

SOUTH AFRICA / JUDGMENT

Sithebe v S (A299/2021) [2024] ZAGPPHC 886 (5 September 2024)

[2024] ZAGPPHC 886**COURT**

North Gauteng High Court, Pretoria

BEFORE

MJ Mosopa, N Tshombe

CASE / FILE NUMBER

A299/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case number: A299/2021****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****SIGNATURE****DATE:**

05/09/2024

In

the matter between:

SIPHIWUMUZI

SITHEBE

APPELLANT

And

THE

STATE

RESPONDENT

JUDGMENT

MOSOPA J

1. The Appellant was convicted of one count of Housebreaking with intent to steal and theft in the Benoni Regional Court. As a sequel to such conviction, the appellant was sentenced to an effective period of five years imprisonment.
2. On the 13 September 2021, this Court by petition granted leave to appeal against the sentence, this was after the appellant's leave to appeal against both conviction and sentence was denied by the trial court.

BACKGROUND

3. Even though the appellant only appeals against sentence, I find it prudent to give a summary of the evidence that led to his conviction, the appellant pleaded not guilty to the charge levelled against him and he did not proffer an explanation for his plea.
4. The complainant, Ms Malaza was at home at approximately 10h30 when she heard the security alarm in her home going off and she went out to inspect but could not see any person or anything suspicious, she then went back inside her home. While she was inside her home, she heard a sound and went outside again and that is when she saw three young men, two of them were inside the yard and the other one was outside the yard. She then shouted for Wayne Rabie to help, Wayne came out with his brother or a friend to assist. It was later established in evidence that the person who came out with Wayne was his brother Rickus Rabie.
5. Mr Rickus Rabie, who lives seven houses away from Ms Malaza's house was standing outside the gate of his property as he was on his way to drop someone at the corner of the Police Station. He saw three males running behind him and one was carrying a plastic box with an orange lid. He then hooted and screamed for his brother Wayne to come out of the house and Wayne came out running. Wayne then entered into his vehicle, and Rickus informed him that he saw someone who stole something. They then drove after those male persons and caught them about four or five houses down the road at the corner on a stop street.
6. Rickus then saw the appellant putting the box on the ground on the side of the road. His brother alighted from the vehicle so that he can observe the people that they were chasing as Wayne went to the detective offices to seek help and fortunately, he came across a detective who then followed him to where the appellant was and then the detective then assisted in arresting the males into his bakkie.

7. Mr Wayne Rabie testified that he was busy working in his backyard when he heard his brother screaming in the front yard and he then ran towards that direction. He confirmed that he entered his brother's vehicle, and they chased after the three males and arrested one of the three males at the corner of their street. The one he arrested was carrying a grey and orange toolbox and the

other two that they could not arrest were carrying a gas burner. He also confirmed that his brother came back with a detective after leaving him on the street, and the appellant was arrested and the items which he found with were also seized by the detective that assisted in the arrest of the appellant.

SENTENCE

8. As a general rule, sentencing is pre-eminently the function of the trial court and the appellate court can only interfere with the trial court's findings if the trial court materially misdirected itself. See (*S v Grobler* 2015 (2) SACR 210 (SCA) at par 5). The Constitutional court when dealing with the Appellate court's powers to interfere with a sentence imposed by a trial court in *S v Bogaards* 2013 (1) SACR (CC) at par 41 stated that.

"[41] An Appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

9. The personal circumstances of the appellant ex-facie, the record were stated as follows;
- 9.1. At the time of his arrest, he was a student at Springs FET College studying Entrepreneurial studies;
- 9.2. The appellant is 21 years old, single with no children.
- 9.3. That he was employed as a bartender at VH Gardens, even though his salary or earnings were not provided;
- 9.4. That he does not have any previous convictions, except for this conviction;
- 9.5. His mother is a school principal at Bongani Primary School and his sister is an administrator at UNISA and that he is from a stable family background with strong family support structure;
10. After the appellant was sentenced to imprisonment on the 05 October 2020; he was then released on bail pending finalisation of his appeal matter on 13 September 2021. The period spent in custody after sentence is therefore eleven months.
11. Mr Nkuna on behalf of the appellant, in argument contended that the trial court misdirected itself by sentencing the appellant to direct imprisonment and should have instead considered another sentence option which is Correctional Supervision. This is premised by taking into consideration the personal circumstances of the appellant, more especially his age and the fact that he is from a stable family background. Further that the complainant

did not suffer any actual loss, as her stolen items to the value of R30 000 were recovered moments after they were stolen by the appellant and the two people who were in his company. Finally, that the trial court did not adequately consider the personal circumstances of the appellant.

