

SOUTH AFRICA / JUDGMENT

S v Esau (199/21) [2021] ZAWCHC 140 (30 July 2021)

[2021] ZAWCHC 140

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni, Mantame

CASE / FILE NUMBER

199/21

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Source record

In
the High Court of South Africa
(Western
Cape Division, Cape Town)
High
Court Case No. 199/21
Magistrate's
Serial No: 04/2021
Case
No. 2284/2017
In
the matter

between:

THE
STATE
And
KYLE
ESAU
Accused

JUDGMENT

Delivered on 30 July 2021

LEKHULENI AJ

INTRODUCTION

[1] On 09 July 2019 the accused was convicted of robbery in the Bishop Lavis magistrate's court and was sentenced to 36 months' correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 ("the CPA") plus a further 18 months' imprisonment which was suspended for five years on condition, inter alia, that he was not found guilty of robbery or attempted robbery committed during the period of suspension. The accused, having breached the conditions of his correctional supervision order, was brought before the Bishop Lavis magistrate's court on 23 April 2021 in terms of section 276(4)(a) of the CPA for the reconsideration of sentence and was subsequently sentenced to eighteen months' direct imprisonment. On automatic

review, a query was raised by the reviewing judge as to whether the new sentence of eighteen months' imprisonment included the sentence of imprisonment of 18 months which was wholly suspended. The trial magistrate was also asked whether the new sentence was not too harsh in the light of the suspended sentence which remained in operation. In his reply, the trial magistrate noted that only the correctional supervision component of the sentence was reconsidered and in lieu of this component, an alternative sentence of eighteen months' direct imprisonment was imposed.

- [2] The magistrate also alluded to the fact that after he considered the fact that the accused completely disregarded the conditions of the correctional supervision, he came to the conclusion that direct imprisonment was the only option available. The magistrates also stated that in 2019 when the original sentence was imposed and before he considered correctional supervision as an option, he intended to impose a sentence of 36 months' imprisonment and to suspend half of it. If I correctly understood the magistrate's response, he implied that when he reconsidered the sentence on 23 April 2021, he reverted to his original view of imposing 36 months' imprisonment with a suspension of half of the period.
- [3] This matter is subject to automatic review in terms of the provisions of section 302 of the CPA. This court is essentially enjoined to consider whether the proceedings before the trial magistrate appear to be in accordance with justice.

FACTUAL

BACKGROUND

[4] The allegations against the accused were that on 26 December 2017, he unlawfully and intentionally assaulted one Rowena Muthien and did then with force steal from her one handbag the property in the lawful possession of the complainant. On 09 July 2019, the charge was put to the accused in terms of section 105 of the CPA and the accused pleaded guilty to the charge. A statement in terms of section 112(2) of the CPA was prepared in terms of which the accused admitted that

on the day in question he saw the complainant walking in the street and he approached her and grabbed her handbag off her shoulder. The complainant resisted and he pulled the handbag harder until the complainant let go of her grip. The accused ran away with the

complainant's handbag and was thereafter stopped by a taxi driver who stopped his car next to the accused. The accused handed

over the complainant's bag to the taxi driver and attempted to run away and was immediately apprehended. The taxi driver took the accused to Bishop Lavis Police Station where he was charged with robbery and later detained. The complainant arrived at the police station and laid a case against the accused. She was given back her handbag.

[5] When the matter appeared before the magistrate, the trial court was satisfied with the admissions of the accused and thereupon found the accused guilty as charged. There were no previous convictions proven against the accused and the matter was postponed to 23 September 2019 for the evidence of the complainant in aggravation of sentence. On 23 September 2019, the complainant appeared and informed the court that she has forgiven the accused. She implored the court to give the accused another chance as she has learnt that he was a breadwinner. The matter was subsequently postponed for a pre-sentence report.

[6] On 30 October 2019 the prosecutor informed the court that the Correctional Officer's report was available and same was handed to the court as an exhibit. In passing sentence, the court took into account the fact that the accused was 32 years old. He has two children aged ten and six years old and has passed standard eight at school. The court also took into account the fact that the accused was divorced and that he was working as a welder.

[7] After listening to arguments from the accused and the prosecution, the court thereupon sentenced the accused to 36 months' correctional supervision in terms of section 276(1)(h) of the CPA. In addition, the court imposed a sentence of 18 months' imprisonment which was wholly suspended for a period of five years on condition the accused was not found guilty of robbery or attempted robbery committed during the period of suspension.

[8] On 31 March 2021, the Head of Bellville Community Corrections, Ms Van De Rhee brought an application in terms of section 276A(4)(a) of the CPA. The application was accompanied by her sworn affidavit in which she requested the court to consider an alternative sentence as the accused was alleged to have failed to comply with the conditions of his sentence in terms of section 276(1)(h) of the CPA. Among others, it was alleged that the accused changed

his address without consulting the correctional officer. When he was monitored by officers of the correctional services, the accused was not found at the given address. In response to this application, the accused indicated that indeed he left the given address and went to stay in Rondebosch as his mother passed away. He admitted that he did not inform the correctional officers after leaving his address. He pleaded for mercy and after considering the matter, the court imposed an alternative sentence of eighteen months direct imprisonment.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

