

SOUTH AFRICA / JUDGMENT

Phiri v S (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR 211 (GNP) (8 August 2013) [2013] ZAGPPHC 279

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka, JS Baloyi

CASE / FILE NUMBER

A 400/2012

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REPORTABLE

REPUBLIC

OF SOUTH AFRICA

IN

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

CASE

NO: A 400/2012

DATE:08/08/2013

In

the matter between:

MPHIKELELI

LOVERS

PHIRI.....

Appellant

and

THE

STATE.....Respondent

JUDGMENT

MAKGOKA J et BALOYI AJ:

- [1] This is an appeal against conviction and sentence, with leave of the trial court - regional court Piet Retief. The appellant was convicted of attempted murder and sentenced to 6 years' imprisonment. The charge arose from the appellant having had unprotected sex with the complainant while knowing that he was HIV-positive. Only the complainant and the appellant testified during the trial.
- [2] The complainant testified that during February 2010 she met the appellant at a local clinic where she had visited for an HIV test. The appellant was employed as an HIV-Aids counsellor at the clinic, and also responsible for testing. The appellant tested her, and her result was that she was HIV-negative. Later a love relationship developed between her and the appellant. At that stage, she was pregnant and had just separated with the father of her unborn child. It was common cause during the trial that the appellant had been HIV-positive three years prior to meeting the appellant, and that he was aware of his status.
- [3] During the course of their relationship they had consensual sexual intercourse on two occasions. On each occasion, the appellant did not use a condom. Despite she requesting him to do so, on each occasion he declined. Subsequently, she tested HIV-positive when she tested as part of her pre-natal routine. As the appellant was the only person she had sexual intercourse during the relevant period, she confronted the appellant for having infected her with HIV virus. The appellant apologised and pleaded for forgiveness.
- [4] The only point in dispute during the trial became whether or not the appellant used a condom during the sexual encounters with the complainant. During cross-examination by the prosecutor, the appellant changed his version, and for the first time, stated that he had informed the complainant of his HIV status before the first sexual intercourse, as a result of which he used a condom on both occasions. The trial court was thus confronted with two conflicting versions. Having weighed the two versions, the learned regional magistrate preferred the complainant's version over that of the appellant.
- [5] On behalf of the appellant, it was contended that the learned regional magistrate misdirected himself in the evaluation of the evidence and the law, as, so was the contention, the State had not established that appellant had the necessary mens rea to sustain a conviction on attempted murder. The State supports the conviction.
- [6] Before we consider the arguments on behalf of the parties, it is useful to remind ourselves of the proper approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. The approach is found in the collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A). A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection

on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. See also DPP v S 2000 (2) SA 711 (T); S v Leve 2011 (1) SACR 87 (ECG); and Minister of Safety and Security and Others v Graig and Another NNO 2011 (1) SACR 469 (SCA).

- [7] The learned authors, Schmidt & Rademeyer, in their work, Bewysreg 4ed at p116, neatly sum up the position as follows:

‘Wanneer teen ‘n verhoorhof se feitebevindings geapelleer word, hou die appelhof daarmee rekening dat die hof aquo in 'n gunstiger posisie verkeer het om ‘n oordeel te vel omdat hy die getuïes tydens hul ondervraging waargeneem het en in deurgaans in die atmosfeer van die verhoor verdiep was. Die appelhof gaan gevolglik uit van die veronderstelling dat die verhoorhof se bevindings korrek was en sal normaalweg daardie die bevindings aanvaar tensy daar die een of aander anduiding is dat ‘n fout begaan is.’

- [8] In our view the appellant’s version that he used a condom during sexual intercourse on both occasions was correctly rejected by the magistrate. It was not credible, especially in light of his adaptation of his evidence as pointed out in para [4] above. We find no irregularity on the part of the learned regional magistrate in rejecting the appellant’s version as not being reasonably possibly true. We are therefore not at large to interfere with the trial court’s findings in this regard. In the circumstances the appeal against the conviction has to fail.
- [9] It was further argued that the appellant should not have been convicted of attempted murder, but of a less count such as assault

with intent to do grievous bodily harm. There is simply no merit in this contention. It is to be borne in mind that the appellant was not convicted of having in fact transmitted HIV to the complainant. The State did not have to go that far. It was sufficient for a conviction on the count of attempted murder, to establish that the appellant, knowing that he was HIV positive, engaged in sexual intercourse with the complainant, whom she knew to be HIV negative, without any preventative measures. This entails the presence of mens rea in the form of dolus eventualis. In this regard it must be accepted, and we can take judicial notice of the fact, that HIV-Aids has no cure presently, and the infection with the virus is likely to lead to reduced life span.

