

SOUTH AFRICA / JUDGMENT

Watson v S (A235/2017) [2017] ZAGPJHC 394 (12 December 2017) [2017] ZAGPJHC 394

COURT

South Gauteng High Court, Johannesburg

BEFORE

T. Ncongwane, I. Opperman

CASE / FILE NUMBER

A235/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

Case

No A235/2017

Not

reportable

Not of

interest to other judges

Revised.

12

December 2017

In the matter between:

WATSON

JANICE Appellant

and

THE

STATE Respondent

JUDGMENT

NCONGWANE AJ:

- [1] The appellant, a 44 year old woman was arraigned in the Regional Court Roodepoort (Gauteng) on one count of fraud amounting to R656 099.92, read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997, committed between the periods 2014 to 2015.
- [2] The appellant was legally represented throughout the proceedings. She pleaded guilty to the charges and was subsequently convicted and sentenced on the 19th of September 2016 to seven (7) years direct imprisonment. With leave granted by the trial magistrate on the 21st of November 2016, the appellant appeals against the sentence. On the 22nd of December 2016, the appellant successfully secured bail pending the outcome of the appeal.
- [3] Before us Mr Du Plessis appeared for the appellant and Mr Badenhorst for the respondent. I do not intend to burden the judgment with the facts that led to the appellant's conviction, since the appeal is not directed at the trial court's pronouncement in this regard. I shall however, during the judgment make reference to portions of the facts that led the trial court to conclude that the appropriate sentence in the circumstances is seven (7) years direct imprisonment. The principal issue raised before us by the appellant, relates to the principles to be applied where a person convicted of a criminal offence is potentially the primary care-giver of the children.
- [4] The issue of sentencing generally, as a matter of law, falls within the discretion of the trial court. The appeal court may only interfere with the trial courts exercise of its discretion, in imposing the sentence, if it is of the view that the sentence imposed by the trial court is disturbingly or shockingly inappropriate or is vitiated by an irregularity or misdirection and where the discretion was not properly exercised, and a failure by the trial court to consider other sentencing options, resulting in a sentence that is strikingly different to a sentence that the appeal court would have imposed, had it sat as the trial court.
- [5] For sentencing purposes, the court needs to consider whether or not the trial court considered the personal circumstances of the appellant, on the one hand, and the interests of the society, the complainant's loss, the extent of the offence and its prevalence on the other hand. This is the Zinn triad which has become the mantra when pronouncing sentence. The current approach to sentencing as predicated in *The S v M* (Center for Child Law as Amicus curae) 2008 (3) SA 237 CC at 241 para 10, is premised from the recognition by the Constitutional Court that sentencing is 'innately controversial'. The classic Zinn triad was endorsed as the paradigm from which to proceed when embarking on 'the lonely and onerous task' of passing

sentence. In *S v Banda and Others* 1991 (2) SA 352 at 355 A-C, Friedman J explained that:

“The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies requirements. What is necessary is that the courts shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.”

- [6] If the court confines itself to the triad approach where the person convicted of a criminal offence is the primary care-giver of the minor children, a determination of a sentence to be passed by the court may render any subsequent sentence imposed inappropriate due to its lack of consideration of the holistic circumstances, where the best interests of the minor child are considered indispensable by the Constitution as an extra element which should not escape the sentencing court when executing its duty to pass sentence upon a primary care-giver.
- [7] The appellant was employed by a company called Levero Group Company (Pty) Ltd (“the company”) for a period of three years leading to the time when the frauds were committed. She was in a position of trust as a Bookkeeper for the company and trusted by her employer. She has three children, aged 9, 19 and 23 years of age. At the time of imposing the sentence, she stayed with her two older children. The youngest child of 9 years stayed with the appellant’s grandparents. The trial court found that the appellant is not a primary care-giver. The trial court stated:

“In this case, as I have said, you have quite a close bond with your elder children. They are now, not minor any longer (sic). So, there is not, what we call a primary care-giver’s situation, in your case.”

- [8] On page 43 line 4 to line 13 of the record. The trial court stated the following:

“The question arises, if your upbringing or your health or any other aspect can be taken, as a compelling and substantial circumstance. Because you are now again gainfully employed and earning R 10.000.00 approximately, a month, with another company. If you lose this, then there might be the possibility that your young child, who is to some extent, dependent on you might then lose his, or the child might then lose the financial comfort. But, it is also so that it seems as if your family are quite a close neat family (sic). That you, that it seems, that there is nothing placed before this court, to show that the child will be left destitute, if a custodial sentence is passed.”

