

SOUTH AFRICA / JUDGMENT

S v Osmond (SA368/2018) [2019] ZAMPMHC 19; 2020 (1) SACR 357 (ML) (11 December 2019) [2019] ZAMPMHC 19

COURT

Middelburg High Court, Mpumalanga

BEFORE

Ratshibvumo AJ

CASE / FILE NUMBER

SA368/2018

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THE

HIGH COURT OF SOUTH AFRICA

(MPUMALANGA

DIVISION, MIDDLEBURG LOCAL SEAT)

HIGH

COURT REF NO: 132/2018

MAGISTRATE

SERIAL NO. SEC06/2018

CASE

NO. SA368/2018

REPORTABLE:YES

OF

INTEREST TO OTHER JUDGES:YES

REVISED

DATE: 11 DECEMBER 2019

In

the matter between:

THE

STATE

And

NICOLAS

OSMOND

(THE ACCUSED)

REVIEW

JUDGMENT

RATSHIBVUMO AJ

1.

Introduction.

This matter was placed before me by the Registrar of this Division on 06 September 2019 as a review matter in terms of section 302 the Criminal Procedure Act, no. 51 of 1977. Mr. Nicolas Osmond (the accused) appeared in person before Magistrate TF Kekana of Secunda District Court. He was charged with a crime of theft of a shower gel and a body wash valued at R160.50. He pleaded guilty and was duly convicted. He was thereafter

sentenced to 3 (three) years imprisonment. The sentence was subject to automatic review.

2. On 06 September 2019, I received the file from the Registrar and immediately addressed a letter to the Magistrate seeking clarity on some issues in this matter. Taking into account the urgency and nature of the case, I specifically requested the Magistrate to respond to my correspondence by no later than 16 September 2019. Despite further enquiries made, the Magistrate failed to respond as requested.
3. Due to the conduct of the Magistrate, the Judge President of this Division, Legodi JP issued out a directive on 12 November 2019 ordering the return of the file from the magistrate, with or without the response. In a response dated 15 November 2019, a Senior Magistrate indicated that the Magistrate was busy attending to the typing of the response. Finally, the reasons dated 14 November

2019 were received from Magistrate Kekana by the Registrar, on 18 November 2019. Her reasons comprised no more than a page.

4. I also requested comments from the office of the Director of Public Prosecutions (DPP) and they were made available to me before writing this judgment.
5. The Sentence.

From the record, it appears that the accused was 43 years old, a father of two children aged 16 and 11 years old respectively. The accused also had the following previous convictions which the court took into consideration: one conviction of housebreaking with the intention to steal and theft committed in 2005 of which he was convicted in 2012 and sentenced to 2 (two) years imprisonment; and two convictions of theft, which were committed in 2015 and 2018 and he was sentenced to 12 months imprisonment and a wholly suspended fine respectively. There were other previous convictions which were older than 10 years and as such the court did not have to take them into consideration for sentencing purposes.[1]

6. Previous convictions play a role of stripping the offender of all the privileges he would otherwise enjoy if he was a first offender. They however should not subject the offender to double jeopardy as he/she has already received due punishment for those previous convictions. In *S v Baartman*,^[2] the following was held regarding the value of previous convictions when imposing a sentence,

“In a case such as this it is necessary to be aware of three considerations:

- (a) the accused should be sentenced for the offence charged and not for his previous record;
- (b) the public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
- (c) while it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased... It all comes down to the basic principle that the punishment should fit the crime.”

7. Again, in *S v Matiwane*^[3], a 32 years old father of two children was initially sentenced to three years imprisonment for theft of items valued at R111. He had a record of 17 previous convictions of theft and housebreaking with the intention to steal and theft. On appeal, the sentence of three years imprisonment was replaced with a caution and discharged with the court emphasising that an offender should not be sentenced for his past wrongdoings.^[4]
8. In this case the accused indicated in mitigation that he had two children aged 16 and 11. The following question was sent to the magistrate in a query referred to in the paragraph above,

“[I]n mitigation, the accused indicated that he was a father of two minor children. Was the court not supposed to find out if he was the primary care giver? See S v M

^[2007] ZACC 18; 2007 (2) SACR 539 (CC), *S v De Villiers* 2016 (1) SACR 148 (SCA) and *S v Piater* 2013 (2) SACR 254 (GNP).”

