

SOUTH AFRICA / JUDGMENT

Ngema v S (A728/2016) [2019] ZAGPPHC 163 (26 March 2019)

[2019] ZAGPPHC 163

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela, Mokose SNI

CASE / FILE NUMBER

A728/2016

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA
(NORTH GAUTENG HIGH COURT,
PRETORIA)

Case No: A 728/2016

27/3/2019

In

the matter of:

Siphiwe
Ngema
Appellant
And
The
State

JUDGMENT

Maumela J.

1. This matter came before court as an appeal against both conviction and sentence. Before the district court for the District of Witbank, (the court a quo), Appellant was charged with the offence of Assault. He was legally represented throughout the trial.

ALLEGATIONS.

2. The allegations were that upon or about the 4th of August 2015, and at or near Kusile Power Station in the Regional Division of Witbank, the Appellant did unlawfully and intentionally

assault Hermanus Stephanus Legrarige, by beating him with fists and kicking him with booted feet.

3. The Appellant understood the charge put. He pleaded not guilty. When offered an opportunity to disclose the basis of his defence in terms of section 115 of the Criminal Procedure Act, Appellant opted to exercise his rights to remain silent.
4. The state called Mr Hermanus Stephanus Legrange, the complainant, as its witness. Under oath, this witness testified that he is employed at Topfix; a firm located at Kusile Power Station. He stated that Appellant is one of his drivers. On the 4th of August 2015, he was at work together with a group of employees under his charge. He stated that on that day an incident took place. As a result, he looked for the workers under him, including the Appellant. He could not find the Appellant in particular. A search all over for the Appellant proved in vain. Acting on a tip-off, he found the Appellant sitting inside one of the vehicles; a Toyota Quantum. He told court that sitting in a vehicle during working hours is contrary to applicable regulations.
5. He said that he opened the door of the vehicle and asked the Appellant to alight. The Appellant, who kept on fidgeting with his cell phone ignored him. After waiting for a while, to no avail he asked Appellant several times to alight and to follow him to his office. As he walked towards his office, he heard Appellant banging the door of the vehicle. He walked back and requested Appellant not to slam the door of the vehicle, reminding him that the vehicle does not belong to him. He stood there holding the door of the vehicle. He stated that the Appellant attempted to pull the door and to get the complainant's hand off the door. He resisted the Appellant who kicked him on his stomach.
6. The witness testified further that when he asked Appellant what he was doing, the latter hit him with a fist on his eye. He stated that he clung to the Appellant to avoid suffering further assault. He said that his spectacles flew in the air during the fracas and he could no longer see. He had to use eye drops over a long period to treat his injured eye. He consulted and received treatment at a hospital where his X-Rays were taken. The witness confirmed a J 88 form generated at the time of his treatment in hospital. When he was at the HR section, photos depicting some of his injuries were taken. Despite objections by the defence, photos shot from the complainant's cell phone were admitted as exhibits. The J 88 form was also admitted into the record as an exhibit.
7. Under cross examination the witness disputed that on the day of the incident Appellant pointed out to him that he was busy on the phone with his bank. He denied that he got angry and impatient with the Appellant or that he demanded for the Appellant to alight from the vehicle even though he was not done with communicating with his bank. He was adamant that Appellant never responded when he spoke to him. He testified that when he found him, Appellant was hiding in the Quantum vehicle. He said that Appellant lay flat on the seat. He was adamant that the Appellant kicked him on the stomach.

8. The following issues were not in dispute:

8.1. That around the day of the incident in this case the Appellant and the complainant Mr Le Grange were both employed at Top Fix, at Kusile Power Station, (the workplace).

8.2. That both were present at the workplace on the 4th of August 2015, (day of the incident).

8.3. The J 88 form submitted into the record purporting to reflect sustained by the complainant was not in dispute.

8.5. After looking for him for a long time, the complainant found the appellant seated in the vehicle at the workplace.

8.6. That on the day of the incident, at the workplace, an altercation took place between the appellant and the complainant.

8.7. That during the altercation complements spectacles fell to the ground. He picked them up walked to his office.

8.8. Both the appellant and the complainant were suspended from work.

AD CONVICTION.

9. The state called one witness, namely the complainant. It handed in the J 88 form on which injuries were recorded which were found at the time the complainant underwent a medical examination. The only evidence to be considered was that given by the complainant. Appellant opted neither to give evidence nor to call witnesses. The Appellant argues that the court aquo erred in convicting him. He seeks an order setting aside his conviction in the hands of the court a quo.

10. It is trite that in any criminal case, the onus rests upon the state to prove its case against the accused beyond a reasonable doubt. In the case of *S v Thebus and Another*[1], the court stated the following: "The State bears the onus of proving every element of an offence without the assistance of the accused. It is clear from the Constitution that the presumption of innocence implies that an accused person may only be convicted if it is established beyond a reasonable doubt that he or she is guilty of the offence. That in turn, requires the proof of each element of the offence. However, our Constitution does not stipulate I that only the State's evidencemay be used in determining whether the accused person has been proved guilty. Indeed our law has always recognised that the question of whether the accused has been proven guilty or not is one to be determined on a conspectus of all the admissible evidence, whatever is provenance."

