

SOUTH AFRICA / JUDGMENT

Pharasi v S (A193/15) [2015] ZAGPPHC 1038 (13 October 2015) [2015] ZAGPPHC 1038

COURT

North Gauteng High Court, Pretoria

BEFORE

SK Hassim, DS Fourie

CASE / FILE NUMBER

A193/15

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: A193/15
13/10/2015
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
In the

matter between:

THABISO
HAPPY
PHARASI Appellant
and
THE
STATE Respondent

JUDGMENT

SK HASSIM AJ

[1] This is an appeal against sentence only. The appellant was charged in the Springs Regional Court on a count of housebreaking with intent to steal and theft (Count 1) as well as for robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA") in that a firearm was used in the commission of the offence (count 2). The appellant was represented by an attorney. The appellant was notified that a conviction on a charge of robbery with aggravating circumstances attracted a minimum sentence of imprisonment for 15 years. He pleaded guilty to both counts. A statement was handed in in terms of section 112(2) the CPA. Based on this statement the appellant was found guilty and convicted. He was sentenced on both counts on 21 October 2014.

[2] On the count of housebreaking with intent to steal and theft, he was sentenced to 4 years' imprisonment. On the count of robbery with aggravating circumstances he was sentenced to 15 years' imprisonment. In terms of section 280(2) of the CPA the sentences on the two counts are to be served concurrently. The court a quo declared the appellant unfit to possess a firearm. An application for leave to appeal the sentence imposed for robbery with aggravating

circumstances failed. Leave to appeal against this sentence was granted on petition to the honourable Judge President of this division.

[3] The appeal centres around two issues. Firstly, whether the court a quo misdirected itself by not requesting a pre-sentencing report prior to sentencing the appellant because limited mitigating factors

were put before it. Secondly, whether substantial and compelling circumstances were present justifying a departure from the

minimum sentence that must be imposed.

[4] As a general proposition, a sentencing court is not obliged to request a pre-sentencing report. Whether it is duty bound to do so depends on whether or not it requires evidence "to enable it to exercise a proper judicial sentencing discretion".[1] This was expressed as follows in *S v Siebert* 1998(1) SACR 554 (SCA):

"... The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court. "[2]

[5] In *S v Le Roux*[3] the Supreme Court of Appeal was faced with the question whether the trial court had committed a misdirection when it refused to postpone the sentencing proceedings at the appellants' request to enable them to obtain pre-sentence reports. It was found that the refusal did not amount to a misdirection. Mlambo JA stated in this regard as follows:

"[35] It is correct that pre-sentence reports and other reports of that nature do in the normal course assist trial courts with regard to sentence. In the main, pre-sentence reports are used to bring the personal circumstances of accused persons to the fore. The role of pre-sentence reports must, however, not be confused with the obligation of a trial court to impose an appropriate sentence in the first place. As stated in many cases, which it is not necessary to cite, sentence is a matter for the discretion of the trial court, and a court of appeal must focus on whether that discretion was exercised judicially. As an appeal court we should be slow to interfere in sentences imposed by trial courts where the exercise of their discretion is beyond reproach. See *S v Pieters* 1987

(3) SA 717 (A) at 727F-H where the following is stated:

'Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in ta/le uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan horn toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom le stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat a/le appe/le teen vonnis beheers.'

[35] The issue, in my view, is whether the sentence imposed by the trial court in this case is appropriate. In itself the refusal to allow a postponement for purposes of a pre-sentence report is not a misdirection. It is clear, in this case, that all the appellants' personal circumstances were considered by the trial court before it imposed sentence. The trial court was also clearly conscious of the six-year time lapse from when the offence was committed to the conclusion of the trial. We were not informed during argument what facts were left out of account by the trial court before it imposed sentence. The facts in casu are clearly distinguishable from those in *S v Van Rooyen* 2002 (I) SACR 608 (C) where a pre-sentence report was found to be essential, more so as a juvenile was involved

[6] *S v Magano* 2014 (2) SACR 423 (GP)[4] does not constitute a departure from what the Supreme Court of Appeal stated in *S v Le Roux* even though it found that in the particular circumstances of that case the trial court had committed a misdirection when it failed to request a pre-sentencing report. The full court did not find that in all cases a failure by a trial court to call for a pre-sentencing report would amount to a misdirection. This is evident from the following portion of the judgment:

"[9] It is evident that pre-sentence reports are meant to provide guidance to the exercise of the discretion which a court has to exercise properly and judicially when sentencing a convicted offender. The reports assist a presiding officer to understand the offender and the reasons for the crime -this being one of the triad of factors that the court has to consider when deciding on an appropriate sentence. These reports are called for where a court feels the need to be better informed about the character and the possible future of the offender. An ideal

pre-sentence report must embody all the necessary information relevant to the offender, the victim and the community. To be able to decide on an appropriate sentence the sentencing court needs to have sufficient information such as information relating to mitigating and aggravating factors.

