

SOUTH AFRICA / JUDGMENT

Ngqandu v S (CA&R183/2014) [2014] ZAECHGC 87 (15 October 2014)

[2014] ZAECHGC 87

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen, J Nepgen

CASE / FILE NUMBER

CA&R183/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA & R 183/2014

Date heard: 15 October 2014

Date delivered: 15 October 2014

In the matter between

MZIMKHULU SMITH NGQANDU

Appellant

and

THE STATE

Respondent

Criminal appeal – against sentence– appellant convicted of attempted murder and sentenced to 7 years’ imprisonment – appellant elderly and first offender – magistrate failing to consider sentence of correctional supervision – disregarding such sentence on basis of seriousness of offence – trial court misdirecting itself – appeal court at large to consider sentence afresh – having regard to fact that appellant already served two-and-a-half years in prison inappropriate to convert sentence to one of correctional supervision – punitive and deterrent purpose of sentence would be served if portion of sentence imposed by trial court conditionally suspended - appeal allowed – trial court’s sentence altered.

JUDGMENT

GOOSEN, J.

- [1] The appellant was convicted of attempted murder and sentenced to 7 years imprisonment. The appellant applied for leave to appeal against both conviction and sentence. Leave to appeal against sentence only was given.
- [2] The complainant's evidence was that he had attended a traditional ceremony which was held at the house alongside that of the appellant. He drank heavily at the ceremony which the appellant also attended. At some stage during the early hours of 24 December 2009 the complainant fell asleep under a tree in the accused's yard. He was not able to explain fully what happened thereafter. He said that he awoke to find himself in the appellant's house. He could not say how he got there or what he was doing. When he came to his senses the appellant was attacking him with a sharp instrument. A scuffle ensued during which the complainant tried to defend himself. He felt something in his stomach. He then ran out of the house. As he ran he noticed that his intestines were protruding out of his stomach. He tried to cover them with his shirt as he was running away. He ran for a short distance and then fell to the ground. He regained consciousness in hospital where he remained for seven days. The J 88 medico-legal report which was handed in by agreement at trial confirms that the complainant suffered a laceration to his stomach and that his bowel was protruding.
- [3] The prosecution also led the evidence of the neighbour at whose house the ceremony was held and his daughter. Neither of them witnessed the stabbing which, it was common cause, occurred in the house of the appellant. Both however, testified that the appellant came out of his house carrying a spear or assegai and that he made to chase after the complainant who was running away. The neighbour, Mr B., restrained the appellant and took him back to his house.
- [4] The appellant's defence was one of self-defence. His version was that the complainant who was drunk had come into his house and had started to assault him with his fists. During the assault the appellant had grabbed hold of an assegai and stabbed once at the complainant. The complainant then fled. The appellant denied that he had left his house in pursuit of the complainant.
- [5] The magistrate convicted the appellant on the strength of the prosecution case, accepting, as it appears from the judgment, the evidence of the state witnesses regarding what had transpired. The magistrate furthermore observed that on the appellant's own version he had exceeded the bounds of self-defence.

[6] The appeal against sentence was founded upon the submission that the imposition of direct imprisonment of seven years for a first offender aged [.....] years is shockingly inappropriate. It was also submitted that the court had failed to give proper consideration to the fact that an assessment report prepared in terms of s 276 of the Criminal Procedure Act 51 of 1977 had indicated that the appellant was a suitable candidate for a correctional supervision sentence.

[7] The trial court, in dealing with the issue of a correctional supervision sentence, said the following:

Attempted murder, you will understand, is a serious offence and the way that it has happened in this instance, as the accused has committed or done it, it is so serious that you cannot compare the complainant with the accused person and you cannot ever think of a situation wherein an elderly person like the accused person before court should have reacted the way he did on the day in question. The Court, unfortunately, is not going to entertain or use the pre-sentence report that has been submitted to Court, the correctional supervision report. The Court is not going to be able to use it. Seeing or looking at the seriousness of the offence and the consequences thereof as a result of the actions of the accused person and as a result of thereof the Court will consider giving the accused, a term of imprisonment. (sic)

[8] The offence of attempted murder is undoubtedly a very serious offence. The magistrate was clearly correct in regarding it so and also in taking into account the aggravating features present. However, the summary dismissal of the correctional supervision report because of the seriousness of the offence is a misdirection. It is trite that a sentence of correctional supervision may be considered in relation to the most serious of offences. That is so because correctional supervision is not a “light” or easy sentence. The introduction of correctional supervision as a sentencing option sought to ensure that all of the objects that are ordinarily sought to be achieved in sentencing can be achieved without long-term incarceration of certain offenders (cf. *S v R* 1993 (1) SA 476 (A); *S v M* (Centre for Child Law intervening as amicus curiae) [2007] ZACC 18; 2007 (2) SACR 539 (CC) at para 63).

[9] A sentencing court is required to give careful consideration to the range of options available when determining an appropriate sentence. In this instance the court was obliged to consider the imposition of correctional supervision. It failed to do so. Strikingly, the court also failed to consider whether a portion of the sentence imposed ought to be suspended so as to achieve the deterrent effect of imposing sentence.

[10] It was also submitted that the court did not adequately consider the fact that the appellant was a first offender, at the very mature age of [...] years. Although the court rejected the appellant’s version the only evidence as to what occurred inside the house of the appellant was that of the appellant. It must be accepted therefore on the evidence and that the attack upon the complainant came about as a result of the complainant’s presence in the appellant’s house. It must also be accepted that there was a fight and that the complainant may well have been the aggressor. In the circumstances this court is at large to consider the

sentence afresh.

- [11] The appellant was convicted on 28 February 2012 and was sentenced 8 March 2012. He has therefore already served just over 2 ½ years of his sentence. Having regard to the advanced age of the appellant and the fact that he is a first offender who, as set out in the assessment report takes full responsibility for his criminal conduct, I am of the view that the appellant falls into that category of persons who ought not, where possible, to be incarcerated as the only form of punishment (cf. *S v Marks* 2009 (2) SACR 562 (ECG) at 570 h – j).
- [12] In the circumstances of this matter it is not appropriate to remit the matter to the sentencing court to impose a sentence afresh. This court is in a position to impose an appropriate sentence. It was submitted that it would be appropriate in the circumstances to set aside the sentence imposed and to impose a sentence in terms of s 276
- (h) or (i) of the Criminal Procedure Act. In my view the fact that the appellant has already served a period in excess of 2 ½ years in prison militates against the conversion, at this stage, of the sentence imposed upon the appellant into a sentence in terms of s 276 of the Act. The appellant has already suffered the consequence of a period of imprisonment and, it seems to me, that an order suspending a portion of the sentence of imprisonment imposed by the magistrate would have the effect not only of securing the release from custody of the appellant, but also of serving as a deterrent upon any future criminal conduct on the part of the appellant.
- [13] It follows from this that the appellant's appeal against sentence must succeed. I accordingly make the following order:
1. The appeal against sentence is upheld.
 2. The sentence imposed upon the appellant is set aside and replaced with the following:
The accused is sentenced to undergo 7 years imprisonment of which 4 years is suspended for a period of five years on condition that the accused is not, during the period of suspension, found guilty of any offence of which violence or the threat of violence is an element.
 3. The sentence imposed above is antedated to 8 March 2012.

G. GOOSEN

JUDGE OF THE HIGH COURT

NEPGEN, J.

I agree.

J. NEPGEN

APPEARANCES:

For the Appellant

Adv. D. P. Geldenhuys

Grahamstown Justice Centre

For the Respondent

Adv. H. L. Obermeyer

Director of Public Prosecutions

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