

SOUTH AFRICA / JUDGMENT

Ntelki v S (CA14/2021) [2021] ZANWHC 72 (22 October 2021)

[2021] ZANWHC 72

COURT

North West High Court, Mafikeng

BEFORE

Mtembu, R D Hendricks

CASE / FILE NUMBER

CA14/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Case

No.: CA14/2021

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES /

In

the matter between:

PULE

NTLEKI

Appellant

And

THE

STATE

Respondent

JUDGMENT

MTEMBU AJ

INTRODUCTION

[1] The appellant was convicted in the Regional Court, sitting in Stilfontein, of attempted murder (count 1). The appellant was legally

represented and pleaded guilty to count 1 on 13 January 2021. On 17 March 2021, he was sentenced to eight (8) years imprisonment and a further four (4) years imprisonment which is suspended for a period of five (5) years on condition that the appellant is not again found guilty of any offence committed during the term of suspension. He was declared unfit to possess a firearm in terms of the provisions of section 103 of the Firearms Control Act 60 of 2000. The appellant applied for leave to appeal, which was granted in respect of his sentence only.

CONDONATION

[2] The appellant seeks condonation for late noting of his appeal. However, the founding affidavit is unsigned. This makes the application defective. The appellant was convicted on 13 January 2021 and was subsequently sentenced on 17 March 2021. Without any further delay, on 18 March 2021, the appellant made an application for leave to appeal which was dully granted on the same day of 18 March 2021. It is unclear as to when the records were dispatched by the Registrar. But less than a period of a month from the date of granting leave to appeal, the appellant filed his notice of appeal on 16 April

2021. It appears to me that the appeal was instituted within the prescribed timeframe. Therefore, there is no need for condonation. Whether the application is defective or not it is therefore immaterial under the circumstances.

THE SUMMARY OF THE FACTS

[3] The charge of attempted murder and consequent conviction stem from events that occurred on 21 August 2019. On 21 August 2019, the appellant called the complainant with the intention to resolve their marital problems so that she could return back home. The complainant agreed to meet with the appellant. The complainant arrived at their marital home accompanied by two female friends. The appellant got irritated when he saw the two female friends. He believed that these two female friends of the complainant have tremendously contributed to their marital problems, as they introduced the complainant to gambling. The appellant did not allow the two females to enter into the house and as a result an altercation between him and the complainant ensued. They started manhandling each other and the appellant stabbed the complainant with a butter knife. The

complainant sustained several serious injuries. She was admitted at the intensive care unit of the hospital.

- [4] As already stated above, the appellant was subsequently sentenced to eight years imprisonment and a further suspended sentence of four years. It is this sentence that the appellant seeks to appeal.
- [5] The grounds on which the appellant relies for the appeal are summarised as follows: the Court a quo erred in overemphasising the gravity of the offence and the interest of the community at the expense of the appellant's personal circumstances; the Court a quo failed to properly take into account the mitigation factors while overemphasising the aggravating circumstances; the sentence is shockingly inappropriate; and the Court erred in not ordering the sentence as recommended by the probation officer in that the appellant is a suitable candidate to serve a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1997.

EVALUATION OF THE FACTS AND THE LAW

- [6] There are well-established principles governing the hearing of appeals against sentence. In short, punishment is pre-eminently a matter for the discretion of the trial court and a court of appeal should be careful not to erode that discretion. Interference is only warranted if it is convincingly shown that the discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by an irregularity, a material misdirection or is disturbingly

inappropriate.[1]

- [7] This was echoed in *S v Van Wyk and Another*[2] where the Supreme Court of Appeal (SCA) held that it would interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence the appeal court would have imposed was such that interference was competent and required. But then, the court cautioned, the appellate court needed to have a definite view as to what sentence it would have imposed, even if it is only able to identify a particular range within which it would have imposed the sentence.[3]
- [8] It is trite law that the sentence of an accused person must be balanced between the interests of society, the offence and the personal circumstances of the accused.[4] The balancing of interests of the society, the offence and the personal circumstances of the accused requires a careful weighing up of the mitigating circumstances of the case against the aggravating factors. The trial court is expected not to just list the factors but to discuss the weight he assigns to each in order to justify his decision to impose a given sentence.[5]
- [9] In respect of aggravating factors, the state called Lindiswa Michael Tlathe, the complainant's daughter, and also relied on the pre-sentencing report by Ms Palesa Moitso Morake. Ms. Tlathe testified that the complainant moved back home in Joubertina, Extension 11. The complainant is staying at her son's place. She testified that she was not staying together with the complainant. She lives in Mafikeng. Complainant would just visit her randomly. Her mother, the complainant, never communicated her marital problems to her until the last

incident. After the incident, she was no longer her mother she knew back then. She has mood swings.