- [9] It was argued by Mr Du Plessis on behalf of the appellant that the trial magistrate misdirected herself when, during the sentencing proceedings, she failed to take a more active role relating to issues to be taken into account when assessing the weight which should be attached to the objectives to be achieved in sentencing an accused person. In particular, so the argument goes, that the trial court gave scant and superficial regard to the contents of the pre-sentencing report, resulting in the interests of the children not being taken into account.

[10] Mr Badenhorst however, put up a spirited argument for the State, contending that the appellant misused her position of trust. That the fraud she committed did not only have a devastating effect on First National Bank, who subsequently paid the company the amount of the loss, but it also had ruinous effect on the two employees of FNB who trusted her to such an extent, that they overlooked certain procedures at the bank in order to assist her. These actions ultimately cost the two employees their employment. It was argued that the knock on effect of the appellant's criminal conduct is that the families of the two FNB's employees dismissed from their employment, would suffer financially due to their loss of employment. Mr Badenhost further argued that the

grandmother of the appellant's 9 year old child, and not the appellant, is the primary caregiver, since the child resides with the grandmother and the latter therefore protects, makes decisions and looks after the best interests of the child. This issue was, so the argument ran, not in dispute during the trial proceedings. He submitted that the custodial sentence of seven years was appropriate.

[11] In dealing with the principal issue central to this appeal, it becomes imperative to consider the personal circumstances of the appellant and the interests of the nine year old child.

[12] The probation officer's report was requested by the trial court. In the report, the appellant's background, behavioural patterns and socio-economic circumstances, are dealt with. The probation officer reports that the appellant, when probed by him, stated that she met a gentleman by the name of Chris Hattingh who enticed her into the idea of defrauding the company. She went on to add that she was later introduced to another gentleman by the name of Tony Erasmus. According to her, the two gentlemen assured her that nothing will go wrong and instructed her to open a business account on her husband's name, (Mr Rassheed Smith), into which the targeted funds would be deposited. In addition, she stated that the amount of money defrauded was shared amongst them. According to her, she acted out of desperation and did not think of the repercussions of her unlawful actions. These facts

effectively constitute an elaboration of the facts included in the appellant's s112 (2) statement. The probation

office further stated that the appellant mentioned to him that she was under financial constraints as her nine year old son was ill and needed professional medical attention. She also added that she was under financial pressure to provide for her two older children as their father did not assist her financially with their educational needs. The appellant indicated that she is remorseful for having involved herself in such criminal activities and stated that she takes full responsibility for her unlawful action.

[13] During the probation officer's consultation with the appellant's ex partner, the latter made good remarks concerning the appellant's behaviour and role as a mother towards the wellbeing and maintenance of the their nine year old child.

- [14] The probation officer recommended that, although the accused's nine year old child is currently under the care of his parental grandmother, the appellant remains to be accountable for the well being of the child even though she does not permanently reside with him. Moreover, he stated that should the appellant be subjected to an imprisonment sentence, the best interests of the child will be compromised and such may have a negative emotional and educational impact on the well being of the child. He added that even though the appellant's two older children are regarded as adults, they are still dependent on the accused for parental support, care and guidance. The probation officer acknowledged that the offence committed by the appellant is serious in nature and warrants imprisonment but was of the view that the appellant's personal circumstances and other aspects relating to the interests of the minor child warrants that the court should consider passing a lenient sentence.
- [15] In *S v De Villiers* 2016 (1) SACR 148 (SCA) at para 31, Lewis JA stated that the Constitutional Court, in *S v M* has accepted that when sentencing an offender, it was not sufficient to regard the child's interests as one of the circumstances of the offender. The issue of the child's interests must be considered independently and must not be subsumed into a consideration of culpability and circumstances of the offending primary care-giver. A reading of s 28 (1) together with s 28 (2) of the Constitution requires that when a custodial sentence of a primary care-giver is an issue the court has four responsibilities: to establish whether there will be an impact on the child, to consider independently the child's best interests, to attach appropriate weight to those interests, and to ensure that the child will be taken care of if the primary caregiver is sent to prison. In *S v M*, Sachs J said on page 525 para A-C:
- 'Focused and informed attention needs to be given to the interest of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for Constitutional requirements necessitates a degree of change in judicial mindset. Specific and well informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interest of the children, given the legitimate range of choices in the circumstances available to sentencing courts.'
- [16] In order to meet the Constitutional requirements regarding the paramountcy of the right of children in every matter that will have a direct or indirect impact on the interests of the children, the courts can only pass a custodial sentence to a primary care-giver after having applied its mind, and embarked on a short enquiry aimed at satisfying itself that it can, from the replies received including the evaluation of the content of the pre-sentencing report, that the approach will fulfill the four responsibilities referred to in paragraph 15 supra.
- [17] In accordance with s 1 of the Children's Act No 38 of 2005, a 'care-giver' means:

"any person other than a parent or guardian, who factually cares for a child"

‘Child’ means a person under the age of 18, ‘Care’ is defined as in relation to a child, includes. Where appropriate –

- (a) within available means, providing the child with –
- (i) a suitable place to live
- (ii) living conditions that are conducive to the child’s health, wellbeing and development, and
- (iii) the necessary financial support,
- (b) safeguard and promoting the wellbeing of the child,
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards...
- (d) respecting or protecting, promoting...
- (e) guiding, directing and securing the child’s education and upbringing ...
- (f) guiding and advising and assisting the child in decisions to be taken by the child...
- (g) guiding the behaviour of the child in a humane manner ...
- (h) maintaining a sound relationship with the child
- (i) accommodating any special needs that the child may have ...
- (j) generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child.

[18] With all these responsibilities that are legislatively required to be provided and promoted by a care-giver, a primary care-giver is set to be the ‘person with whom the child lives and who performs every day tasks like ensuring that the child is fed and looked after and that the child attends school regularly’. In all matters concerning children however, everything will depend on the facts of the particular case in which the issue might arise.

[19] The trial court, undoubtedly omitted to weigh itself in on all relevant issues pertaining to the best interests of the minor child when considering to impose a custodial sentence. The judgment is silent on the responsibilities formulated in *De Villiers* (supra) and does not independently and broadly consider the interests of the child separately from the personal circumstances of the appellant. The principles formulated in *S v M* and explained in *De Villiers* (supra), have been accepted and international recognition has been given in legal instruments such as the United Nations, Human Rights Council and by the African Committee Experts and Rights and Welfare of a Child, in their general comment number 1. In the judgment of the majority, in *MS v S* (Centre for Child Law as Amicus curae) 2011 (2) SARC 88 CC, Cameron J dismissing a further appeal from the SCA, said in para 62:

“S v M has revolutionised the sentencing in cases where the person convicted is the primary care-giver of the children. It has asserted the central role of the interest of young children as an independent consideration in the sentencing process. Yet it would be wrong to apply S v M in cases that lie beyond its ambit. The mother in S v M was a single parent, and was almost exclusively burdened with the care of her children. There was no other parent who could, without disruption, step in during her absence to nurture the children, and provide the care they need, and to which they are constitutionally entitled.”

[20] It has also been stated in S v De Villiers, para 11 that :

“When considering the best interests of children a court must consider evidence as to their current position to determine what their best interest require.”

[21] This court is not in a position to consider whether a sentence involving imprisonment is appropriate or required after having fully evaluated the best interests of appellant's nine year old minor child. I will therefore, refrain from making any evaluation as to a proper sentence that should be imposed on the appellant, since, in my view it is the trial court that would be in the best position to reconsider the issue of sentence afresh. This judgment is not intended to, nor can it, dictate to the learned Magistrate how she should exercise her discretion once all the relevant facts have been placed before her. It may well be that the trial magistrate may conclude that a term of direct imprisonment of seven years is appropriate having analysed independently the interests of the minor child. The magistrate has a complete free hand, to hand down a sentence afresh once all the facts are placed before her. The trial magistrate has not sufficiently dealt with the four factors referred to in the De Villiers (supra). She neither explored nor voiced any appreciation of the content or the legal meaning of the term 'primary care-giver' and the factual content relating to the interests of the minor child. She failed to explore the personal circumstances of the appellant and the circumstances of the grandparent in so far as it may have relevance in assessing who the minor child's primary care-giver is. In view of the lack of factual matter to consider these issues, I am of the view that the issue of sentence should be remitted to the trial

court for that court to reconsider the issue of sentence afresh. As I have stated above, the record reflects that the appellant is on bail pending the appeal.

[22] In the result I grant the following order:

22.1 The appeal is upheld;

22.2 The sentence imposed by the trial magistrate is set aside;

22.3 The matter is remitted back to the trial magistrate for the appellant to be resentenced;

22.4 The appellant's bail is extended on the same conditions as those set by the learned Magistrate on 22 December 2016 in paragraphs 3 to 6 as recorded at page L of the J15. The appellant's attention is, in particular, directed to the content of paragraph 4 of such conditions.

T. Ncongwane

Acting Judge of the High Court

Gauteng Division, Johannesburg

I agree

I. Opperman

Judge of the High Court,

Matter heard on : 24th November 2017

Judgement delivered: 12 December 2017

Appearances:

For the Appellant: Mr P. Du Plessis

Instructed by: David H. Botha, Du Plessis and Kruger Inc

For the Respondent : Adv JA Badenhost

Instructed by: Office of the DPP

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