

SOUTH AFRICA / JUDGMENT

S v Madiba and Another (09/2019) [2019] ZANWHC 22 (2 May 2019)

[2019] ZANWHC 22

COURT

North West High Court, Mafikeng

BEFORE

N G Laubscher, R D Hendricks

CASE / FILE NUMBER

09/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO.:09/2019

In

the matter between:

THE
STATE
and
MARCIA
MADIBA FIRST
ACCUSED
THANDI
MENU SECOND
ACCUSED

JUDGMENT

LAUBSCHER AJ

Delivered: 2019 MAY 2

INTRODUCTION

- [1] This matter came before this Court as an automatic review by virtue of the provisions of Section 302(1)(a)(i) of the Criminal Procedure Act, Act 51 of 1977 (hereafter “the Criminal Procedure Act”).
- [2] This Court noted that a portion of the record was missing and was also concerned, based on the information, which was contained in the record, whether the sentence imposed by the learned Magistrate were in accordance with justice.
- [3] As such, this Court raised a query addressed to the learned Magistrate. This query comprised of two portions. The first portion related to the fact that the record which came before this Court was incomplete. This issue was addressed and rectified. The second portion of the query related to the sentence which was imposed by the learned Magistrate. The second portion of the query is relevant to this judgement and reads as follows:

“Second Query

Q2.1 Without having the benefit of the missing portion of the record as explained in the First Query supra, the following query is raised in respect of the sentence which was imposed by the Court:

- (a) Why was the Court of the view that a suspended sentence is “totally inappropriate” (record p 52, line 18) in casu, having regard to the fact that both accused (now convicted) persons were first offenders, who have young children?
- (b) Are there any other factors and/or circumstances which the Court took into account when it imposed the sentence, which are not reflected in the record of the proceedings?
- (c) Which alternative sentences to incarceration did the Court consider (if any) and why were such alternative sentences deemed inappropriate as an applicable sentence for the accused (now convicted) persons?”
- [4] The response to this Court’s query from the learned Magistrate and the portion of the response which addresses this Court’s query regarding the sentence imposed by the trial court, read as follows:

“Query 2:

When I have explained the Accused rights to sentence, I have also indicated the seven options of sentences I have considered.

The reason why I said I said that a Suspension sentence is an inappropriate sentence:

i.

It is true that both Accused persons are first offenders;

ii.

Both are having minor children;

iii.

I am also a mother and a grandmother and work in the Children's Court for a long period. I am having a passion for little children, because they are so vulnerable. Children of such a tender age are totally depending on their Mothers;

iv.

It is not lightly considered to send a Mother with young children to jail;

v.

I am now presiding for eighteen years in Ga-Rankuwa Courts; This way of stealing, by pushing a trolley through the till points

without paying, is a severe problem in Ga-Rankuwa jurisdiction; Shoprite Ga-Rankuwa and Central City are targeted; The previous

Prosecutor of Court C called the Managers of Shoprite Ga-Rankuwa and Central City to testify about the monthly lost based on theft.

In all those cases the lost were more than twenty thousand per month;

vi.

At the end the prices are increasing and the community members are paying more for the items;

vii. I have stated to impose suspended sentences in an attempt to prevent this specific way of stealing, to rehabilitate Offenders, and

to protect the community and the shop owners, but this specific problem escalated severely. Later I imposed fines coupled with imprisonment, as much as three thousand rand or six month imprisonment. The problem was still not solved.

viii. It is shocking to think that you pre-planned to go to a shop, walking up and down, selecting different items, knowing that you are

intending to steal those items. What also need to be noted is that in almost all similar cases, the Mothers are having their Babies with them, whilst acting in this way. Mother's with young children and first offender must receive more mercy, especially where most needed things, baby milk, baby medication, baby clothes and other most needed items, were stolen. Our people are poor and are suffering severely, due to high rate of unemployment in South Africa. Face serum, face lotion and other items were stolen.

ix.

I feel that the Accused were having more than enough time to re-think their actions, whilst collecting the items and even at the

pay point. The facts that umbrellas were stolen by Accused one, opening and looking at it, whilst being at the paying point, placing it in the trolley with the unpaid items, that Accused two removed a pen, threw the package at the back of the till point, hide it in a paper she found at the till point, after all the selected items were packed in the trolley, is clearly showing their attitude and intention to proceed by stealing. A kind of arrogance.

x.

Public members love to visit our Courts, to sit and listen to what is happening in Court.

xi.