12. The trial court when sentencing the appellant stated the following;

“As you are a first offender, fairly young of age I have downscaled on the sentence that would normally be imposed for this type of an offence also bearing in mind that the goods were recovered. Blending the sentence with a measure of mercy is my view that the following is a suitable sentence...(sic)”

13. Mr Nkuna in support of his contention referred the court to the matter of *S v Grobler* 2015 (2) SACR 210 (SCA) wherein a correctional supervision was considered as a sentencing option and the following was stated; at paragraph 7 when the court quoted *S v Samuels* 2011 (1) SACR 9 (SCA) at par 9-10 with approval, were Ponnann JA stated that;

“[9] An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.

- [10] It was urged upon us that correctional supervision would have been an appropriate sentence for the appellant. Sentencing courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences.”

14. The distinguishable aspect from the matter in casu, is that the trial court in the *Grobler* matter had a benefit of a Correctional Supervision report whereas in casu, the trial court was not presented with a Correctional Supervision report.

15. Mr Nkuna contended that it is not a requirement for Correctional Supervision to serve before a sentencing court for a trial court to consider Correctional Supervision sentence as a sentencing option. I beg to differ, the purpose of Correctional supervision sentence is to provide services and interventions that will contribute to the reintegration of the offender as law abiding citizens into the community by ensuring that probationers are rehabilitated, monitored and accepted by communities. Correctional Supervision is a community-based sentence which is served by the offender in the community under the control and supervision of correctional officials, subject to conditions set by the Court or Commissioner or Correctional Services in order to protect the community and to reduce recidivism by the offenders.

16. To this end, no court in South Africa may impose a sentence of Correctional Supervision without a pre-sentence report; either by a Correctional official or a probation officer. Supervision conditions give content to the sentence of correctional supervision, this simply has the effect that, without these conditions one may not talk of a sentence of Correctional supervision.
17. The most important element encompassing a sentence of Correctional Supervision, is monitoring with assistance of a probation officer as to whether a particular offender is suitable for monitoring. Without monitoring Correctional Supervision sentence will not serve the purpose it is intended for.
18. We are alive to the fact that there is nothing to gainsay that the appellant is from a stable family and that his mother is a school principal, and his sister is an administrator at UNISA, no expert opinion was presented before the trial court that the appellant is a suitable candidate for rehabilitation and most importantly that he cannot re-offend. In our considered view, this could have been cured by the presentation of a Correctional Supervision report.
19. From the appellant's presented personal circumstances, it is not clear as to how long the appellant has been employed as a bartender at the time of his sentence and how much he earned as a bartender. It is also not clear as to what motivated the appellant to commit the offence even though he was gainfully employed, he also comes from a family which is stable and clearly supportive of his needs. The only inference that can be drawn is that the appellant was motivated by greed to commit the offence that he has been convicted of. The appellant is also not remorseful for his actions.
20. When sentencing the appellant, the trial court considered the fact that the stolen items were recovered, even though they were not recovered voluntarily. The trial court also considered his age and the fact that he is a first offender.
21. The offence was committed brazenly in broad daylight which begs the question, what was the appellant doing at that time as he was supposed to either be at work or at the FET College where he was studying. The garage door of the complainant was damaged, and the complainant testified that it will be expensive for her to repair such damage as she is a pensioner. It is, therefore, our view that Correctional Supervision sentence is not an appropriate sentencing option under the circumstances.
22. The appellant is the type of person who does not respect other people's properties and the security of the person. This is not a first housebreaking at the complainant's place as there was a housebreaking before, where various items were stolen from her place, even though that previous housebreaking incident cannot be attributed to the appellant as no one was arrested for that crime. The appellant as a friend to a child of the complainant's neighbour, he should have protected, instead of stealing from the complainant. It is for these reasons that we are of the view that appeal against sentence ought not to succeed.

ORDER

23. As a result, the following order is therefore made;
1. Appeal against sentence is hereby refused;
 2. A sentence of five years imprisonment imposed by the Benoni Regional Court dated 05 October 2020 is hereby confirmed;
 3. Bail granted to the appellant pending finalisation of the appeal on the 2 December 2021 is hereby cancelled;
 4. The appellant is hereby given a period of seven days after the delivery of this judgment on appeal, to hand himself over to the Investigating Officer of the matter at the Crystal Park Police Station and to immediately commence with his sentence at the Modderbee Correctional Centre.

MJ MOSOPA

JUDGE OF THE HIGH COURT,

PRETORIA

I Agree;

N TSHOMBE

ACTING JUDGE OF THE HIGH COURT,

Date of hearing: 23 July 2024

Date of judgment: 05 September 2024

APPEARANCES:

FOR THE APPELLANT: ADVOCATE NKUNA INSTRUCTED BY: NKUNA INCORPORATED FOR THE
RESPONDENT: ADVOCATE T SEKHESA INSTRUCTED BY: THE DIRECTOR OF PUBLIC
PROSECUTION

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