

SOUTH AFRICA / JUDGMENT

Radebe v The State (A219/15) [2015] ZAGPPHC 792 (23 September 2015) [2015] ZAGPPHC 792

COURT

North Gauteng High Court, Pretoria

BEFORE

SK Hassim, EM Kubushi

CASE / FILE NUMBER

A219/15

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: A219/15
23/9/2015
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
In

the matter between:

ZAKHELE
LUCAS RADEBE
Appellant
and
THE
STATE Respondent

JUDGMENT

SK HASSIM AJ

[1] This is an appeal against sentence only. The appellant was charged in the Nigel Regional Court on a charge of robbery with aggravating

circumstances as intended in section 1 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA") in that a "beer bottle and/or a similar object was used" in the commission of the offence. The appellant was represented by an attorney. He pleaded not guilty to the charge. However, he was found guilty, and on 27 November 2014, he was sentenced to 15 years' imprisonment. He was declared unfit to possess a firearm. The court also made an order in terms of section 120 of the Children's Act 38 of 2005 that the appellant is unfit to work with children. The State correctly concedes that the Children's Act does not apply in this case. That order must be set aside.

[2] An application for leave to appeal the sentence failed. Leave to appeal against the sentence was granted on petition to the Judge President of this division.

[3] Robbery with aggravating circumstances is an offence listed in part 2 of schedule 2 of the Criminal Law Amendment Act 105 of 1997 and as such attracts a minimum sentence of 15 years' imprisonment in the case of a first conviction for the offence unless a court is satisfied that substantial and compelling circumstances exist that justify the imposition of a lesser sentence.

[4] The appellant's case rests on two legs. The first is that a court convicting a 21 year old for an offence that attracts a minimum

sentence must call for a pre-sentence report in order to establish whether substantial and compelling circumstances exist warranting a departure from the minimum sentence. In not having done so, the court a quo did not have the benefit of considering an appropriate sentence against the background of all of the appellant's circumstances. The second is that substantial and compelling circumstances were present. I do not have to consider the second argument if I find that the failure to call for a pre-sentence report constituted a misdirection that vitiates the trial court's discretion.

[5] As a rule, 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]

[6] 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 before sentencing. 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 hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te 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 appelle 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 (1) SACR 608 (C) where a pre-sentence report was found to be essential, more so as a juvenile was involved.

[7] In *S v Magano* 2014 (2) SACR 423 (GP) a decision of a full court of this division (even though it found in the particular circumstances of that case that the trial court had committed a misdirection when it failed to request a pre-sentencing report) does not constitute a departure from what the Supreme Court of Appeal stated in *S v Le Roux*. 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 on the part of a trial court. 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 'n strafsak neem 'n aktiewe rol in die verhoor en sit nie net passief by waar getuienis gelei word nie. Inderdaad bepaal art 186 van die StrajfJroeswet 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.

- [8] 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 court has to ask itself whether it "feels the need to be better informed about the character and the possible future of the offender"[4].
- [9] 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 the sentence has to decide, namely is the sentence imposed appropriate.[5] 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 we will consider whether any substantial and compelling
- circumstances existed that warranted a lesser sentence than the prescribed minimum sentence.
- [10] At the outset, I mention that the appellant steadfastly denied any involvement in the robbery. His defence was an alibi in the form of his girlfriend. The question was therefore identification.
- [11] The State called two witnesses. The first was the complainant and the second was a medical doctor who treated the complainant for the injuries he sustained in the robbery. The appellant and then his girlfriend testified.
- [12] On 26 January 2014 at 3h00, the complainant a 53-year-old man was on his way home. He was accosted by two youths. The appellant stood in front of him. He hit him with a bottle on the left side of his head causing an open stab wound. The appellant then stabbed him on his left forearm and inflicted three open stab wounds. The appellant's accomplice searched the appellant and removed his Nokia cell phone and wallet with R350 from his pocket. These items were not recovered. He recognised one of his assailants, namely the appellant, as the son of a friend who he had known for six years.
- [13] The scars caused by the stab wounds were visible when the appellant testified and he pointed them out to the court. His injuries were serious enough for him to have been transported by ambulance to a hospital.
- [14] The medical doctor who treated the appellant at the hospital testified to the injuries that the complainant suffered. There were two lacerations, which he estimated to be 4cm long, and a third, which was 2cm long. All three lacerations had to be stitched.
- [15] 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 21 years old when he committed the offence.
 - (b) He was unmarried and had no children.

