

SOUTH AFRICA / JUDGMENT

S v Abubaker (A197/2016) [2017] ZAFSHC 38 (16 March 2017)

[2017] ZAFSHC 38

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Nicholson

CASE / FILE NUMBER

A197/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A197/2016

In

the matter between:

THE
STATE
Appellant
and
FATIMAH
ABUBAKER
Respondent

CORAM:

VAN ZYL, J et NICHOLSON, AJ
HEARD

ON:

27 FEBRUARY 2017

JUDGMENT

BY: C.M.A NICHOLSON, AJ

DELIVERED ON: 16 MARCH 2017

[1] This is an application by the State, for condonation of the late filing of the Notice of Appeal and an appeal against the sentence

imposed by a Magistrate of the Regional Court, Bloemfontein on 11 February 2015.

[2] The application for condonation of the late filing of the notice of appeal and the record in the matter must be dispensed with before the appeal may be considered. The application for condonation is thus dealt with below.

The Background

[3] The Respondent's conviction for attempted murder in this matter on 18 August 2014, flowed from events that transpired on 27 August 2008 in or near Ficksburg, Free State. The Respondent was arrested on 1 September 2008 and entered a plea of not guilty before the court a quo on 29 March 2010. Judgement was handed down on 18 August 2014 and sentencing took place on 11 February 2015.

[4] The Appellant applied for condonation of the late application for leave to appeal and for leave to appeal. Both condonation and leave to appeal were granted by Kruger J on 25 June 2015.

[5] It is relevant to the current proceedings that the reasons proffered to the court in June 2015 in support of the application for condonation of the late filing of the application for leave to appeal appear from the supporting affidavit of Adv. CA Van Der Merwe, Deputy Director of the Department of Public Prosecutions (DPP) and were, inter alia:

(a) The late receipt of the court record in the matter. (See pars 7 to 8 of the supporting affidavit);

(b) That no injustice would be done to the Respondent should the application for condonation succeed (par 10 of the supporting

affidavit);

(c) That steps had been taken to properly consider a possible appeal immediately the matter was brought to the attention of the DPP (par 10 of the supporting affidavit), by the complainant (par 4 of the supporting affidavit);

(d) That the granting of condonation would be in the interests of justice; (Par 12 of the supporting affidavit); and

(e) That there was a reasonable prospect that the application for leave to appeal would succeed.

- [6] Despite Kruger J's granting of leave to appeal, the Appellant did not immediately serve the Notice of Appeal, in fact, the Notice of Appeal was only filed in April 2016, almost a full year after leave to appeal was granted. The application for condonation of the late filing of the Notice of Appeal is again supported by an affidavit sworn to by Adv. Van Der Merwe of the DPP. (Affidavit 2)

Current application for condonation:

- [7] In the current application for condonation, it is again argued that condonation should be granted for the late filing of the notice, inter alia, for the following reasons, as appear from affidavit 2:
- (a) Adv. Van Der Merwe assumed that immediately the leave to appeal was granted, the appeal process had started and the Appellant would request a transcript of the record of proceedings in the court a quo; (Par 5) Adv. Van Der Merwe only became aware that the transcript had not been requested in August 2015, (par 6) and there was confusion regarding which State department would assume responsibility for the costs associated with the transcription of the record. (par 7) The record was only received by the Clerk of the Court on 8 April 2016 and said transcription was incomplete. The Clerk of the court then addressed the problems associated with the record; (par 9)
 - (b) It is in the interests of justice to grant the condonation; (par 10)
 - (c) The Respondent will suffer no injustice should the condonation be granted; (par 11) and
 - (d) The Applicant has a reasonable prospect of success on appeal. (par 12)
- [8] These reasons will now be dealt with individually.

8.1 The Record:

It appears from the paragraphs of Adv. Van Der Merwe's affidavit in support of the application for condonation of the late application for leave to appeal referred to above, the record of the proceedings in the Court a quo was available to the Appellant when application for leave to appeal was granted by Kruger J in June

2015. The Appellant offered no satisfactory explanation why there would be such a prima facie contradiction on the papers submitted to the Court. The explanation presented during argument that only sections of the record had been transcribed for purposes of applying for leave to appeal did not gain traction with the court. A Judge granting leave to appeal would only have done so had he been convinced that there was a reasonable prospect of success. In order to have made this assessment, he would have required access to the complete record of proceedings.

