

SOUTH AFRICA / JUDGMENT

Smith v S (S22/2010) [2011]

ZAWCHC 142 (15 February 2011)

[2011] ZAWCHC 142

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

S22/2010

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IN THE HIGH COURT
OF SOUTH AFRICA
(WESTERN
CAPE HIGH COURT, CAPE TOWN)
CASE

NUMBER: S22/2010

DATE: 15
FEBRUARY 2011

In the matter between: ELTON
JEROME SMITH
.....Applicant
and
THE
STATE
.....Respondent

JUDGMENT

Application for Leave to Appeal

BINNS-WARD, J:

In this matter accused 1, who was sentenced by me earlier this morning to a sentence of life imprisonment on a charge of murder, 15 years imprisonment in respect of robbery with aggravating circumstances and three years imprisonment in respect offences in contravention of the provisions of the Firearms Control Act, applies now for leave to appeal against those sentences.

The grounds of appeal are that I erred in overemphasising the seriousness of the offences and the interests of the community. That I did not take prospects of rehabilitation into account. That I did not attach weight to the element of mercy in imposing sentence and that I found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence. The notice of application for leave to appeal also contends that I did not give any alternatively sufficient weight to the following extenuating circumstances in imposing sentence: That the applicant was relatively young at the time of the commission of the offence. The application states he was 22 years old. He was actually just short of 22 years old as pointed out in my sentence judgment.

That the applicant had been in custody since his arrest.

That the applicant had only one previous conviction for housebreaking and theft.

That the applicant had grown up without the traditional support and assistance of a father.

That the applicant had only reached Grade 8.

6. That there was no evidence put before the court which suggested that the crimes had been planned. In respect of the conviction on the murder and the conviction in respect of robbery with aggravating circumstances, as pointed out in my sentence judgment, the sentence was subject to the legislative prescription set out in Act 105 of 1997 and this court, as I emphasised in my sentence judgment, was in respect of those counts, at liberty to depart from the prescribed minimum sentences of life imprisonment and 15 years imprisonment respectively only if the presence of substantial and compelling reasons to do so was established. As I indicated in my sentence judgment the only factor which might have counted in accused 1's favour in that regard, was his relative youth, but as I also pointed out in my sentence judgment, the Supreme Court of Appeal in *S v Matvitvi* has recently expressed that in respect of any offender who commits offence over the age of 20, there must be evidence, if this relative youthfulness is to be a relevant factor, that it affected the commission of the offence in a way which reduced the moral blameworthiness of the offender. The Supreme Court of Appeal has

made it clear that an age of 21 or 22 is per se, and without more, not sufficient to attach a finding of substantial and compelling reasons to depart from the prescribed minimum sentence. In this case I had regard to the broader picture of the applicant's circumstances as set out in the probation officer's report and nothing in those circumstances indicated to me that the applicant's insight into his wrongdoing would have been affected by his relative youth. I took into account the circumstances of the applicant's upbringing, the fact that his father was absent for lengthy

periods, but that had to be seen in context and in context I was not persuaded that the applicant had a particularly deprived upbringing or that the absence of his father on duty as a long distance truck driver, in any way would have affected his development to bring about reduced moral blameworthiness in the commission of these offences. I balanced the applicant's background circumstances against the extreme seriousness of the offence, particularly the murder and robbery and I am not persuaded that another court, confronted with the same exercise, is likely to find that I, in any material way, misdirected myself. The element of mercy is indeed an element that is weighed in the consideration of an appropriate sentence. It was not, even though I did not expressly refer to it, overlooked in the current case, but mercy in the relevant sense, is not "maudlin sympathy," to borrow the expression used in the *Malgas* case. It is a weighing up of all the relevant factors in the case and mercy, in the relevant sense, would be particularly indicated where prospects for rehabilitation or reform were present. And it was because of my conclusion that those prospects were noticeably absent in this case, that I dealt with that at some length in the sentence judgment. I mentioned in the sentence judgment that the applicant had only reached Grade 8. but a consideration of the probation officer's report makes it clear that that was not through any intellectual incapacity, but because of the applicant's misbehaviour at school and lack of interest in pursuing his education. In view of the extreme seriousness of the offence, the fact that the applicant had only one previous conviction, was not a factor that weighed heavily and I do not believe that there is a reasonable prospect that any other court on appeal would hold otherwise. I did not take into account, although I also did not overlook, that accused 1, like accused 2, had spent about 14 months in prison awaiting trial, but in the context of the sentences which I felt bound to impose, that was not as weighty a factor as it was in respect of accused 2, who was sentenced to a determinate sentence of imprisonment. It was certainly not a factor which would have afforded a basis to depart from the prescribed minimum sentence. In all the circumstances, having given serious consideration to the application, I am impelled to the conclusion that an appeal would enjoy no reasonable prospects of success and the application, therefore, falls to be dismissed. BINNS-WARD, J