- [10] It was established over a decade ago by this court that such conduct constitutes attempted murder. See S v Nyalungu 2013 (2) SACR 99 (T)1. We are therefore satisfied that the appellant was properly convicted of attempted murder. There is no basis to disturb the conviction on this ground.

- [11] As indicated in the introduction, the appeal is also directed against the sentence, to which we now turn. Counsel for the appellant submitted that the sentence of 6 years imprisonment is disturbingly inappropriate in that the appellant is a first offender HIV-positive. It was also contended that the trial court did not take sufficiently into account that the appellant and the complainant were in a love relationship and there was therefore no forced sexual intercourse.
- [12] It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Rabie* 1975 (4) SA 855 (A); *S v Snyder* 1982
- (2) SA 694 (A) *S v Petkar* 1988 (3) SA 571 (A); *S v Sadler* 2000 (1) SACR 331 (SCA) and *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10.
- [13] As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

'Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, 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 misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.' (my emphasis)

- [14] In the present case, the trial court took into consideration the serious nature of the offence, and carefully balanced it against the appellant's personal circumstances, which were placed on record as follows. He was 32 years old during the time of sentencing. He is a first offender. His highest academic qualification is standard 5. He is unmarried, but has two children, aged 7 and 10. It does not appear from the record whether he lived with these children or whether they lived with their mother(s). He was employed at a health clinic, earning R1 800 per month.
- [15] The trial court found to be aggravating, the fact that he was employed as an HIV counsellor by the Department of Health to help in educating people about the dangers of unprotected sex, among others. Indeed, much was expected of the appellant. The argument that because there was a love relationship between the parties should serve as a mitigating factor, is a startling proposition. We do not perceive how this could possibly serve as a mitigating factor. That very fact could easily serve as an aggravating one, as lovers are expected to protect one another. At best, this is a neutral aspect. Although the State did not prove that he

transmitted the complainant with HIV virus, his conduct remains reckless.

[16] In our view, the only aspect of the appellant's personal circumstances deserving of consideration, is his HIV-positive status. In *S v Mahachi* 1993 (2) SACR 36 (Z), it was observed that the HIV status could tip the balance in favour of the imposition of a suspended sentence where the court had a real choice between the imposition of, on the one hand, a sentence of effective imprisonment and, on the other, a non-custodial sentence. In the present case, the trial court found that the circumstances of the case rendered custodial sentence the only option. I find no fault with that finding.

[17] As a result, the appellant's HIV status is only but a factor among others to be considered. The head-note in *S v Mabutho* 2005 (1) SACR 485 (W) reads as follows:

'Depending upon the circumstances, a convicted person's health may sometimes afford a good reason for not sentencing her or him to imprisonment. There is certainly no rule that ill-health automatically relieves the criminal from being imprisoned. Adequate medical facilities are generally available for convicts. A reduction or suspension of prison sentence on a mere excuse of ill-health would attract criticism from the public and undermine confidence in the system of administration of justice...'

[18] Having regard to all the conspectus of the matter, we do not find any misdirection in the manner in which the magistrate considered

sentence. There is no evidence to suggest that the sentence is vitiated by irregularity, either. Equally, we find nothing shockingly

disproportionate in the sentence of 6 years' imprisonment in the circumstances of the case. In the absence of misdirection or disproportionality, we are not entitled to interfere with the sentence.

[19] To sum up. There is no merit in the appeal, either on the conviction or the sentence. In the result we make the following order:

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

TM MAKGOKA

JUDGE OF THE HIGH COURT

JS BALOYI

ACTING JUDGE OF THE HIGH COURT

DATE HEARD : 3 MAY 2013

JUDGMENT

DELIVERED : 8 AUGUST 2013

FOR THE APPELLANT : ADV MG LEDWABA

INSTRUCTED BY : PRETORIA JUSTICE CENTRE

FOR THE STATE : ADV C PRUIS

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTIONS,
PRETORIA

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