9. The Magistrate responded saying,

“[R]egarding the issue of the children of the accused – The magistrate is aware of the provisions of section 28 of the Constitution of the Republic of South Africa, 1996 Act as amended as well as the case of S v M and passed the sentence with the above in mind – even though same was not mentioned – on record (sic).”

10. It is not clear from the response what the Magistrate meant by she “passed the sentence with the above in mind.” She failed to deal with the direct question on whether she was not supposed to inquire if the accused was a primary care giver or not. The record reflects that even after the accused indicated that he has two minor children, the court displayed no interest whatsoever about the children. The court proceeded to sentence the accused without a proper enquiry into the interest of the children. It is not known who resides with the children; whether they are attending school or not and most importantly, whether the

accused was their primary caregiver or not. If he was the primary caregiver, the court clearly failed in its duty to give proper attention to the interests of the children whilst the accused was incarcerated.

11. The Constitutional Court makes it pertinently clear *S v M*[5] that to be a primary caregiver is more than being a parent or a breadwinner when it held,

“[Th]e directions in this matter referred to sentencing of primary caregivers, not to the wider class of breadwinners. Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly protected right of a child to parental care under section 28(1)(b). We are accordingly not called upon in this judgment to deal with delineating the duties of the sentencing court where the breadwinner is not also the primary caregiver.”

12. The Court held that there are four responsibilities on a sentencing court when imposing a custodial sentence on a primary caregiver, which are to establish whether there will be an impact on a child; to consider independently the child’s best interests, to attach appropriate weight to the child’s best interests and to ensure that the child will be taken care of if the primary caregiver is sent to prison.[6] The reason for this is capsulated in paragraph 35 where Sachs J, writing for the majority stated,

“[T]hus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children’s interests that threatens to do so.” [Own emphasis].

13. Upon close reading of the paragraph above one understands that taking care of the children’s interests does not mean that a primary caregiver cannot or should not be handed a custodial sentence as a punishment when one is deserved; but in imposing such a sentence, the court should first take care of the best interests of the children under his or her care. In *S v Piater*[7], Makgoka J, as he then was (Bosman J concurring) analysed the Constitutional Court judgment in *S v M* [8] and concluded that,

“[21] The [Constitutional] Court held that focused and informed attention needed to be given to the interests of the children at appropriate moments in sentencing process. What is expected of the sentencing court is to give sufficient independent and informed attention as required by s 28(2) and s 28(1)(b) of the Constitution³, to the impact on the children, of sending their primary caregiver to prison. The objective is to ensure that the sentencing court was in a position adequately, to balance all the varied interests involved, including those of the children placed at risk. The form of punishment imposed should be the one that least damages the interests of the children, given the legitimate range of choices available to the sentencing court.

- [22] The [Constitutional] Court developed the following guidelines in applying the principles set out above: Firstly, a sentencing court should determine whether an accused is a primary caregiver, wherever there were indications that this might be so. Secondly, the court should ascertain the effect on the children of a custodial sentence if such a sentence was being considered. Thirdly, if on the ‘Zinn triad’ approach (which requires the court to consider the

crime, the offender and the interests of society) the appropriate sentence was clearly custodial and the accused was a primary caregiver, the court must apply its mind to the question of whether it was necessary to take steps to ensure that the children would be adequately cared for while the caregiver was incarcerated. Fourthly, where the appropriate sentence was clearly non-custodial, it must be determined bearing in mind the interests of the children. Fifthly, if there was a range of appropriate sentences, the court must use the paramountcy principle as an important guide in deciding which sentence to impose.

14. In casu, it is no known if any of the measures suggested in Piater would be applicable because strictly speaking, the court did not know if the accused was a primary caregiver to his two children since it failed to elicit more information in that regard. The record reflects though that the accused was widowed as of 2013.

15. Record keeping

Whilst the transcribed record was initially not made available to the Review Court, the magistrate's hand written record was always part of the record. The transcribed record reflects the address by both the accused and the public prosecutor as follows:[9]

ACCUSED ADDRESSES THE COURT IN MITIGATION:

COURT:

Thank you Sir. Are you employed?