The grounds of appeal are that I erred in overemphasising the seriousness of the offences and the interests of the community. That I did not take prospects of rehabilitation into account. That I did not attach weight to the element of mercy in imposing sentence and that I found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence. The notice of application for leave to appeal also contends that I did not give any alternatively sufficient weight to the following extenuating circumstances in imposing sentence:

That the applicant was relatively young at the time of the commission of the offence. The application states he was 22 years old. He was actually just short of 22 years old as pointed out in my sentence judgment.

That the applicant had been in custody since his arrest.

That the applicant had only one previous conviction for housebreaking and theft.

That the applicant had grown up without the traditional support and assistance of a father.

That the applicant had only reached Grade 8.

6. That there was no evidence put before the court which suggested that the crimes had been planned.

In respect of the conviction on the murder and the conviction in respect of robbery with aggravating circumstances, as pointed out in my sentence judgment, the sentence was subject to the legislative prescription set out in Act 105 of 1997 and this court, as I emphasised in my sentence judgment, was in respect of those counts, at liberty to depart from the prescribed minimum sentences of life imprisonment and 15 years imprisonment respectively only if the presence of substantial and compelling reasons to do so was established.

As I indicated in my sentence judgment the only factor which might have counted in accused 1's favour in that regard, was his relative youth, but as I also pointed out in my sentence judgment, the Supreme Court of Appeal in *S v Matvitvi* has recently expressed that in respect of any offender who commits offence over the age of 20, there must be evidence, if this relative youthfulness is to be a relevant factor, that it affected the commission of the offence in a way which reduced the moral blameworthiness of the offender. The Supreme Court of Appeal has made it clear that an age of 21 or 22 is per se, and without more, not sufficient to attach a finding of substantial and compelling reasons to depart from the prescribed minimum sentence.

In this case I had regard to the broader picture of the applicant's circumstances as set out in the probation officer's report and nothing in those circumstances indicated to me that the applicant's insight into his wrongdoing would have been affected by his relative youth. I took into account the circumstances of the applicant's upbringing, the fact that his father was absent for lengthy periods, but that had to be seen in context and in context I was not persuaded that the applicant had a particularly deprived upbringing or that the absence of his father on duty as a long distance truck driver, in any way would have affected his development to bring about reduced moral blameworthiness in the commission of these offences. I balanced the applicant's background circumstances against the extreme seriousness of the offence, particularly the murder and robbery and I am not persuaded that another court, confronted with the same exercise, is likely to find that I, in any material way, misdirected myself.

The element of mercy is indeed an element that is weighed in the consideration of an appropriate sentence. It was not, even though I did not expressly refer to it, overlooked in the current case, but mercy in the relevant sense, is not "maudlin sympathy," to borrow the expression used in the *Malgas* case.

It is a weighing up of all the relevant factors in the case and mercy, in the relevant sense, would be particularly indicated where prospects for rehabilitation or reform were present. And it was because of my conclusion that those prospects were noticeably absent in this case, that I dealt with that at some length in the sentence judgment.

I mentioned in the sentence judgment that the applicant had only reached Grade 8. but a consideration of the probation officer's report makes it clear that that was not through any intellectual incapacity, but because of the applicant's misbehaviour at school and lack of interest in pursuing his education. In view of the extreme seriousness of the offence, the fact that the applicant had only one previous conviction, was not a factor that weighed heavily and I do not believe that there is a reasonable prospect that any other court on appeal would hold otherwise.

I did not take into account, although I also did not overlook, that accused 1, like accused 2, had spent about 14 months in prison awaiting trial, but in the context of the sentences which I felt bound to impose, that was not as weighty a factor as it was in respect of accused 2, who was sentenced to a determinate sentence of imprisonment. It was certainly not a factor which would have afforded a basis to depart from the prescribed minimum sentence.

In all the circumstances, having given serious consideration to the application, I am impelled to the conclusion that an appeal would enjoy no reasonable prospects of success and the application, therefore, falls to be dismissed.

BINNS-WARD, J

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