Yesterday I released a Mozambique citizen to go and fetch his asylum document. Today I was amazed that another Mozambique citizen requested me to be released to go and fetch his asylum documents, which was non-existing according to Home Affairs.

The power of “word spreading” That then the reason why I have addressed the issue of the members of public in Court.

xii. Since I have imposed this sentence, I have not yet, up until today, received a similar case.

xiii. I am having a habit to impose a “light sentence” for a specific offence. Eg Housebreaking. If the specific

statistics of the same crime is going down, or staying the same, it is an indication to me that the sentence is a suitable, rehabilitating and preventative sentence.

xiv. If the stats are increasing, I increase the sentence also.

xv. Accused 1 indicated she is not having money for a fine, Accused 2 indicated she is having five hundred Rand to pay a fine.

xvi. I have also considered the possibility that both the Accused might be released on parole after serving a third of their sentence.

xvii. I am truly of the opinion that the imposed sentence in the circumstances is appropriate.”

RELEVANT

BACKGROUND

[5] The First Accused is Marcia Madiba, a 34-year-old unemployed female person, a single mother of two children, who are respectively one and eight years old. The First Accused stood as a first offender before the trial court.

[6] The Second Accused is Thandi Menu, a 37-year-old unemployed female person, a mother of three children, who are one, eight and twelve years old. The Second Accused also stood before the trial court as a first offender.

- [7] The two accused persons were charged with theft. It was alleged that on or about 6 January 2019, at or near Mabopane, in the District of Madibeng, they unlawfully and intentionally stole items to the value of R 566.50 from Shoprite.
- [8] Both accused conducted their own defence and pleaded not guilty to the charge on 6 March 2019. On 13 March 2019 they were found guilty on the charge of theft. Upon the automatic review of the matter, this Court is satisfied that both the accused persons were correctly convicted of the offence of theft
- [9] The First and Second Accused were each sentenced by the trial court to 12 months imprisonment. It is this sentence which raised the concern of this Court.

THE SENTENCE IMPOSED BY THE TRIAL COURT

- [13] The learned Magistrate commences the process of sentencing by referring to the personal circumstances of the accused persons.
- [14] In the view of this Court the manner in which the trial court dealt with the personal circumstances of the accused are glancing and without a proper and due consideration of the true state of the personal circumstances of the accused persons. In this regard the following important issues must be raised:

14.1 Both the First Accused and the Second Accused were first offenders.

14.2 They are mothers of very young children. The First Accused also has no family support structure, as she is a single mother. The Second Accused only cohabitate with a partner.

14.3 The trial court recognises the interests of the children by making reference to the obtaining of a “social workers” report, yet the trial court proceeds with sentencing notwithstanding the absence of such a report, or in fact any evidence as the impact which the removal of the mothers from the households may have on the children.

14.4 The interests of the very young minor children should have been more carefully considered by the trial court. Information as to the impact of a sentence of direct imprisonment on the care and wellbeing of these children should their mothers be imprisoned should have taken place in a manner and at a stage which would have informed the trial court as to the appropriateness of direct imprisonment in casu. Not the other way around as stated by the trial court: “I will contact the social workers immediately when coming in my office and ask them to go and do home visits and bring me a circumstantial report so that if there are problems, we can act immediately”

14.5 In this regard the value of pre-sentence reports was not considered by the trial court, nor was such a report requested under circumstances where the commissioning of such report was opportune.

See in this regard the “guidelines” stipulated by *S v M*[1] and more importantly the guidelines that: “The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.” and “...the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.”

14.6 This Court is not for one moment suggesting that the mere fact that

an accused person (irrespective of whether such a person is a male or a female) is a mother, or a father of a young child, per se, grants such a person a proverbial “get out of jail” card. Not at the least. See in this regard *S v M*. [2] What this Court is stipulating is that a due and proper discounting of the personal circumstances of an accused when it comes to sentencing must be conducted by the trial court. Where the interests of young children are involved, as in this instance, it is axiomatic that the interests of such children and their wellbeing should be duly established and taken into account as part of the accused’s personal circumstances when it comes to sentencing.

14.7 It is the view of this Court that the clearly present interests of very young children in *casu* should have sparked serious concern with the trial court. Especially in view of the fact that the trial court was considering imposing a sentence of direct imprisonment in *casu*. This also raises another concern and that is the fact that the trial court could have considered the imposing of alternative sentences which would have been effective in *casu*. One such an option was community service, seeing that both the accused persons were not employed and could have paid their

debt to society in a constructive manner.