8.2 Condonation will serve the interests of justice:

The Appellant has asserted that to grant the condonation would serve the interests of justice. It is Appellant's assertion that the complainant and the community are outraged at the leniency of the non-custodial sentence imposed in this matter. They opine that failure to grant the condonation and thus the prevention of the appeal from proceeding, would overlook the interests of the community and send out the wrong message to the community. This would, in turn, create the impression that women who are primary caregivers to minor children will not be subject to incarceration should they commit a serious offence. These assertions will be dealt with when prospects of success are addressed below.

8.3 Absence of prejudice to the Respondent:

The Appellant has stated that the Respondent will not suffer any injustice should the condonation be granted. This assertion is

difficult to reconcile with the circumstances in this matter. The matter has been ongoing over a protracted period. Eight years have elapsed since the events took place that have led us to this day. The Respondent was first arrested on 1 September 2008, entered a plea in 2010, was convicted in 2014 and sentenced in 2015. The sentence that was imposed was 5 years imprisonment, wholly suspended for 5 years on condition that:

- (i) Respondent is not convicted of murder, attempted murder, culpable homicide or assault with intent to do grievous bodily harm during the period of suspension;
- (ii) Respondent undergo 36 months of correctional supervision (Section 276(1)(h) of Act 51 of 1977).

Respondent was declared unfit to possess a firearm in terms of Section 103(2) of Act 60 of 2000.

The correctional supervision commenced with a period of six-months, high-risk house arrest (p 999 lines 23-25 of the record) and 576 hours of community service (p 1000 lines 13-15 of the record). As at 27 February 2017, when this court was seized of the matter, the Respondent has served two years of her suspended sentence, two-thirds of the period of correctional supervision and has completed the community service that she was obligated to perform. In other words, the Respondent is laboring under the reasonable apprehension that she has progressed substantially along the road to having paid her debt to society. She will indeed suffer some injustice should the sentencing in this matter be revisited. Furthermore, the potential injustice will be visited not only on the Respondent but, on the three minor children for whom she continues to be the primary caregiver.

8.4 Reasonable prospect of success on appeal:

Condonation may only be granted in circumstances in which the Court is convinced that there is a reasonable prospect of success. For this reason, the court was compelled to consider the merits of the appeal and, to this end, heard and considered argument on these from both parties.

The appeal

- [9] The grounds for the appeal set out in Appellants papers are:
- (a) The court a quo did not attach enough weight to the nature and seriousness of the offence;
 - (b) The court did not attach enough weight to the interests of the community
 - (c) The sentence imposed creates the impression that as long as an accused has minor children, she will not be incarcerated if she commits a serious offence.
 - (d) The court a quo did not attach sufficient weight to the seriousness of the injuries the complainant suffered.
 - (e) The court a quo did not attach sufficient weight to the fact that the crime was a serious case of domestic violence, which crime has become endemic in South Africa.
 - (f) The court a quo over-emphasized the respondent's personal circumstances.
 - (g) The sentence imposed has no deterrent effect on future offenders.
- [10] The Appellant argued before this court, that the court a quo paid only lip-service to the various factors that were required to be considered in passing sentence. It emphasized that the court a quo stressed only the personal circumstances of the respondent as a primary caregiver and lost sight of the fact that this was a serious crime perpetrated on the complainant in the safety of his own home; that the complainant was vulnerable as the respondent had taken his gun; and that the respondent shot the complainant eight times after having had ample opportunity and time to reconsider her actions. The Appellant argued that the attack was unprovoked and that the devastating impact of the attempted murder on the complainant, the children born of the marriage, the extended family and the community were overlooked by the court.
- [11] The Appellant also argued that the court erred by not taking the motive for the attack into account. The point was however made by instant court that the motive was always a matter of speculation and as such, the trial court could not take it into account in sentencing.
- [12] The Appellant made much of the finding of the court a quo that the Appellant had shown some measure of remorse. They argued that the court erred in this regard and that no remorse had been shown as the Respondent never admitted her guilt or assumed responsibility for her actions. Whilst this may be so, the Respondent argued that although the trial court examined remorse it was not pivotal in the sentencing.

On the topic of remorse, in *GK v S* ([2013] ZAWCHC 77 2013 (2) SACR 505 (WCC)), the court stated (at par [23]):

“My colleague observes that the appellant expressed no remorse and that this must count against him. I agree. Whether the failure to express remorse is, as my colleague considers, indicative of a lack of insight into his reprehensible conduct is less clear to me. Persons who face serious charges may consider that their best course is to deny the charge, since even a guilty plea will not spare them a heavy sentence. The court naturally cannot condone the putting up of a false version, and the fact that an accused person

lies and makes the complainant re-live her experience in court must certainly go into the scales against him. However, once an accused person follows this course he effectively makes it impossible to throw himself on the mercy of the court and to express remorse...."