- [9] As explained above, the matter was placed before me for the consideration of the review in terms of section 302 of the CPA. It is the duty of this Court in reviewing this matter to ensure that the proceedings in the court a quo, as well as the conviction and sentence, were in accordance with justice. After perusing the record, I was satisfied that the conviction of the accused was in accordance with justice. However, after consideration of the circumstances of this case, I was concerned with the alternative sentence of eighteen months' imprisonment that was imposed by the trial court. This sentence was additional to the remaining suspended sentence of eighteen months' imprisonment which was originally imposed by the trial court when the matter was finalized. I held the view that the cumulative effect of the whole sentence was disproportionate and disturbingly inappropriate.
- [10] It is trite that section 276A(4)(a) of the CPA is aimed at failed sentences of correctional supervision. It is also a fundamental principle of our law that when a court reconsiders a punishment in terms of section 276A(4)(a), it is limited to the reconsideration of the correctional supervision component and may not reconsider any other part of the sentence
- See *S v Jacobs* 1994 SACR 326 (C) at 333C-D; See also *S v Pule* 2003
- (2) SACR 540 (T). In other words, the court is restricted to the correctional supervision component of the sentence and no other component of the sentence may be reconsidered.
- [11] On reconsideration of proper sentence, the trial court is enjoined to take into account all relevant circumstances which would include consideration of the effect of the alternative sentence, and any other remaining punishment which it may not interfere with and which accordingly
- remains extant. In other words, when reconsidering an alternative sentence, the court must be alive to the remaining sentence which was imposed in addition to correctional supervision that is the subject of reconsideration.
- [12] Friedman J, as he then was, noted with admirable brevity in *S v Jacobs* (supra) that the only limitation imposed on a court imposing 'any other proper punishment' is that it may not impose a punishment in place

of correctional supervision which, together with any punishment which remains in place, would exceed its jurisdiction. Thus, a magistrate's jurisdiction is limited, in terms of section 92(1)(a) of the Magistrates' Courts Act 32 of 1944, to three years' imprisonment. When a magistrate imposes any other sentence, his power would be limited to imposing a sentence which, together with any existing sentence, does not exceed three years.

[13] It must be stressed that when reconsidering a sentence in terms of section 276A(4)(a) of the CPA, a magistrate must ensure that the new sentence as well as the remaining sentence that was imposed together with correctional supervision must be appropriate and must be proportionate to the offence committed and must not exceed the penal jurisdiction of the magistrates' court as envisaged in section 92(1)(a) of the Magistrates Court. In Jacobs (*supra*), the court observed that if a magistrate wishes, when sentencing an accused person *ab initio*, to impose correctional supervision together with imprisonment which is conditionally suspended, which is permissible in terms of s 276(3)(a), he may impose both the maximum of three years imprisonment as well as the maximum of three years' correctional supervision, since

correctional supervision is not imprisonment and there is no limitation on a magistrate's jurisdiction to impose correctional

supervision up to the limit of three years laid down in section 276A(1)(b). However, should he impose the maximum of three years' imprisonment together with correctional supervision and he should be called upon, at a later stage, to reconsider the correctional supervision, he would be unable to impose any other sentence in its place. The court noted that this potential anomaly may necessitate legislative intervention.

[14] In this case, the trial court initially imposed a sentence of three years' correctional supervision. In addition to this sentence, the court imposed a sentence of eighteen months' imprisonment which was wholly suspended on normal conditions. When the court was called upon to reconsider the sentence in terms of section 276A(4)(a), the court substituted the thirty-six months' correctional supervision with a sentence of direct imprisonment for a period of eighteen months. The new sentence as well as the remaining sentence that was imposed during the trial cumulatively amounts to thirty-six months and falls within the penal jurisdiction of the district court. However, the cumulative sentence of thirty-six

months' imprisonment under these circumstances is in my view harsh and evokes a sense of shock. I am further of the view that the sentence is disproportionate to the offence committed by the accused.

[15] In this matter the accused was arrested immediately after committing the offence. The accused was found in possession of the handbag that he robbed the complainant and the handbag was obviously returned to her. The complainant did not suffer any prejudice other than the temporal loss of her bag and the traumatic ordeal that she went through. The complainant informed the court that she wanted the court to give the accused another chance especially after she got to know that the accused was a breadwinner and looking

after his children and mother. The accused in this matter was a first offender and he was remorseful for committing the offence. In my view, all these circumstances taken together should have weighed in favour of the accused.

- [16] I appreciate the fact that robbery is a serious offence as stated by the magistrate in his reasons for judgment. However, this is not the only consideration of the triad. What is expected is for the court to act judiciously by taking into account all of the relevant factors and competing interests involved, so as to arrive at a sentence which strikes an equilibrium of the triad. In *S v Kruger* 2012
- (1) SACR 369 (SCA) at para 11, the court stated that ‘punishing a convicted person should not be likened to taking revenge. To this end, I agree with the views expressed by the court in *S v Pillay* 2018
- (2) SACR 192 (KZD), where the court stated that ‘every sentence that must be imposed must be tempered with a degree of mercy no matter the crime’.
- [17] More importantly, whilst it is accepted that it is in the interests of justice that crime should be punished, however, punishment that is excessive as is the case in this matter, serves neither the interests of justice nor those of society. The Supreme Court of Appeal in *S v Scott-Crossley* 2008
- (1) SACR 223 (SCA) at para 35 stated as follows:
- “Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.” (the emphasis is mine)*
- [18] I consider it necessary to reconsider the alternative sentence imposed. In my view, it is prudent not to remit the matter to the magistrate as all the relevant facts are on record. The remittance of the matter to the court a quo will unnecessarily delay the finalisation of this matter. I have considered the personal circumstance of the accused, the fact that he is a first offender as well as arguments from both sides as recorded and I am of the view that in addition to the sentence of eighteen months which was wholly suspended, a sentence of eight months’ imprisonment is appropriate in the circumstances.

ORDER

[19] In the result, I propose the following order:

19.1 The sentence of eighteen (18) months imprisonment imposed by the court a quo on the accused is set aside and replaced with the following sentence:

19.1.1 The accused is hereby sentenced to eight months’ imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

MANTAME J

JUDGE OF THE HIGH COURT

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