[15] Concerning to this Court is the fact that the trial court, in the same breath as dealing with the interests of the minor children of the accused persons, proceeds to state that: “I have to make an example out of you...”. This line of reasoning adopted by the trial court, in the view of this Court, overemphasises the interests of the community and the retribution consideration, leaving the balance to be struck in sentencing between all the different considerations, askew.

[16] The frustration of the trial court with the prevalence of this type of offence and the trial court’s concern to protect the public interest against this type of offence is evident from the contents of the record and from the trial court’s response to this Court’s query.[3] The trial court is faced on a daily basis with these types of crime and this Court will not without compelling reasons interfere with the actions taken by the trial court in any matter. Unless there is a clear concern that the actions of the trial court were not in accordance with justice.

- [17] This Court has a clear understanding and awareness of the uncontrollable deasease with which rampant crime and lawlessness are infecting our country every day. To this end the trial court must be commended for the stance which it is taking against this prevailing onslaught of crime. Was this case the correct occasion for the trial court to emphasise that stance? The answer is negative.
- [18] The sentencing of an accused should not be conducted in a fashion where similar offences received a leaner sentence until one day when it is decided that the prevalence of this type of offence are on the increase and as such, the court then and there decide to stem the prevalence of the crime by increasing the sentence, irrespective of other considerations. This leaves a skewed and disproportionate balance in the act of sentencing. The response of the learned Magistrate to the query raised by this Court indicate that that was in fact what transpired in this instance.[4]

APPLICABLE LEGAL PRINCIPLES

- [19] In the matter of *State v Motau*[5] this Court confirmed that it is trite that the imposition of sentence is pre-eminently for the discretion of the trial court. As stated above, a court of review (or appeal) will only interfere in the sentence where the trial court has failed to exercise its discretion judicially or where the sentence is vitiated by irregularity, or is disturbingly inappropriate.[6]
- [20] In the well-known matter of *S v Zinn*[7] the following phrase introduced the triad of considerations in dealing with finding an appropriate sentence: “...what has to be considered is the triad consisting of the crime, the offender and the interests of society”. One consideration must not be overemphasised over the other.
- [21] Terblanche *The Guide to Sentencing in South Africa*[8] provides the following detailed summary of basic principles according to which sentence is to be imposed by the courts:
- “1. The sentencing court has to impose an appropriate sentence, based on all the circumstances of the case. The sentence should not be too light or too severe.*
2. An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender, in other words, the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender. These two factors, the crime and the offender, are the first two elements of the triad of Zinn.
 3. An appropriate sentence should also have regard to or serve the interests of society, the third element of the Zinn triad. The interests of society can refer to the protection society needs, or the order or peace it may need, or the deterrence of would-be criminals, but it does not mean that public opinion be satisfied.
 4. In the interests of society the purposes of sentencing are deterrence, prevention and rehabilitation, and also retribution.

5. Deterrence has been said to be the most important of the purposes of punishment, although this has been shown to be an oversimplification. Deterrence has two components, namely deterring the offender from re-offending and deterring other would-be offenders.
 6. Rehabilitation should be pursued as a purpose of punishment only if the sentence actually has the potential to achieve it. In the case of very serious crime, where long terms of imprisonment are appropriate, it is not an important consideration.
 7. Prevention as a separate purpose of punishment is rarely discussed any longer.
 8. Retribution, as an expression of society's outrage at the crime, has been held not to be as important as it was in the past but may nevertheless be of great importance, depending on the facts of the case. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence. Retribution can also be related to the requirement that the punishment should fit the crime, or that there should be a proportional relationship between the punishment and the crime.
 9. Mercy is contained within a balanced and humane approach to consideration of the appropriate punishment. This appropriate punishment is not reduced in order to provide for mercy. There is no room for a vindictive and vengeful attitude from the sentencing officer." (Court's emphasis)
- [22] When considering the triad of considerations stated in Zinn, the first is the "crime". Terblanche[9] states in respect of the "seriousness of the crime" the following: "The crime has always been an extremely important ingredient of any sentence. In fact, no other factor has the same influence on the nature and extent of the sentence. The relationship between the seriousness of the crime and the sentence is also expressed by the proportionality requirement. In addition, in many modern foreign criminal-justice systems it is a requirement, first and foremost, that the sentence should reflect the severity of the crime." (Court's emphasis)
- [23] In this instance this Court is of the view that there is a palpable disproportion between the seriousness of the crime and the severity of the sentence. To this end, it is the view of this Court, that alternative sentences could have discounted the seriousness of the crime and the other considerations in this matter (the accused persons responsibility to care for their children) more appropriately.
- [24] In dissecting the second part of the triad stated in Zinn, i.e. "the offender", Terblanche[10] states the following: "Many factors are involved when the offender is considered, including age, marital status, the presence of dependants, level of education, employment and health. Ideally, the sentencing officer should get to know the character and motives of the offender. However, as these are very difficult to establish accurately, modern criminal-justice systems increasingly merely attempt to determine more objectively the blameworthiness of the offender."

