

SOUTH AFRICA / JUDGMENT

Ndlovu v The State (CA&R14/2016) [2016] ZAECHC 17 (8 December 2016)

[2016] ZAECHC 17

COURT

Eastern Cape High Court, Bhisho

BEFORE

Ntlama, D Van Zyl

CASE / FILE NUMBER

CA&R14/2016

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

Case No.: CA& R 14/2016

Reportable Yes / No

In the matter between:

SINDISIWE CRESENTIA ALBERTO

NTSOKANA NDLOVU

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

NTLAMA AJ

- [1] This is an appeal against the sentence that was imposed by the Regional Magistrate Court, Mdantsane in relation to the crimes of contravening the provisions of the Immigration Act 13 of 2002 as amended (Immigration Act), kidnapping and attempted extortion, of which the appellant was found guilty and convicted.
- [2] The brief facts of the case are as follows: The appellant is a 32 year-old Mozambican national that entered the Republic of South Africa (Republic) illegally to find work. Upon entering the Republic, she was employed as a child-minder by the parents of a 3 year old girl in

Mdantsane. Within two weeks of her employ, she kidnapped the child and left with her for Mozambique. Upon her arrival in Mozambique, the child's mother received a call from a man known to the appellant as 'Seven', demanding a ransom of R500 000 which was later reduced to R120 000 as she could not afford the amount they initially wanted. In this period, the parents were severely traumatized as they did not know what would happen to their child. Mr 'Seven' would, on occasion, call them and let the child cry over the phone for her 'Daddy to come pick her up'. The anguish went on for a month, from 3 August to 3 September (2015) before the child was finally rescued and brought back to them.

- [3] During this saga, the appellant left Mozambique, leaving the child in the care of 'Mr Seven' and headed for Johannesburg where she was arrested by the South African Police Service (SAPS) working at a certain tavern. Upon her arrest, she co-operated with the SAPS and took the police back to Mozambique to fetch the child where the child was found unharmed and returned to the parents.

4 The appellant was then charged first, for entering the Republic illegally by contravening section 49(1) as read with section 1, 9 to 23 of the Immigration Act. Secondly, for the crime of kidnapping, as read with sections 256 and 270 of Criminal Procedure Act 51 of 1977 (CPA), and lastly, for attempted extortion read with sections 256 and 270 of the CPA and section 90 of the Magistrates' Court Act 32 of 1944 (Magistrates Court Act).

- [5] She pleaded guilty to all the charges and was convicted on all counts. She was then sentenced to 3 months imprisonment for entering the Republic illegally, 15 years for kidnapping and 5 years for attempted extortion. Effectively, she was sentenced to 20 years, three months imprisonment. She appeals against the sentence only in respect of Count 2 (kidnapping) and Count 3 (attempted extortion). Leave to appeal was granted by the trial court without any additions to the reasons for the sentence.

Issues

- [6] The appeal is based on the grounds that the trial court:
- (a) Erred by not considering her personal circumstances as she was:
 - (i) a first offender.
 - (ii) remorseful.
 - (iii) has a minor child (11 year old).
 - (iv) had a difficult upbringing and the reasons that brought her into South Africa.
 - (b) Misdirected itself by not considering the local jurisprudence relating to the crime of kidnapping as it was based on international law.
 - (c) Was not merciful towards her because the child was returned unharmed.

- (d) Put greater emphasis on the crime as opposed to the impact of the sentence on her; and
- (e) The cumulative sentence was shockingly inappropriate.

[7] The basic question that emanates from these grounds of appeal as raised in *S v Pieters*[1] judgment is whether the ‘trial court could have reasonably imposed the sentence which it did’.[2] It is evident from *Pieters* that the standard principle regarding appeals on sentence is that the appellate court cannot interfere with the sentence unless the trial court has not exercised its discretion in a judicial manner. The appellate court is therefore precluded from interfering with the sentence of the trial court unless there is a ‘material misdirection’ which warrants such interference in order to protect the integrity of the judicial process. Various terms such as a ‘sense of shock, disturbingly inappropriate, striking disparity’ have been established to determine whether the appellate court would have imposed the sentence if it was the trial court.[3] These terms require a deeper analysis to determine whether the imposed sentence induces a sense of shock as opposed to the same offence that was decided by another court. This is the ‘safety valve’ of the judicial proceedings that seek to ensure the exercise of the court’s judicial discretion in a reasonable way. In

essence, the principle of ‘non-interference’ eliminates the seizing of the authority that is not vested in the appellate court in the absence of ‘material misdirection’ by the trial court.

