

SOUTH AFRICA / JUDGMENT

T S v S (A134/2020) [2020] ZAFSHC 245 (7 December 2020) [2020] ZAFSHC 245

COURT

Free State High Court, Bloemfontein

BEFORE

P.J. Loubser, J.P. Daffue

CASE / FILE NUMBER

A134/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A134/2020

In

the matter between:

T
S Appellant
and
THE
STATE Respondent
CORAM: DAFFUE,
ADJP et LOUBSER, J

JUDGEMENT

BY: LOUBSER, J

HEARD ON: 7 DECEMBER 2020

DELIVERED ON: 7 DECEMBER 2020

- [1] The Appellant, now 36 years of age, was found guilty in the Bloemfontein Regional Court on two counts of contravening a protection order issued against him (counts 1 and 4), on two counts of malicious injury to property (counts 2 and 3) and on one count of arson (count 5). He was sentenced to an effective term of 23 years imprisonment for the crimes he has committed.
- [2] The Appellant committed all the crimes during the night of 31 August 2017 at the house of his ex-wife in Erlich Park, Bloemfontein. They were married by customary rights before they became separated in
2015. Only one child was born of the marriage relationship between the two of them, and the child was living with his mother at the time of the events that took place during the night in question.
- [3] The appeal is with the leave of two judges of this division to appeal against the sentences only. It is alleged in the notice of appeal that was filed subsequently, that the trial magistrate misdirected herself by, inter alia, not considering the cumulative effect of the respective sentences.
- [4] The trial magistrate took counts 1 and 4 together for the purposes of sentence, and she sentenced the Appellant to 5 years imprisonment on those two counts. She likewise took counts 2 and 3 together for the purposes of sentence, and sentenced the Appellant to 8 years imprisonment on those counts. On the charge of arson, namely count 5, the Appellant was sentenced to 10 years imprisonment. As mentioned earlier, the effective term of imprisonment was therefore 23 years.
- [5] The question this court now has to consider on appeal, is whether the imprisonment of 23 years constituted an appropriate sentence for the crimes committed by the Appellant. The circumstances in which the crimes were committed, are also relevant to this enquiry.
- [6] The complainant testified in the court a quo that she had obtained a protection order against the Appellant only a week before the incidents in question. In terms of that order, the Appellant was prohibited from assaulting, swearing at, intimidating, harassing or threatening the complainant. He was also prohibited from entering her house.

- [7] Despite the clear terms of this order, however, the Appellant arrived at the house of the complainant in the early hours of 31 August 2017 and began knocking at the window of the bedroom where the complainant and her boyfriend were sound asleep. He then proceeded to break that window, and he grabbed the burglar bars inside the window while shouting the name of his child. When the complainant pressed the panic button in the room, the alarm sounded and the Appellant ran away. Upon investigation, they found that the windscreen of the boyfriend's car was also broken. This car was parked in the yard near the window that was broken by the Appellant.
- [8] Around the time that dawn was breaking, the complainant and her child were in the sitting room when they heard something like water pouring. It was the accused pouring petrol through the broken window into the bedroom. He then lit a match and threw it onto the bedroom floor. The petrol instantly caught fire and the flames eventually destroyed the electrical wiring in the room as well as the bed. Fortunately the neighbours quickly came to assist, and the fire was extinguished soon. Meanwhile, the Appellant had jumped over the gate and disappeared. He then went on to drink rat poison in an apparent effort to commit suicide. He was subsequently admitted in hospital for a period of five days before he was eventually discharged.
- [9] According to the testimonies of the complainant and her boyfriend in the court a quo, the broken bedroom window and the fire in the bedroom caused the complainant damages of some R 6 000. The damage to the car windscreen

amounted to only a crack in the windscreen, which the boyfriend had not repaired as yet. He estimated the cost of replacing the

windscreen at some R 3 000.

- [10] While the crimes committed by the Appellant were by their very nature serious crimes, it cannot be denied that the ultimate effect of the crimes were not that serious at all. Nobody became injured during the incidents, and the damages caused were relatively minimal. In addition, it appears as if the Appellant became highly agitated and emotionally distressed that night because of the boyfriend's presence in the complainant's house. A reading of the record of proceedings in the court a quo leaves one with a strong sense of understanding that the Appellant was unable to cope with the idea that he was losing his erstwhile

wife forever. That would explain his attempt to kill himself afterwards. That would also explain the State's concession before us, that was made quite correctly in my view, that the sentences imposed cannot be supported as they are shockingly inappropriate.

- [11] On the other hand, it is a fact that there is presently a general and nationwide outcry against domestic and other violence against women and children. We have seen many public protests and other actions in recent times regarding this issue. Society is clearly demanding firm action by the courts to put an end to such violent behaviour. In my view, the actions of the Appellant on the night in question therefore clearly call for some term of imprisonment.

Such a sentence would not only serve as a deterrent, but also serve the interests of justice and of the community.

[12] However, the Supreme Court of Appeal has warned [1] that a sentence that is intended to serve the purpose of deterrence must not be grossly disproportionate to the offence of which an accused person was convicted. This is so,

“because a grossly disproportionate sentence does not only violate the accused person’s right to a fair trial, but also his or her right not to be punished in a cruel, inhumane or degrading manner”

the court remarked by word of Jafta, JA.

[13] Applying this principle, I am of the view that, having regard to all the circumstances of this case, the trial magistrate has erred by imposing on the Appellant sentences that are grossly disproportionate to the offences of which he was convicted. The sentences must therefore be set aside and be substituted by sentences that are proportionate to the circumstances.

[14] The following orders are made:

1. The appeal succeeds and the sentences imposed by the trial magistrate are set aside.
2. The sentences imposed by the trial magistrate are substituted by the following:
 - a) Counts 1 and 4 are taken together for the purposes of sentencing, and the Appellant is sentenced to 18 months imprisonment;
 - b) Counts 2 and 3 are taken together for the purposes of sentencing, and the Appellant is sentenced to 12 months imprisonment;
 - c) On Count 5 the Appellant is sentenced to 4 years imprisonment;
 - d) The above sentences will run concurrently, resulting in an effective term of 4 years imprisonment;
 - e) The above sentences are deemed to have been imposed on 14 June 2019, namely the date of sentence in the court a quo.

P.J. LOUBSER, J

I concur:

J.P. DAFFUE, ADJP

For the Appellant:

Adv. K.F. Pieterse

Instructed by:

Van Schalkwyk and Partners

Bloemfontein

For the Respondent:

Adv. J. Botha

Instructed by:

Director of Public Prosecutions

[1] In S v Fhetani 2007 (2) SACR 590 (SCA) at 593 f-g

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