[10] Pre-sentence reports are usually called for by the prosecution or the defence. The court, however, has a duty to step in and call for such reports where the need arises. In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) ([2002] 4 All SA 731) at 205g the court said:

'[14] And the placing of this important information before the sentencing court is not the responsibility of State counsel alone. The presiding officer, who must satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances are present, also bears some responsibility.'

In *S v Dlamini* 2000 (2) SACR 266 (T) at 268d-e Vander Walt J said:

'Die hof wat vonnis ople in 'nstrafeaak neem 'naktiewe rol in die verhoor en sit nie net passief by waar getuienis gelei word nie. Inderdaad bepaal art 186 van die Strafproseswet 51 van 1977 dat die hof kan op enige stadium van strafregtelike verrigtinge iemand as 'ngetuie by daardie verrigtinge dagvaar of laat dagvaar en die hof moet 'n getuie aldus laat dagvaar indien die getuienis van so 'n getuie vir die hof blyk noodsaaklik te wees vir die regverdige beregting van die saak.'

A pre-sentence report which tells the court more about the offender and the victim always has the added advantage of properly placing before court all the information which explains why the offender committed the offence as well as his or her view with regard to the offence itself if properly done, such evidence would also explain whether or not the offender is remorseful. The report which covers the victim as well discloses the impact that the offence has had on her. The sentencing court is then able to impose informed and properly considered sentences which are well balanced.

[11] The sentencing court had a discretion to call for the report or not. The court did not call for the report but proceeded to pass sentence.

[7] In the final analysis, whether to call for a pre-sentencing report or not, is a matter that lies in the exclusive discretion of the trial court. It has to impose an appropriate sentence and in considering what an appropriate sentence would be it has to decide whether it has before it sufficient information to exercise its sentencing discretion properly and reasonably. This is a subjective assessment. The sentencing

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court has to ask itself whether it 'feels the need to be better informed about the character and the possible future of the offender.'"[5]

[8] The question whether the court a quo misdirected itself, or not, in not calling for a pre-sentence report gives rise to the same issue which every court of appeal sitting on appeal against sentence has to decide, namely is the sentence imposed appropriate.[6] This is the same question that the Supreme Court of Appeal had to answer in *S v Le Roux*. In the context of considering whether the sentence was appropriate or not, I must consider whether any substantial and compelling

circumstances existed that warranted a lesser sentence than the prescribed minimum sentence.

[9] The circumstances surrounding the offences appear in the appellant's written statement in terms of section 112(2) of the CPA.

[10] The appellant admitted that on 4 October 2012 he and four accomplices planned to rob the complainant's store. They all went into the store. One of the accomplices had a firearm, which was used to threaten the complainant and to overcome any resistance. They stole two cell phones and cash. The appellant and his accomplices shared the cash. The appellant received R 1 200.00.

[11] In mitigation of sentence the appellant's legal representative placed the following information before the court a quo:

- (a) The appellant's relative youth. He was 23-years old when he committed the offence and was 25-years old when sentenced.
- (b) He was unmarried. He had a three-month old child.
- (c) Prior to his arrest, he was employed. He earned R950.00 fortnightly.
- (d) He completed Grade 11 at school.
- (e) He pleaded guilty to a very serious offence.
- (f) The complainant was not injured.

- [12] Apart from arguing that the court a quo should have requested further evidence on the appellant's personal circumstances through a pre-sentence report, Ms Moloi who appeared on behalf of the appellant argued that the factors referred to in paragraph 11 (a) to (f) above constituted substantial and compelling

circumstances that justified a departure from the prescribed minimum sentence for robbery with aggravating circumstances. She argued that the court a quo erred in over emphasising the seriousness as well as the prevalence of the offence and the interests of society, and underemphasised the personal circumstances of the appellant. Relying on *S v Nkomo*[7] she argued that the appellant's age, the fact that he was employed and that there may be a chance of rehabilitation, even though no evidence had been led in this regard, constituted substantial and compelling circumstances.