ACCUSED: Currently no Your Worship. I was employed with CCI up until February... January of this year, then the company lost a contract. But I have been attending all the assessments that have been... That is one of the reasons I am here.

COURT:

Are you married Sir?

ACCUSED: I am widowed Your Worship as of 2013.

COURT:

Do you have children?

ACCUSED: Two daughters aged 16 and 11.

COURT:

Their ages again?

ACCUSED: 16 and 11 Your Worship.

COURT:

Do you have money to pay a fine today?

ACCUSED: Not. No Your Worship. I am trying to get money to pay my daughter's medical fees at the moment.

COURT:

Thank you. Mr. Mhlangu?

PROSECUTOR ADDRESSES THE COURT IN MITIGATION:

Your Worship the accused has been found guilty of an extremely prevalent offence in this court jurisdiction. We believe it is an act of dishonesty on the part of the accused Your Worship. Your Worship there is actually no excuse for the said offence.

What is mostly aggravating are the previous convictions of the accused. He has several previous convictions. Clearly there is no deterrent. At this stage in light of the previous convictions of the accused which are so many, and relevant, the State is only going to ask for a sentence of direct imprisonment Your Worship. I am of the view that that is the only suitable option... of imprisonment Your Worship.

I can even go as far as asking for the maximum of 3 years Your Worship on this matter. As the court pleases Your Worship.

COURT:

Thank you Sir. The 22nd day of June 2018, 08:30, A Court, Secunda. Thank you.

On 22 June 2018, the court proceeded to hand down the sentence without any further address.

16. The handwritten record reflects the following as having transpired in court:

BESKULDIGDE VOOR VONNIS:

Employed? No. Not currently. I was employed until February 2018. Married? No. Widowed as of 2013. Children? Yes. How many? 2. Their ages? (1) 16 and (2) 11 years old. Do you have money to pay a fine today? No Your Worship.

STAATSANKLAAGER VOOR VONNIS:

Your Worship the accused has been convicted of a very serious offence which is also very prevalent in our area of jurisdiction. The accused has pleaded guilty and it does serve as an aggravating factor that the accused has a long list of previous convictions and the State is therefore requesting that a period of imprisonment be imposed as sentence. ITO section 103 of Act 60 of 2000 the State is requesting that the accused be declared unfit to possess a firearm.

17. The form used by the Magistrate above is a pro forma with blank lines provided for the addresses by the respective parties. The words not underlined above reflect additions made outside the lining space in the pro forma.

18. The discrepancy between the handwritten notes of the Magistrate and the transcribed record prompted me to address an enquiry to the Magistrate:

“[P]age 11 of the original record completed by the magistrate’s handwriting reflects that the Public Prosecutor addressed the court in terms of sec 103, Act 60 of 2000. Page 9 of the transcribed record does not confirm this. It would appear there was no such address recorded mechanically. The magistrate is requested to explain this discrepancy.”

19. She responded to the query in the following manner:

“See page 11 of the original record completed by the Magistrate handwriting reflect that what transpired and the matter case records

are transcribed by a company outside our premises and the Magistrate could not get an explanation from them or to why some portion was not transcribed (sic).”

20. Although the Magistrate’s response suggests that the transcribers omitted to type what the Public Prosecutor said in addressing the court regarding the fitness of the accused to possess a firearm, the transcribed record paints a different picture. It reflects no “inaudible” throughout the address by the Public Prosecutor; a word that is usually typed when they do not hear what was recorded. The address concludes with a decent, “as the court pleases Your Worship,” a clear indication that the address by the Public Prosecutor was complete.
21. In my view, a suggestion that the transcribers omitted to type a further address as hinted is improbable given the above. If it was so, that would be a serious misconduct and violation of contract on the part of the transcriber who also appended the certificate of correctness of the transcription. One would have expected the magistrate to have confronted the transcribers armed with the audio recording demanding explanation and correction of the record. The magistrate chose to rather certify the record as reflecting the correct version of what happened before her.
22. A Magistrate Court is a court of record.[10] Everything that takes place in court is open to public and should be recorded for public to have access thereto.[11] A magistrate is not only expected to keep the record of proceedings, but to see to it that such record is an accurate record that reflects what happened in court. The obligation to record the proceedings by long hand is relaxed when there are mechanical recordings like in this case. However, the records attached to the charge sheet which is a reflection of how the case was dealt with in court should reflect what happened in court even if it is in a summary format. As long as the mechanical recording operates properly, whatever is endorsed in the charge sheet should be found in the transcribed record. To endorse what did not take place in an open court is equivalent to fraud or tempering with the record. Such conduct is discouraged as it is misconduct and may call for corrective measures if proved.[12]
23. Section 103 inquiry