[25] Having regard to the “offenders” in this instance and more importantly the fact that they both have very young children, it is imperative that the trial court should have observed the “guidelines” formulated by the Constitutional Court in the matter of *S v M* to which this Court has already referred above. These “guidelines” comprise of the following:[11]

“There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of

principle, consistency of treatment and individualisation of outcome.

1. A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
2. A probation officer’s report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
3. If on the Zinn triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
4. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

5.1 Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.” (Court’s emphasis)

[26] The above referred to guidelines stipulated in *S v M* also informed the views as expressed by this Court in paragraph [14] above.

[27] The third and final consideration of the triad is the “interest of society”. As indicated above the trial court in this instance placed emphasis on the fact that the sentence must service as deterrence and that the crime which the accused persons committed impacted greatly on society. In this regard Terblanche[12] states: “Another factor to keep in mind is that the interests of the community are only one of the three main sentencing considerations and their influence on the sentence cannot be established without being related to the other main considerations. In this regard the following statement by Botha JA in *S v Keulder* is pertinent: “[die] probleem in die huidige geval [is] hoe om ’n ewewigtige rekonsiliasie te bereik tussen die belange van die individuele

oortreder . . . en die belange van die gemeenskap” For that reason a petty crime committed by an offender with many mitigating personal factors cannot be visited by a sentence which

will prevent crime through the incapacitation of the offender for a long time, because such a sentence gives too much weight to this one component.” (Court’s emphasis)

[28] Finally, having regard to the fact that the sentence which was imposed in casu was one of imprisonment one needs to consider the guidelines presented for the imposing of such a sentence. In respect of

imprisonment as a sentence Terblanche[13] states that: “Imprisonment is the stalwart of the South African penal system. It is not the most commonly imposed sentence; it is the punishment imposed for the most serious crimes and for those criminals who offend regularly and are not deterred by other forms of punishment. It can be imposed for most crimes, but generally those crimes should be of a serious nature.” (own emphasis)

ORDER

[29] Having regard to the above referred to legal principles and applying same to the facts and circumstances of this matter and also having due regard to the contents of the record of the matter, as well as the response received from the learned Magistrate (as quoted above), this Court is of the view that the sentence of 12 months direct imprisonment without the option of a fine or suspension, which was imposed by the learned Magistrate, is not in accordance with justice.

[30] Accordingly, the following order is hereby made:

The sentence imposed by the trial court of 12 months imprisonment be and is hereby set aside and replaced with the following sentence:

“Accused 1 and 2 are each sentenced to 6 months imprisonment, or payment of a fine of R 600.00 (six hundred rand), which is wholly suspended for a period of 3 (three) years on the condition that the accused is not convicted of theft, or attempted theft committed during the period of suspension and sentenced to a term of imprisonment without the option of a fine.”

N G LAUBSCHER

ACTING JUDGE OF THE HIGH COURT,

I agree.

R D HENDRICKS

JUDGE OF THE HIGH COURT,

[1]

[2007] ZACC 18; 2008 (3) SA 232 (CC) at paragraph 3

[2]

Supra at paragraph 34 wherein the following is stated: “In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct. This would be a mischaracterisation of the interests at stake. Indeed, one of the purposes of section 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.”

[3]

See paragraph (v) to (vii) of the trial court’s above quoted response.

[4]

See paragraph (vii) and page 3, paragraph (xiii) and (xiv) of the trial court’s above quoted response.

[5]

Review 36/2018 in this Court at paragraph 16.

[6] S v Rabie 1975 (4) S.A. 855 (A) at 857 D-G and S v Muggel 1998 (2) SACR 414 (C) at 418 e-f.

[7]

1969

(2) SA 537 (A) at 540 G-H.

[8]

Lexis Nexis, 2016, page 151 to 152.

[9]

Supra at page 163.

[10] Supra at page 165.

[11] Supra at paragraph 36

[12] Supra at page 169 et seq.

[13] Supra at page 246.

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