[10] The Court a quo listed as mitigating factors the following personal circumstances of the appellant: that the appellant was 51 years old of age with two sons from his previous marriage; he grew up under loving care of both parents; he experienced domestic violence when his father was intoxicated; both parents are deceased; he is married with the complainant for a period of five years; he is employed at Department of Health; he has a fixed address; he has no firearm and does not object to being declared unfit to possess a fire arm; there are no pending cases against the appellant; he has no previous conviction; he pleaded guilty and he is remorseful.

[11] The Court a quo also took into consideration the following aggravating circumstances: the interests of the community and the seriousness of the offence. Due to the injuries inflicted on the complainant, she struggles with breathing, sitting, and standing for long periods. She is fearful.

She has a difficulty of staying alone. She has flashbacks and is extreme nervous. She receives psychological therapy and is on

medication for depression. The offence committed by the appellant is of a serious nature, as it was a violent crime against a vulnerable woman. Gender based violence is rife in our community. The community expects the courts to impose sentences that promote respect for women and the law and reflect the seriousness of the offences committed. One of the court's duties in the imposition of sentence is to protect the society against the offender and other potential offenders.

[12] On the other hand, it was averred on behalf of the appellant, that the effective sentence was so disproportionate because the court a quo erred in not attaching due weight to the following mitigating factors: The appellant was turning 52 years of age at the time of incident. The appellant is remorseful and takes responsibility that his actions are shameful, regrettable, and unfortunate. He pleaded guilty and did not waste the Court's time. The moving of the complainant from their matrimonial house inflicted so much pain and he is devastated. He views the offence in a very serious light. The complainant chose to leave it in the hands of the Court. She never expressed her intention that the appellant must rot in jail. The appellant's health is not in good condition. The appellant is paying a loan of R3000 for the motor vehicle he bought for the complainant. The motor vehicle is still used by the complainant.

[13] The appellant and the complainant have exchanged medical aid cards. He is employed as a porter by the Department of Health, earning R12, 000,00 per month. He will lose his employment. He is still maintaining his children. He is willing to comply with conditions as set out by the Probation Officer in her report. He seeks a second chance in life. He has behaved most of his adult life. He has no previous conviction. He is on chronic medication. He is still accepted by the people in the community. He has not been rejected by the

community, and by his family, as a result of this unfortunate incidence which he is ashamed of. He is a suitable candidate to serve a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1997.

- [14] I agree, the sentence in this matter is severe and shockingly inappropriate, warranting the interference of this Court. The Court a quo over-emphasized the seriousness of the offence and under-emphasized the personal circumstances of the appellant. This misdirection by the trial court is sufficient to warrant interference by this Court. The court a quo did not explain what weight it attached to all the various factors and how those factors enabled her to arrive at the sentence that was imposed, which does not assist this Court, sitting as court of appeal, in assessing the court a quo's reasoning. The learned Magistrate merely listed the appellant's personal circumstances without properly balancing them against the aggravating factors.
- [15] It is trite law that the sentence of an accused person must be balanced between the interests of society, the offence and the personal circumstances of the accused.[6] This requires a careful weighing up of the mitigating circumstances of the case against the aggravating factors. The trial court is expected not to just list the factors but to discuss the weight he/she assigns to each in order to justify his/her decision to impose a given sentence.[7] In this matter, the trial court just merely listed the appellant's personal circumstances without properly discussing the weight she assigned to each in order to justify the sentence she imposed.
- [16] The Court a quo did not consider at all the following: that the appellant is paying a loan of R3000 for the motor vehicle he bought for the complainant; parties have exchanged medical aid cards, which is a sign of reconciliation. The motor vehicle is still used by the complainant. The complainant, as per the Probation Officer's report, has forgiven the appellant for the pain he caused. However, she has no intentions of reuniting with him. I agree with Mr Khalo, appearing on behalf the appellant, that the Court a quo ignored the pre-sentencing report which recommended that the appellant is a candidate for correctional supervision in terms s 276(1)(h) of the CPA.

[17] In *S v De Villiers*,[5] *S v De Villiers* [2015] ZASCA 119; 2016

(1) SACR 148 (SCA); [2015] 4 All SA 268 (SCA) [9], the Court stated the following:

“... the courts below were guilty of grave misdirections, and that the sentence of eight years’ imprisonment, only three of which were suspended, was unjustified in all the circumstances. The sentencing options canvassed before us at the hearing were correctional

supervision under either s 276(1)(h) or 276(1)(i) of the Criminal Procedure Act 51 of 1977. The former ((h)) permits a court to impose a sentence of house arrest and community service after a report of a probation officer or correctional official has been placed before the court and for a fixed period of three years (s 276A(1)). The latter ((i)) entails imprisonment from which a person may be placed under correctional supervision in the discretion of the Commissioner of

Correctional Services or a parole board, and may be for a period not exceeding five years (s 276A(2)).”