11. It is also trite that Appellate Courts do not have a free hand to interfere with findings of trial courts. In this case, it is submitted on behalf of the Appellant that the court a quo erred in admitting evidence of the complainant who was a single witness. In the case of *Myandu v Padayachi*[2], the court stated the following concerning power of the appellate court where it regards factual findings. "It is trite that a court of appeal will not interfere with the findings of fact and credibility of the trial court unless it is apparent from the record that the court a quo either materially misdirected itself or erred to the extent that its findings are vitiated and fall to be set aside. The court of appeal must a/so remain cognisant that the trial court has the advantage of having observed and heard the witnesses."
12. Our courts hold that it is only in instances where demonstrable and material misdirection by the trial court is evident where the appellate court will be justified to interfere with findings of the trial court. In the case of *S v Hadebe and Others*[3], the court stated the following: "It was well to recall yet again the well-established principles governing the hearing of appeals against findings of fact, which were, in short, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong."
13. The Appellant raised the issue that in this case only the complainant testified about the assault. That the court a quo erred in admitting evidence of the complainant was a single witness. Section 208 of the CPA provides the following: "208 An accused may be convicted of any offence on the single evidence of any competent witness."
14. Our courts emphasise that caution has to be exercised when evidence of a single witness is considered. In the case of *S v Sauls and Others*[4], the court stated as follows: "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (in *R v Mokoena*), may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."
15. In testifying, the complainant did not contradict himself. He explained the on-goings of the day of the incident in very clear terms. He explained how after the incident at the workplace he looked in vain for the appellant. When he eventually tracked him on the basis of information he was given, the Appellant was seated in a Toyota Quantum vehicle and he was operating his cell phone. When the complainant questioned the Appellant for sitting in a vehicle during working hours, the latter did not respond. When the complainant set out to return to his office, the Appellant banged the door of the vehicle in which he was seated.

16. The complainant returned to the vehicle where a tug of war unfolded when both the Appellant and the complainant held on the door, each seeking to do with the door as they wanted. The complainant testified that it is during this tug-of-war that the appellant kicked him twice. He stated that he needed medical attention as a result of the assault.
17. The Appellant did not testify, neither did he call any witness. However the plea he tendered and the line of cross examination on the complainant revealed that he denies all allegations against him made by the complainant. The court a quo accepted the version of the state Appellant. It found that the appellant did assault the complainant. It convicted him on the offence charged. It is this judgment against which the Appellant's lodged an appeal.
18. The court has to determine whether the court a quo was correct or not in finding that the state proved its case beyond a reasonable doubt. In order to do so, the court has to assess the available evidence. As indicated, only the complainant testified. As a result, the available evidence comprises only of the version of the complainant. The court also has to determine the appropriateness or otherwise of the sentence imposed upon the Appellant by the court a quo. Evidence by the complainant proved beyond a reasonable doubt that the Appellant assaulted him. The appeal against conviction stands to be dismissed.

AD SENTENCE.

19. The Appellant also appeals against the sentence imposed on him by the court a quo. He was sentenced to pay a fine of R 1 000-00 or to undergo 60 days imprisonment. In *S v Zinn*[5], the court stated that in imposing the sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community. This principle was reiterated in the case of *S v Kumalo*[6], where the court stated the following: "Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."
20. It is clear from the above that sentences imposed by courts are to be tinged with a measure of mercy. In *S v V*[7], Holmes JA emphasised that 'the element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked.' Holmes JA added that mercy was an element of justice and referred with approval to *S v Harrison*[8]; where the learned judge stated: 'Justice must be done; but mercy, not a sledge-hammer, is its concomitant. "
21. In passing sentence courts are to aim at the achievement of specific goals. In the case of *S v Motswathupa*[9], the court made it clear that punishment is not among goals to be achieved through sentencing. In that case the court stated the

following: "In addition to that the court must also consider the main purposes of punishment, which are deterrent, preventive, reformative and retributive.³ In the exercise of its sentencing discretion a court must strive to achieve a judicious balance between all relevant factors 'in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. "

THE OFFENCE.

22. The crime of assault involves the employment of violence. It undermines the rights of others to security, respect and dignity. It is rife, much as it is overly resorted to in most instances where dialogue should rather be employed to resolve differences. It promotes a culture to undermine the human rights of others. The violence in it tend to breed more violence. More often than not victims directly or indirectly develop keenness to counter it with violence thereby laying the ground for all to take the law into their hands. This is 'recipe' for lawlessness.

THE INTERESTS OF THE APPELLANT.