The quotation in the case above, speaks directly to the circumstances confronting the Respondent in the current matter when it came to leading evidence in mitigation of sentence.

[13] The Appellant argued that, as a custodial sentence was, in its opinion, appropriate in this case, the court erred in considering a non-custodial sentence. The Appellant made much of the fact that the prosecutor in the matter did not avail the court of all relevant authority with regards to the sentencing of primary caregivers, more particularly, the Appellant indicated that the

prosecutor should have brought the case of *S v M* (2007 (2) SACLR 60 (WLD)) to the court's attention in which case a custodial sentence was imposed on a primary caregiver. That said, it is clear from the record, which will be discussed more fully below, that the court was aware of said judgement and did consider a custodial sentence as a possible sentence.

[14] Appellant's position is that the sentence imposed by the court a quo is shockingly inappropriate. The court put too much emphasis on the personal circumstances of the respondent and the fact that she was a primary caregiver (par 5.1 of Appellant's Heads of Argument (HOA A)) and disregarded the seriousness of the offence (par 6.1 HOA A) and the interests of the community (par 8 HOA A). Appellant thus avers that a custodial sentence of eight (8) years should be substituted for the non-custodial sentence imposed by the trial court.

[15] In *Bailey v The State* ([2012] ZASCA 154 per Bosielo JA at par [19]) the Judge expressed himself thus on sentencing:

"Suffice to state that it remains an established principle of our criminal law that sentencing discretion lies pre-eminently in the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing as enunciated in a long line of cases which includes S v Zinn 1969

- (2) SA 537 (A) which espoused a proper consideration and balancing of the well-known triad; *S v Rabie* 1975
- (4) SA 855 (A) at 862; and *S v de Jager* and another 1965
- (2) SA 616 (A) at 628-9. This salutary approach has recently been endorsed by Marais JA in *S v Malgas* para
- 12. It is not for an appeal court to substitute its sentence for that of the magistrate's court, the appeal court must consider whether the sentence imposed was the outcome of a suitable analysis of all relevant factors."

Bosielo JA, in *Bailey v The State* (supra par [20]) posed the question:

“..... Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking?....”

The answer to this question must be a resounding no.

[16] Thus, in evaluating the prospects of Appellant’s success on appeal, the court must ask itself whether the trial court could reasonably impose the sentence it did? The answer is yes. The Court did not misdirect itself and, although the sentence appears lenient, it is not disturbingly inappropriate, nor does it induce a sense of shock. The court’s reasoning in this regard is clearly set out and cannot be faulted. The trial court did not err in law in determining the appropriate sentence. The presiding officer considered each and every aspect raised by the Appellant when she made her

determination.

[17] The Presiding officer in the trial court gave a detailed explanation of her approach to sentencing and the reasons for her final determination. On p 965-966 of the record she clearly identifies the triad of principles that must be applied in sentencing

as established in *S v Zinn* (supra). After determining that there was no mandatory minimum sentence applicable, she proceeded to deal with the evidence the State led in aggravation.

[18] The court first dealt with the testimony of the complainant regarding the impact that the attempt on his life had on him and on his family life. (pp 966-968) It acknowledged that the impact was both significant and devastating. (p968)

[19] Having considered the State’s evidence in aggravation, the trial court then turned to the evidence led in mitigation of sentence and noted the impact that the attempt had had on the Respondent and her family relationships. (pp 968-970)

[20] The trial court also considered various pre-sentencing reports that were presented to it (p970 - p 974) and thereafter, the evidence presented by the respondent in mitigation. (p976-977). It considered what she had to say on remorse (p978) and stated (lines 23-25) that it could not ascertain from her conduct or actions whether or not she was truly remorseful. The court noted, however (p979 lines 7-13) that it at least had some sense of her feelings and emotions and that she believed that the complainant should not have had to go through what he did.

[21] The court took cognizance in aggravation, of the domestic relationship between the respondent and the complainant. (p979 lines

19-21) and that the respondent used a firearm in the commission of an extremely violent offence that is currently occurring with increasing frequency in South Africa, especially within domestic relationships.(p979 line 22 – p980 line 1) The trial court also noted in aggravation, the number of times the respondent shot the complainant (p980 lines 2-6), that the complainant was shot in the bedroom of his own home and while he was vulnerable and unarmed, (p980 lines 7-10) and the premeditated nature of respondent's actions. (981 lines 12-22)

[22] The trial court also dealt with the interests of the community (p981 line 25 to 982 line 21).