[8] It is therefore, of great significance not to read the principle of ‘material misdirection’ in isolation. It has to be conceptualised within the context of considering the impact of the sentence on the offender, the offence itself and the public interests. These three-tier factors are traceable from *S v Zinn*[4] as they affirm the purpose of sentencing. Their significance entails that in the process of imposing the sentence, the court has to strike an appropriate balance that seeks to ensure that it considers what is just and appropriate.

[9] The appropriateness of the sentence within the context of the three-tier factors affirms the importance of the impartiality of the judicial officer without being clouded by ‘revenge’.[5] It is in this context that requires the determination of whether the magistrate in this case was not clouded by vengeance. The foundation

for such an endeavour has long been laid down in *S v Rabie*[6] where the court held:

“a judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and objects of punishment demand of him. Nor should he strive after severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of the circumstances of the particular case”.[7]

[10] Sentencing which is classified as a ‘lonely and onerous task’[8] is the major difficulty that is faced by judges after having assessed the evidence presented before the court. Judges have to determine the applicable law and interpret it in a way that gives meaning and substance to the facts placed before the court. In essence, the judges determine the legal principles applicable in a particular matter in order to find a suitable sentence that ‘fits’ the crime that has been committed.[9] It is therefore imperative that I assess whether the magistrate has balanced the imposition of the sentence against the factors

needed to be taken into account in the sentencing of the appellant.

The merits of the appeal

[11] It is deduced from the trial court record that the magistrate had considered the three-tier factors (offender, offence and interests of the society) on sentencing the appellant in assessing whether there existed ‘substantial and compelling circumstances’ which warranted lesser sentences. He concluded that the appellant’s circumstances are outweighed by the gravity of the offence that she committed and the purpose which is sought by the impact of the imposition of sentence. The magistrate therefore, gave consideration to all the other circumstances impacting on the appellant and balanced them against the legitimate interests of the society. This means that the trial court was not blinded by the atrociousness of the crime but went through a well-thought reasoning in arriving at an appropriate sentence within the limits prescribed by law.

[12] It is therefore, my view, that the conspectus of relevant factors does not justify a lesser sentence because the court was justified in its emphasis on the seriousness of the offence and the purpose which is sought by sentencing as opposed to the impact of the sentence on the offender. The appellant’s conduct impacted on the psychological development of the child as linked to her right to human dignity which is both a justiciable right (section 10 of the Constitution) and foundational value (section 1 of the Constitution).[10]

[13] In this case, kidnapping is given due legislative recognition by its inclusion in the CPA as a punishable offence. This is the indication of the strides taken by the legislature in developing laws that seek to regulate human conduct. It further shows the seriousness of the crime of kidnapping that needed legislative intervention in order to also address the underlying causes of the crime in question. In essence, its legislative recognition was not taken in a vacuum because the high levels of crime appear to escalate every day. The question of whether the law may reduce the increase in crime is not the subject of this appeal but an argument for another day.

[14] Also, it is worth to highlight that remorse, her co-operation with the police, return of the child unharmed and pleading guilty to the charges should not be clouded by regret because the appellant was caught and there was overwhelming evidence against her. These are not legitimate grounds for a lighter sentence considering the impact of the crime itself on the child. Remorse was contextualised in *S v Seegers*[11] when the court held that:

“[it is] an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined”.[12]

- [15] The South African courts are developing jurisprudence relating to the concept of “remorse” where they emphasise that it should be carefully distinguished from the fact that the appellant regrets her actions and does not have any genuine reason to justify her conduct. Ponnarn JA in *S v Matyityi*[13] had alluded to this fact and held that:

“there is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions”.[14]

- [16] In this case, the motive for the commission of the offence is not a legitimate reason that is justified by her difficult upbringing. The appellant has made it equivocally clear that she came to South Africa for socio-economic emancipation. She was fortunate to get the job in order to fulfil her dreams. On top of that, she was brought in as a ‘sleep-in nanny’ within two weeks of being employed. It is deduced from her employer’s conduct that they trusted her and gave all their lives to her by looking after their child. However, it is clear from the evidence that she was motivated by greed which resulted in her kidnapping the child for attempted ransom of money. It is therefore my view that the appellant just regretted her conduct and was not truly remorseful.