- (c) He had at some point been employed as a packer and earned R100 per day.
- (d) He completed Grade 11 at school.
- [16] Apart from arguing that the court a quo should have requested further evidence on the appellant's personal circumstances through a pre-sentence report Adv Marais, who appeared on behalf of the appellant argued that the nature of the goods taken, the minor injuries that were sustained by the complainant and the fact that the appellant had spent 10 months in custody awaiting trial constituted substantial and compelling circumstances that justified a departure from the minimum prescribed sentence. He 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 that it underemphasised the personal circumstances of the appellant.
- [17] It is trite that an appeal court will not interfere with the 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.
- [18] As to the issue of the unreasonable exercise of the 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" or there is a "striking disparity" between the imposed sentence and the one that would have been imposed by the appeal court.
- [19] 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".
- [20] The word "misdirection" has been explained in *S v Pillay* 1977(4) SA 531 (SCA) at p.535E-535G 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."*
- [21] The age of an offender is a factor that a court should take into account in assessing a suitable sentence. However, the question

whether a trial court is obliged to request a pre-sentence report is not determined by the age of an offender who is no longer a juvenile. What determines whether a pre-sentence report should be requested is the question whether the trial court considers itself possessed with sufficient facts concerning the offender's personal circumstances to impose an appropriate sentence.

- [22] It is only a trial court that can know whether it was possessed of 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 was an appropriate sentence. In the exercise of its discretion, it was therefore satisfied that it was possessed of enough facts to make an assessment of 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 would have had a bearing on the sentence. I cannot fault the court a quo for not requesting a pre-sentence report.
- [23] This brings me to the question whether the court misdirected itself in assessing a suitable sentence in the light of the facts it had.
- [24] 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[6].
- [25] In assessing whether substantial and compelling circumstances exist the court is required to look at all the traditional mitigating and aggravating factors, and consider the cumulative effect thereof.[7] If, after it has done so, it concludes that the minimum prescribed sentence is so disproportionate to the sentence imposed - to the extent that an injustice would be done by imposing the minimum sentence-it would be entitled to impose a lesser sentence. [8]
- [26] The appellant criticises the trial court for assessing an appropriate sentence with reference also to the prevalence of robberies in residential areas. The criticism is misplaced in my view. A court is entitled to make use of its personal or own knowledge regarding the prevalence of crime in its area of jurisdiction.[9]
- [27] The trial court found no substantial and compelling factors to exist that warranted a departure from the prescribed minimum sentence of 15 years' for robbery with aggravating circumstances. I examine whether the finding was reasonable and proper.
- [28] There are essentially three facts in mitigation of sentence in the present case: the appellant's age; he was 21 years old when he committed the robbery, he was a first offender, he spent 10 months in custody awaiting trial.

- [29] As against the mitigating factors identified above the facts in aggravation of sentence are that the complainant was stabbed with a bottle, the appellant was the assailant who used force and violence, the complainant suffered injuries that were severe and serious enough to require stitches, the appellant pleaded not guilty and maintained throughout that he was innocent. The latter points to a complete absence of contrition. The fact that the complainant was a friend of the appellant's father makes this crime all the more despicable.
- [30] After weighing the triad consisting of the crime, the interests of society and the appellant's personal circumstances, and 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 the trial court imposed.[10] In my view there are no substantial and compelling circumstances warranting a departure from the minimum prescribed sentence of 15 years' imprisonment. The court a quo properly balanced the different interests, the mitigating and aggravating factors.
- [31] In my view, the court a quo exercised its sentencing discretion properly and reasonably. It follows that the appeal against sentence for robbery with aggravating circumstances falls to be dismissed and the appeal against the order in terms of section 120 of the Children's Act 38 of 2005 upheld.
- [32] I accordingly propose the following order:
1. The appeal against the sentence imposed for robbery with aggravating circumstances is dismissed and the sentence imposed by the court a quo is confirmed.
 2. The appeal against the order in terms of section 120 of the Children's Act 38 of 2005 is upheld and the order is set aside.

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

I agree and it is so ordered.

E M KUBUSHI J

Judge: Gauteng Division, Pretoria

Date of Hearing: 7 September 2015

Date of Judgment: 23 September 2015

For Appellant: Adv JP Marais

For the State: Adv C Smit

[1] S v Van de Venter 2011 (1) SACR 238 (SCA) at 243 i-j.

[2] P. 558i-559a.

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- [3] 2010 (2) SACR 11 (SCA).
- [4] S v Magano p. 426 c
- [5] S v Le Roux p. 26d-e.
- [6] S v Zinn 1969(2) SA 537 (A) at 540 G-H.
- [7] S v Dyantyi 2011 (I) SACR 540 (ECG)
- [8] Cf S v Dyantyi.
- [9] S v Chipape 2010(1) SACR 245 (GNP) at p. 253b-c
- [10] Cf S v Dyantyi.
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Prepared on 12 October 2026 · Esheria