5 September 2017

Judgment

delivered on September 2017

Appearances:

For first and second appellant: Adv LA Van Wyk

Instructed by: Pretoria Justice Centre

For Respondent: Adv C Mnisi

Instructed by: Office of the DPP

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Prepared on 13 October 2026 · Esheria