- [17] The emphasis on international law as opposed to ‘home-grown jurisprudence’ regarding kidnapping is another factor that needs a comment. The magistrate did not misdirect himself in putting emphasis on international and foreign law. This is the mandate that is deduced from the Constitution itself. Section 39(1)(b)&(c)

thereof provides that the courts must consider international law and gives discretion to the courts to consider foreign law in the interpretation of the Bill of Rights. This provides an opportunity for the infusion of international law into domestic law to ensure the integration of the lessons from the international community into domestic law or vice-versa. Hence Chaskalson P in *Makwanyane* held that:

“the international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this [contentious] issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution, ... Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law

accordingly provide a framework within which Chapter [Two] can be evaluated and understood ...”.[15]

[18] It is my view that in as much as local jurisprudence is of great significance in the determination of the cases, it should also be borne in mind that the ‘silent rules of adjudication’ should not be used as a yardstick against which to determine which law (domestic or international) carries more weight than the other in resolving a particular impasse, especially in the context of the new constitutional dispensation. It is also acknowledged that the doctrine of ‘precedent’ is the gist of the judicial process but it is further affirmed that as considerably as it is so, each case is judged according to its own merits. The general impression of the trial court on the emphasis on international law as opposed to domestic jurisprudence in relation to the crime of kidnapping has caused him to establish a ‘lens’ in order to draw comparative lessons on the seriousness of the offence. This, accordingly, cannot be classified as a ‘material misdirection’ which warrants interference by the appellate court in the development of the elements of the crime of kidnapping.

[19] The contention in respect of the ‘inappropriate sentence’ relating to the same offence handed down in other jurisdictions warrants a comment as well. I am not persuaded by the appellant’s

contention that the sentence of 15 years imprisonment regarding kidnapping is ‘shockingly inappropriate’ and warrants interference by this Court. The reason for my conviction is based on the fact that inconsistency in sentence

imposed by different courts in respect of the same crime does not necessarily mean it sends a sense of shock and warrants interference.

As stated in *Engelbrecht v State*[16] the fundamental question in relying on the argument is whether the ‘imposed sentence on the specific appellant under consideration

is disturbingly inappropriate and whether the trial court misdirected itself regarding the specific sentence under appeal’.[17]

[20] It is therefore, my view that the fact the appellant is not praying for a ‘non-custodial sentence’ but for an ‘appropriate’ one is her acknowledgment of the seriousness of the offence. It is a further admission on the broader factors that have to be taken into account

on sentencing: offender, offence and public interests. It is also evident from the facts of this case that the appellant appreciated the wrongfulness of her conduct. She lied to her aunt and alleged that the child belonged to her boyfriend, leaving not only Mozambique, but the child with a stranger about whom she knew no more than that he was called 'Seven', to seek work in Johannesburg. She was not concerned about the health and well-being of the child and further collaborated with 'Seven' to extort money from the parents before she was arrested. There was a clear intention to induce the child's parents to give money that was not due to her. The fact that the appellant did not agree with 'Mr Seven' on the amount to be extorted does not lessen her culpability for the crime of attempted extortion.

These factors are indicative of her cold and calculating state of mind and warranted the sentence imposed by the trial court.

[21] In line with the argument made above, her offence touch on the substantive conception of the supremacy of the Constitution 1996 as entrenched in section 2 by compromising the best interest of the child as envisaged in section 28(2). These rights are directly linked to parental rights and responsibility which was equally undermined by her conduct. It is worth to emphasise that the direct relationship between the parents and the child had long been laid down in *President of the Republic of South Africa v Hugo*.^[18] Although this case challenged the Proclamation passed by President Nelson Mandela, which at face value had a discriminatory

impact on men, it endorsed the importance of the relationship between the parents and the child. It is this relationship that the appellant compromised which might have ramifications for the future as the girl's father alluded to in court when giving evidence on the impact of the kidnap of their child on them wondering whether they will ever see her alive again.