[18] In *S v De Villiers*[8], the SCA held that it remains to be considered whether a sentence involving imprisonment is required in the circumstances. While

considering the sentences imposed in similar cases is always useful, each person to be sentenced must be considered against her own background and own circumstances.

[19] In *Ngobeni v S* (741/13) [2014] ZASCA 59 (2 May 2014), the Court held that

“In view of the appellant’s age and the fact that a custodial sentence would not have the desired effect, a wholly suspended

sentence appears to be appropriate. However, attempted murder is a serious offence. The appellant must consider himself lucky that the bullet did not hit the complainant higher up on his body - because that could have struck the complainant on his spine and most probably caused more serious injuries or death. Therefore a suspended sentence would be an appropriate sentence.” [My Emphasis]

[20] It is trite, that when sentencing a court must also consider the purposes of punishment, namely deterrence, prevention, and rehabilitation: See: *Director of Public Prosecutions KwaZulu-Natal v P* 2006

(1) SA 243 (SCA) para 13, cited in para 10 of *S v M*. In *DPP v P* it is further stated that to these aims must be added the quality of mercy, though not mere sympathy for the offender.

[21] In my view, as recommended by the Probation Officer, the appellant is a suitable candidate for correctional supervision in terms of s 276(1)(h) of the CPA. The appellant was turning 52 years of age at the time of incident. He is a first offender. The appellant is remorseful and takes

responsibility that his actions are shameful, regrettable, and unfortunate. The offence was not premeditated. It was a frustration

in the spur-of-the-moment. The appellant has a permanent address where he can be monitored. The Probation Officer’s report

records that the appellant, during interview, appeared to be very peaceful, cooperative, and respectful. He is able to differentiate

between correct and incorrect acts. It further recommends that a house arrest would serve as a punitive measure as the appellant’s

freedom will be limited. By performing community service, the appellant will be correcting the wrongs he has done and playing a

more responsible role within the community. The appellant may also benefit out of attending life skills programs as part of correctional supervision.

[22] The stringent conditions placed on an offender, such as house arrest, community service and the like afford such offender an opportunity to remain a member of society in gainful employment while not free to do as he/she pleases and also paying his/her dues to society. [9]

[23] I consider particularly the appellant's personal circumstances and contrition which point to a good chance of rehabilitation and accept that thus rehabilitated, he will be a useful member of society.

[24] The correctional supervision as a substantive sentence is correctly to be regarded as severe punishment even for a serious offence without making use of imprisonment. See *Mlanga v S*. [10]

[25] In conclusion therefore, I am of the view that the sentence is vitiated by a material misdirection which warrants interference by this Court.

ORDER

[26] WHEREFORE, the following order is made:

(i) The appeal against sentence is upheld.

(ii) The sentences of eight (8) years' imprisonment and a further four (4) years imprisonment suspended for five (5) years are set aside.

(iii) The matter is referred back to trial Court for consideration of the imposition of a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977, or any other alternative sentence.

A.M. MTEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 03 SEPTEMBER 2021

DATE OF JUDGMENT

: 22 OCTOBER 2021

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[1] (S v Rabie 1975 4 SA 855 (A) at 857D-E; S v Malgas 2001

(2) SA 1222 (A) paras 12-13.)

[2] 2015 (1) SACR 584 (SCA) at [31] - [32]

[3] See S v Monyani and Others 2008 (1) SAGA 543 (SCA) at [23] and [26]

[4] (S v Banda and Others 1991

(2) SA 352 (BGD) at 355 A.

[5] Ntoyana v S (A228/17) [2018] ZAFSHC 14 (8 March 2018)

[6] (S v Banda and Others 1991

(2) SA 352 (BGD) at 355 A.

[7] Ntoyana v S (A228/17) [2018] ZAFSHC 14 (8 March 2018)

[8] De Villiers v S (20367/2014) [2015] ZASCA 119; 2016 (1) SACR 148 (SCA);

[2015] 4 All SA 268 (SCA) (11 September 2015, at para 40

[9] Maroulis v S [2009] JOL 23195 (SCA at para[16]

[10] (CA&R230/2018)

[2020] ZAECGHC 9; 2020 (2) SACR 416 (ECG) (13 February 2020, at para [38])

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