Perhaps this haste and an apparent attempt to incorporate the inquiry into the fitness of the accused to possess a firearm could have been avoided had the magistrate understood her role given the conviction and the sentence she imposed. It was for this reason that the query was directed to the magistrate in the following manner,

“[W]as the magistrate not supposed to hold an inquiry in terms of which both parties have the opportunity to address the court or even lead evidence before determining whether to interfere with the automatic declaration that kicks in with the type of sentence imposed? See S v Lukwe 2005 (2) SACR 578 (W), S v Mkhonza 2010 (1) SACR 602 (KZP) and S v Maake 2007 (1) SACR 403 (T).”

Unfortunately, the Magistrate chose not to respond to this query.

24. The Office of the DPP, Mpumalanga also submitted comments as requested, signed off by Adv. TB Molefe and the Acting Deputy DPP, Adv. FW Van der Merwe. I am grateful that these comments were made available at short notice. The submission by the DPP is that the magistrate was not obliged to hold an inquiry in terms of section 103 of the Firearms Control Act.[13]

25. In *S v Mkhonza*,^[14] Walis J, as he then was (Niles-Duner J concurring) said,

“[I]n my view when the legislature vested in the courts of this country the jurisdiction to determine that the statutory unfitness to possess a firearm imposed under s 103(1) of the Act [the Firearms Control Act, 60 of 2000] should not apply, it did not intend the courts to adopt a supine approach to these matters, dependent entirely upon whether the

accused had the knowledge, means and resources to place a proper case before it, that the disqualification should not apply to them, and in all other cases for the disqualification to apply as a matter of rote. At the very least it was the intention of the legislature that the court should have regard to all relevant factors concerning the offence, however feeble and limited the case advanced by the accused, and to consider the issue of whether it should determine otherwise in the light of all the facts. In other words, there is an obligation on the trial court to consider properly, having regard to all relevant factors, whether the case is one where the statutory disqualification from possessing a firearm should remain in place, or whether it should determine otherwise. In approaching that task the court should have regard to any factor that bears on the issue and, if there is reason to believe that all material facts bearing on that decision are not before it, to cause those facts to be discovered and placed before it. Without attempting to be comprehensive, I agree with the court in *S v Phuroe en Agt Ander Soortgelyke Sake*^[15] that amongst the important issues that should be considered are:

- (a) the accused's age and personal circumstances;
- (b) the nature of any previous convictions or the absence thereof;
- (c) the nature and seriousness of the crime of which he has been found guilty and the connection that the crime has with the use of a firearm;

- (d) whether there is any background which suggests that the accused may make use of his or her licensed firearm for the purpose of committing offences; and
- (e) whether it is in the interests of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.” [Own emphasis].

26. In *S v Lukwe*, [16] Bouchers J said,

“Where the matter is governed by s 103(1), the accused is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. The legislation does not expressly require the court to hold an enquiry into the accused's fitness, but, in my view, particularly where an accused is unrepresented, the court should draw the accused's attention to the provisions of s 103(1) and invite him, if he wishes to do so, to place facts before the court to enable the court to determine that he is indeed fit to

possess a firearm.