- [13] It is trite that an appeal court will not interfere with the imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably. The enquiry is not whether the sentence was right or wrong but whether the court in imposing it exercised its discretion properly and reasonably.
- [14] As to the issue of the unreasonable exercise of a trial court's sentencing discretion, a court of appeal will be convinced that the discretion was exercised unreasonably if the trial court could not reasonably have imposed the sentence it did. The courts have used various tests to assist in the determination of the reasonableness of the sentence. Does the sentence "induce a sense of shock"? Is it "startlingly inappropriate"? "Is there a "striking disparity" between the imposed sentence and the one that would have been imposed by the appeal court?"
- [15] In *State v Malgas* 2001 (1) SACR 469 (SCA) at 478d-e the court stated that a court of appeal will not, "in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court".
- [16] The word "misdirection" has been explained in *S v Pillay* 1977(4) SA 531 (A) at p. 535D as follows:
- "A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."
- [17] In determining a suitable sentence, the trial court has to look at the triad consisting of the crime, the offender, and the interests of society.[8]
- [18] The trial court is the only court that can know whether it has sufficient facts to exercise its discretion to impose an appropriate

sentence. The court a quo imposed in the exercise of its discretion, what it considered to be an appropriate sentence. It follows that it was therefore satisfied that it had enough facts to make assess a suitable sentence looking at the triad consisting of the crime, the offender, and the interests of society. It then, in the exercise of its discretion, decided not to call for a pre-sentencing report. In my view, the court a quo had adequate information before it. In any event, the appellant was legally represented and there was no bar to the appellant testifying in mitigation of sentence and putting his personal circumstances to the court. Had he done so the court a quo would have been better apprised as to whether anything relating to his personal circumstances required investigation. Apart from this, this court was not told what facts relating to the appellant's personal circumstances not before the court a quo would have had a bearing on the sentence. I cannot fault the court a quo for not requesting a pre-sentence report.

- [19] This brings me to the question whether the court misdirected itself in assessing a suitable sentence in the light of the facts it had.
- [20] The trial court found no substantial and compelling circumstances to exist that warranted a departure from the prescribed minimum sentence of 15 years' for robbery with the use of a firearm being an aggravating circumstance.
- [21] There are essentially five facts in mitigation of sentence in the present case: The appellant was 23 years old when he committed the robbery, he pleaded guilty, he did not brandish the firearm, the robbery was not of the worst or most violent of those that this country experiences on a daily basis and there was no evidence that the complainant was injured.
- [22] As against the mitigating factors identified above the factors aggravating sentence are that a firearm was used, the offence was pre-planned and the appellant was one of a gang of armed robbers, a supermarket was robbed during business hours and the appellant is not a first offender; he has a previous conviction in 2012 for receiving stolen property knowing it to be stolen (section 37 of the Criminal Law Amendment Act 62 of 1955). While this is an offence with an element of dishonesty, it does not include an element of violence.
- [23] In assessing "whether substantial and compelling circumstances exist a court is required to look at all the traditional mitigating and aggravating factors, and consider the cumulative effect thereof".[9] If, after it has done so, it "concludes that the minimum prescribed sentence is so disproportionate to the sentence which

would be appropriate- to the extent that an injustice would be done by imposing that sentence-it would be entitled to impose a lesser sentence".[10]

- [24] After weighing all the mitigating and aggravating factors and considering their cumulative effect I am unable to find that the minimum sentence is disproportionate to the sentence which would be appropriate.[11] The effective sentence that the appellant has to serve for the two crimes is fifteen years since the trial court ordered that the

sentences on the conviction for housebreaking is to be served concurrently with the sentence for robbery with aggravating circumstances. This on its own ameliorates the severity of the prescribed minimum sentence. The court a quo properly balanced the different interests, the mitigating and aggravating circumstances. In my view there are no substantial and compelling circumstances warranting a departure from the prescribed minimum sentence of 15 years' imprisonment. The court a quo exercised its sentencing discretion properly and reasonably. Consequently, the appeal falls to be dismissed.

[25] I accordingly propose the following order:

1. The appeal is dismissed

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

5 October 2015

D S FOURIE J

Judge: Gauteng Division, Pretoria 5 October 2015

I agree and it is so ordered.

Date of Hearing: 8 September 2015

Date of Judgment: 22 September 2015

For Appellant: Ms MB Moloi

For the State: Adv C Mnisi

[1] S v Van de Venter 201 1 (1) SACR 238 (SCA) [par. 16] p.243 i-j.

[2] P. 558i-559a.

[3] 2010 (2) SACR 11 (SCA).

[4] A decision of the full court of this division.

[5] S v Magano p. 426 c.

[6] S v Le Roux p. 26d-e.

[7] 2007(2) SACR 198 (SCA).

[8] S v Zinn 1969(2) SA 537 (A) at 540 G-H.

[9] S v Dyantyi 201 1 (1) SACR 540 (ECG) p. 457e-f [par 14].

[10] S v Dyantyi p.457 f-g [par. 14].

[11] Cf S v Dyantyi p.457f-g [par. 14].

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