23. The appellant was 40 years of age when he was sentenced. He is a first offender. He has 3 school-going children with different unemployed mothers. They are aged 17, 15 and
14. He is also responsible for the upkeep 3 of his sister's children who receive child grants. They are aged 15, 13 and 10. His salary at Top Fix was R 7 000-00 per month. It was submitted that there are a number of people who will suffer adverse consequences should the appellant be incarcerated. It was submitted before court that at time sentence was being considered by the court a quo the appellant had received a final warning at his place of employment.
24. It was also pointed out that the appellant's conviction may prove to be a hindrance to him renewing his driver's license and if that were to happen, he may lose his employment. Should he lose his employment, you will need to go out and seek employment afresh. The general job scarcity obtaining renders job-seeking to be more than daunting, much as it presents with massive financial challenges to the job-seeker. It was argued that appellant is a good candidate for rehabilitation.

THE INTERESTS OF THE SOCIETY.

25. Most societies are forever inundated with spate after spate of acts of indiscriminate violence. Little children start witnessing episodes of violence among adults and as perpetrated against other children from tender age. Courts have to be stern in punishing offences like assault where unnecessary violence is unleashed against defenseless and innocent victims.
26. In considering the appeal against sentence the court has to bear it in mind that in every case sentencing is a matter for the discretion of the trial court. It is for that reason that appellate courts cannot consider themselves as having a free hand in interfering with sentences passed by courts a quo.
27. In the case of *S v Romer*[10] , the court stated the following: "It has been held in a long line of cases that the imposition of sentence is pre- eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal have been shown to exist. Only then will the appellate court be justified in interfering.

These grounds are that the sentence appealed against is:

- (a) disturbingly inappropriate;
- (b) so totally out of proportion to the magnitude of the offence;
- (c) sufficiently disparate;
- (d) vitiated by misdirection showing that the trial court exercised its discretion unreasonably; and
- (e) is otherwise such that no reasonable court would have imposed it."

See *S v Giannoulis*[11] *S v Kibido*[12] and *S v Salzwedel and Others*[13] ."

- 28. In the case of *S v Beja*[14], the court stated the following: "It is trite the sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of similar nature while it may be an important factor, could never to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such person must be punished. A period of imprisonment must always be reasonable in relation to the seriousness of the offence".
- 29. The question the court has to answer is not whether this court in the place of the court a quo would have, or could have imposed a different sentence. It is rather whether or not the court a quo exercised discretion reasonably. In *S v Pieters*[15] , the Honourable Botha JA stated at page 7340-F that the decisive question facing a Court of appeal on sentence was whether it was convinced that the court which imposed the sentence being adjudicated upon exercised its discretion to do so unreasonably. If so, the Court of appeal was entitled to interfere and, if not, then it cannot.
- 30. In *S v Petkar*[16], the court stated that a court on appeal can only interfere with a sentence if it is vitiated by certain attributes. In that regard the court stated the following: "This Court's powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate. The main thrust of the argument of Mr Engelbrecht, for the appellant, was that the appellant's sentence fell into the third category. "
- 31. When compared to the offence committed, the interests of the Appellant and those of the community the sentence imposed upon the appellant does not appear to be out of proportion. It is not shockingly disproportionate to the offence committed in the circumstances of the Appellant. That being the case there seems to be no basis upon which interference with the sentence imposed by the court a quo can be justifiable. Therefore the appeal against sentence also stands to be dismissed.

32. In the result, the appeal against both conviction and sentence stands to be dismissed and the following order is made:

ORDER.

1. The appeal against both conviction and sentence is dismissed.

Maumela J

Judge of the High Court of South Africa.

I agree.

Mokose SNI

Heard

: 07 February 2018

Delivered

: 26 March 2019

APPEARANCE

For the Appellant :M Marriott

For the Respondent :Gibbs Mkhwanazi Galane Inc

[1] 2003(2) SACR 319 (CC), at page 356, paragraph 84.

[2]

[2016] 4 All SA 110 (KZP).

[3] 1997 (2) SACR 641 (SCA), at page 642.

[4] 1981 (3) SA 172 (A) at 180E-G.

[5] 1969 (2) SA 537 (A).

[6] 1973 (3) SA 697 (A), at 698 a.

[7] 1972 (3) SA 611 (A), at page 614 D - E.

[8] 1970 (3) SA 684 (A), at page 686 A

[9] 2012 (1) SACR 259 SCA, at page 261.

[10] 2011 (2) SACR 153 (SCA), in paragraph [22].

[11] 1975 (4) SA 867 (A) at 873G - H.

[12] 1998 (2) SACR 213 (SCA) at 216g - j.

[13] 1999 (2) SACR 586 (SCA) (2000 (1) SA 786; [2000] 1 All SA 229), at paragraph 10."

[14] 2003 (1) SACR 168 (SE).

[15] 1987 (3) SA 717 (A).

[16] 1988 (3) SA 571 (A).

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