[23] The trial court then turned to a detailed consideration of the position of the three minor children in the care of the respondent.

In doing so, the court considered *J Pillay v The State* (739/10 [2011] ZASCA 111), *S v M* (2007 2 SACR 539 CC); *S v The State (Centre for Child law as Amicus Curiae)* ([2011] ZACC 7; 2011 (2) SACR 88 (C); 2011 (7) BCLR 740 (CC)); *S v Piater* (2013 2 SACR254 (GNP)); and *S v Howells* (1999 (1) SACR 675 (C)) (p 982 line 2- page 992 line 10).

[24] Finally, the trial court turned to the personal circumstances of the accused. (p 992 line 18 – p 994 line 24).

[25] It cannot be said that the court overlooked important considerations in arriving at its decision on what sentence to impose. The trial court carefully considered the purpose of punishment. (p994 line 25-p 996 line 4) It referred to *S v Loggenberg* (2012 (1) SACR 462 (GSJ) par 6, per Willis J) in stating that sentence serves 5 important purposes: viz. to act as a general deterrent, a specific deterrent, enable the possibility of correction, protect society and serve society's desire for retribution. It further remained cognizant that it must take into account all mitigating and aggravating circumstances, the interests of the community and the best interest of the children. (p996 lines 1-4)

[26] The trial court acknowledged the seriousness of the offence and the devastating impact it had on the complainant and the family when considering a custodial sentence. (p996 line 5- p 998 line 16) The court determined that a sentence of that nature would indeed serve the purposes of retribution, deterrence and prevention but, it looked at the personal circumstances of the Respondent and determined that the evidence supported the view that she was not prone to criminal or violent behavior and that incarceration of the Respondent was not needed to protect society. It concluded that the seriousness of the offence and the violence associated with it could not be taken in isolation for purposes of sentencing and concluded that to sentence the Respondent to incarceration would not serve the purposes of sentencing so much as serve the need for revenge. The court referred in that regard to *Kruger v S* (2012

(1) SACR 369 [SCA] per Shongwe JA at par [11]) where the judge pointed out that punishing a convicted person is not about revenge. (p 997 line 25-998 line 4)

[27] This perspective is also reflected in *Mudau v S* : (supra at par [13]-[14]) thus:

“I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important

to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration

of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity, as Corbett JA put it in *S v Rabie*:

‘[a] judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.’

.... There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation can never be discarded altogether, in order to attain a balanced, effective sentence. The much quoted Zinn dictum remains the leading authority on the topic. Rumpff JA’s well-known reference to the triad of factors warranting consideration

in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective

sentence which meets all the sentencing objectives.”

[28] It is thus patent that the trial court exercised its discretion in sentencing judiciously and with a clear understanding of the applicable principles. It should also be noted that at trial, the prosecutor joined with the defense in supporting a non-custodial sentence in this matter.

- [29] It appears from the Appellant's papers, that the appeal process was commenced at the behest of the complainant who felt aggrieved at the sentence imposed by the trial court. Whilst creating a sense of justice when sentencing is important, the interests of justice must balance the public interest and the complainant's desire for revenge and numerous other factors. This court is convinced that this was done by the trial court in this matter and thus, Appellant has very little prospect of success, if any, in the appeal.
- [30] The Appellant in this matter cannot be excused from the procedural rules put in place to protect parties in the interests of justice on the basis of its ignorance of the process applicable to obtaining the transcribed record. The Appellant is not a lay person and as such can reasonably be expected to have a firm grasp of procedure in such matters. (See in this regard a comparable case of DPP v Olivier 2006 (1) SACR 380 (SCA)).
- [31] Having considered the length of the delay, the shortcomings in the explanation offered and the fact that there is little to no prospect of success on appeal, the court has concluded that the Appellant has failed to show good cause for purposes of the condonation.

The Respondent would be severely prejudiced and it would not serve the interest of justice for the court to interfere with the sentence at this stage.

I would therefor make the following orders:

1. The application for condonation is refused.
2. The Appeal is struck from the roll

C.M.A NICHOLSON, AJ

I concur and it is so ordered

C. VAN ZYL, J

On behalf of appellant: Adv. Chalala

Instructed by:

Director: Public Prosecutions

Bloemfontein

On behalf of respondent: Adv. P Van der Merwe

Instructed by:

Legal Justice Centre

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Prepared on 12 October 2026 · Esheria