[22] In this case, the appellant has acted in a manner that disregarded the psychological well-being of the child. Her leaving of the child in Mozambique with a strange man is a clear indication of the disrespect of the rights of the child as envisaged in South Africa's 1996 Constitution. Also, the defence's argument that this type of crime is 'not prevalent in our area' is very flawed. It constitutes contempt of the fundamental values of the new dispensation which lay the foundation for leaving in a crime free society. One incident of this nature which show the seriousness of the offence is evident in *Mcasa & Another v S*^[19] just nearby in Umtata which also involved the crime of kidnapping for ransom.

[23] I am accordingly of the view that 15 years imprisonment for kidnapping fits within the framework of the sentence imposed upon the appellant. The cases which the defence has referred to in support of their contention for a lesser sentence are distinct from the facts that are linked to the appellant. The interests of justice do not require interference by this court with the sentence of 15 years imprisonment.

[24] In respect of count 3 it was submitted by Counsel that the sentence of 5 years should be ordered to run concurrently with the 15 years imposed in count 2. While the two crimes constitute separate offences each with its own elements, on the facts of the case they are closely related in that the kidnapping was committed in order to facilitate the attempt to extort monies from the child's parents. That being so, I am of the view that it is an appropriate case where the two sentences should be ordered to run concurrently.

[25] For these reasons the appeal is allowed only to the extent that it is ordered that the sentences imposed in respect of counts 2 and 3 are to run concurrently.

N NTLAMA

ACTING JUDGE OF THE HIGH COURT

I agree.

D VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

For Appellant: Mrs N Mtini instructed by Legal Aid Board

King William's Town

For 1st Respondent: Mrs C De Kock instructed by National of Director of Public Prosecutions - Bhisho

Date Heard: 02 December 2016

Date Delivered: 08 December 2016

[1] S v Pieters 1987 (3) SA 717 (A) quoted in Joubert JJ (ed) Criminal Procedure Handbook (2015) 11 ed, 407.

[1] S v Pieters 1987 (3) SA 717 (A) quoted in Joubert JJ (ed) Criminal Procedure Handbook (2015) 11 ed, 407.

[2] Pieters 719G-J.

[3] Joubert (note 1 above) 407.

[4] 1969 (2) SA 537 (A). See also S v Selebi SS (25/2009) [2010] ZAGPHC 58; S v Mqabhi 2015

(1) SACR 508 (GJ); S v Ngcobo 2016 (2) SACR (KZP).

[4] 1969 (2) SA 537 (A). See also S v Selebi SS (25/2009) [2010] ZAGPHC 58; S v Mqabhi 2015

(1) SACR 508 (GJ); S v Ngcobo 2016 (2) SACR (KZP).

- [5] S v Kruger 2012 (1) SACR 369 (SCA).
- [6] 1975 (4) SA 855 (AD).
- [7] Rabie 866 quoted in S v Luke and Others (SS16/10)
- [2012] ZAWCHC 9 para 3.
- [8] Hogarth J, Sentencing as a Human Process (1971) U. of Toronto P 5, Cited in Stockdale and Devlin on Sentencing, 1987, 8 quoted in S v Malgas 2001
- (3) ALL SA 220 (A).
- [9] Bozalek J in S v Isaacs SS38/2011.
- [10] Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2013
- (12) BCLR 1429 (CC). The Court put emphasis on the psychological development of the child.
- [11] 1970 (2) SA 506 (A).
- [12] Seegers 511G-H quoted in Britz v S (889/2015)
- [2016] ZASCA 86.
- [13] 2011
- (1) SACR 40 (SCA).
- [14] Matyityi para 13 and footnotes omitted.
- [15] Makwanyane paras 34-35.
- [16] Case No: 608/06.
- [17] Engelbrecht para 10.
- [18] 1997
- (7) BCLR 708 (CC).
- [19] [2003] JOL 11506 (SCA).

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