...The legislation has recognised that such cases may exist and has thus left it open to a court to determine that a particular accused is fit to possess a firearm, despite the fact that he has been convicted of an offence falling within the provisions of s 103(1). The automatic forfeiture of the right to possess a firearm may have serious repercussions for an accused and, as a layman; he cannot be expected to know of the existence of the provisions of s 103(1). For this reason, these provisions should be brought to his attention.” [Own Emphasis]

27. In *S v Mbekwa*, [17] the High Court confirmed the conviction of assault with intent to do grievous bodily harm and the sentence of 18 months imprisonment. In that case, the accused was automatically declared unfit to possess a firearm. When Pickering J directed a query to the Magistrate, he conceded that he should have held an inquiry in terms of section 103(1) of the Firearms Control Act. The matter was remitted to the Magistrate to hold an inquiry in terms of the said provision.
28. From the above, it is plainly clear that given the offence the accused was convicted of and the sentence imposed, he became automatically unfit to possess a firearm. [18] The court was however empowered to order that the accused was still fit to possess one. It however could only do so after holding an inquiry envisaged in section 103(1) of the Firearms Control Act. In casu, the Magistrate had literally no information before her through which she could exercise the discretion empowered to her. [19]

29. Delay in transmitting the record for review.

This case was finalised by the court a quo on 22 June 2018 being the date on which the sentence of three years imprisonment was imposed on the accused. On 30 July 2018 (over five weeks later), the magistrate signed off the record confirming it to be the true reflection of the trial that took place before her. Three months later, the trial record was received by the Registrar of this Division and was immediately placed before a Review Judge. On 31 October 2018 Roelofse AJ

returned the incomplete record with a request for a duly complete record. Thereafter on 06 September 2019, the complete record was placed before me for review. This was over 10 months from the date Roelofse AJ returned the record. It was then that I dealt with this matter as detailed in paragraph 2 above. It was with this history in mind that I asked the reasons to be made available within ten days.

30. The fact that two months after the request for reasons, the Magistrate still had the record with her and her one page draft of reasons was yet to be typed does not portray her as a person desiring to have this review dealt with expeditiously. It has been 17 months after the accused was handed down a sentence subject to automatic review and the Review Court simply could not have properly reviewed this matter for reasons that the record was incomplete and that the reasons were not forthcoming from the magistrate.

31. Section 303 of the Criminal Procedure Act which deals with the transmission of the record for review purposes provides,

“[T]he clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302(1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration.” [Own emphasis]

32. In an attempt to put forward another reason for the delay, Clerk of the Court at Secunda Magistrate Office wrote a letter explaining that after the record was sent back by Roelofse AJ, it was transmitted to High Court, Mbombela and was returned unopened. No one can explain how this was possible or who is responsible. If explained, this would account for just a short period in this long delay. This delay is inexcusable. All the officers attached to the Criminal Justice System in various levels need to realise that it is the responsibility of each one of us to give effect to the legislation that protects the accused’s constitutional right to a fair trial. Part of ensuring a fair trial is through review mechanism provided for in the Criminal Procedure Act.

[1] On previous convictions longer than 10 years see *S v Seedat* 2017 (1) SACR 141 (SCA), *S v Nthabalala*

[2015] JOL 33629 (SCA), *S v Segwati* 2019 JDR 0637 (SCA) and *S v Ntsweni* 2019 JDR 0637 (SCA). See also section 271A on certain convictions that fall away as previous convictions after 10 years.

[2] 1997 (1) SACR 304 (E) at paragraph 305B-C.

[3] 2013

(1) SACR 507 (WCC).

[4] See also *S v Beja* 2003

(1) SACR 168 SE (at p. 170) and *S v Salman*

[2008] JOL 21701 (E) which deal with the sentence of an offender with previous convictions.

[5]

[2007] ZACC 18; 2007 (2) SACR 539 (CC) at paragraph 28.

[6] *S v M* supra at paragraphs 32 & 33.

[7] 2013 (2) SACR 254 GNP at paragraphs 21-22.

[8] Supra

[9] See page 8 of the transcribed record.

[10] See section 4(1) of the Magistrates Court Act 32 of 1944.

[11] See section 7 of the Magistrates Court Act – supra.

[12] See *S v Ramatar* 2018

(2) SACR 414 (WCC) and *S v Gordon* (171298)

[2018] ZAWCHC 106 (29 August 2018)

[13] Act 60 of 2000.

[14] 2010

(1) SACR 602 (KZP).

[15] 1991

(2) SACR 384 (NC).

[16] 2005

(2) SACR 578 (W) at paragraphs 580F-H & 581A-B.

[17]

[2006] JOL 18826 (E)

[18] Section 103(1)(g) provides, “(1) [U]nless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of- (g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine.

[19] See also *S v Maake* 2007

(1) SACR 403 (T).

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