

SOUTH AFRICA / JUDGMENT

Well v S (A158/19; 2RC76/17) [2022] ZAGPJHC 169 (23 March 2022)

[2022] ZAGPJHC 169**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Dippenaar, Mahomed

CASE / FILE NUMBER

A158/19; 2RC76/17

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Appeal****Case No. A158/19****CASE****No 2RC76/17****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:**Date:**

23/03/2022

In

the appeal of

ROYCE

WELL

Appellant

and

STATE

Respondent

Coram:

Dippenaar J, Mahomed AJ

Heard

: 8 March 2022

Delivered:

23 March 2022

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for handdown is deemed to be 10h00 on the 23rd of March 2022.

MAHOMED AJ

1. The appellant was arraigned, convicted and sentenced by the Regional Court, Kempton Park ("the court a quo"). The appellant was convicted of robbery with aggravating circumstances and assault with the intent to cause grievous bodily harm. He was legally represented at the trial.

The appellant's application for leave to appeal to the court a quo was unsuccessful. The appellant petitioned for leave to appeal against both his conviction and sentence and was granted leave on sentence only.

2. The court a quo imposed a sentence of fifteen years in terms of s51(2)(a) of the Criminal Law Amendment Act 105 of 1992 ("the Act"), being the minimum sentence laid down by the legislature in relation to the serious crimes identified in the Schedule to the Act. The appellant was further declared unfit to possess a fire-arm in terms of s103 of Act 60 of 2000.
3. Accordingly, this court is to determine if the sentence imposed is appropriate and fair to prevent an injustice. This court must identify whether substantial and compelling circumstances exist to reduce the sentence imposed.

APPLICABLE PRINCIPLES

4. An appeal court's approach to sentence is that the task of sentencing lies primarily within the trial court's discretion

and a court of appeal shall not interfere with a sentence so imposed unless the sentence is found to be inappropriate and disproportionate

to the seriousness of the crime committed, see *S v SALZWEDEL*.^[1]

5. In *S v MALGAS*,^[2] the Supreme Court of Appeal stated the following:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing of the trial Court."

6. Parliament has ordained minimum sentences for specific offences and courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them see *S v MATYITYO*.^[3]

7. In applying its discretion on sentence, a court must consider the personal circumstances of the accused, the interests of society and the nature of the crime committed, S v ZINN.[4]

THE ARGUMENTS

The Appellants Case

8. Counsel for the appellant Mr Mogase, submitted that this court must consider the evidence before it in its totality, and argued that the court a quo placed too much emphasis on the seriousness of the crime and failed to consider the personal circumstances of the appellant, relying on S v VILIKAZI[5] and S v PILLAY[6] where the courts confirmed the approach to be adopted.
9. Mr Mogase urged this court to consider the mitigating factors in the appellant's personal circumstances, being his age of 35, which it was contended rendered the appellant a youthful offender, the fact that he was engaged and looking after his fiancé's

child, who was pregnant at the time, and that he was a manager in the family business. It was further argued that the court a quo should have considered the period of some 67 days which the appellant spent incarcerated awaiting trial. It was argued that these facts were not accorded due weight when the court a quo imposed its sentence.

THE RESPONDENT'S CASE

10. Ms Barnard, on behalf of the respondent, submitted that the court may only interfere with the sentence if it found that the court a quo misdirected itself. Counsel submitted that the lower court had applied its discretion judiciously and had considered all the facts before it.
11. Counsel reminded the court that this was a premeditated and planned attack on the complainant and the appellant was assisted by others as a group who each had a role to play where the complainant was held down by one and the appellant seriously injured the complainant, by stabbing him in his eye with a knife, resulting in a loss of the eye. The complainant was further robbed of R5 230, which was not recovered.
12. She further submitted that the incarceration period spent awaiting trial, was relatively short, when one considers the vast number of cases in our courts that take much longer to finalise. Reliance was placed on S v RADEBE[7] where the court held that the period in custody awaiting trial is but one of the factors to be considered in determining an appropriate

sentence.

13. In response to the court's question on a person's constitutionally protected rights to freedom and liberty, Ms Barnard argued that the Constitution does provide for rights to be limited in certain circumstances. She argued that the court must consider the impact and prevalence of the crime committed and the interests of society. She argued further that society looks to the court for protection from dangerous criminals and that the appellant was indeed a danger to society.

DISCUSSION

14. The appellant has been sentenced in terms of the minimum sentence provisions.

15. Section 51(2) of the Act provides:

“Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall, sentence a person who has been convicted a person of an offence referred to in-

Part II of Schedule 2, in the case of-

A first offender, to imprisonment for a period of not less than 15 years;

...

...”

16. The crimes for which he was convicted, aggravated assault and assault with intention to do grievous bodily harm fall within the schedule.

17. The reasons advanced by the court a quo included a reference to his personal circumstances, the seriousness of the offences and a consideration of the prevalence of the crime in society.

18. The court a quo duly considered the accused’s age, his family commitments, and that he was engaged. His fiancé was pregnant and that he was also taking care of his fiancé s minor child. However, he was more a financial caregiver rather than a primary caregiver.

19. The court a quo further considered that the accused ran a business and a tavern together with his father and he sent monies to his family in Nigeria. The businesses generated about R4700 per week and that he was a manager in the tavern.

20. The court a quo considered the various aggravating factors, including that the complainant, a single young person, has lost his sight in his left eye because of this attack which caused the complainant much distress and anxiety as to his prospects of employment and a suitable partner.

21. After considering all the various factors, the court a quo concluded that it was a serious offence and that it was obliged to impose the prescribed minimum sentence.

22. In *S v MALGAS*[8] the court held that minimum sentences cannot be departed from on flimsy reasons. Considering all the facts and weighing up the different

factors, it cannot be concluded that the court a quo misdirected itself in imposing the minimum prescribed sentence.

23. I am unable to determine any substantial and compelling circumstances to justify a deviation from the sentences laid down by the legislature and as correctly imposed by the court a quo. A circumstance has to be a rare fact, not normally advanced for consideration.

24. I have taken note of the accused's period spent awaiting trial and I agree with counsel for the respondent that that period is but only one of the factors that a court should consider in deciding on an appropriate sentence.
25. The accused was found guilty on two counts and the magistrate in imposing the minimum sentence of 15 years, considered it as one offence.
26. I am satisfied that the sentencing court found nothing that is of any weight in the circumstances of the accused to warrant a deviation from the minimum sentence. It is noted that the accused is not a first offender and was previously convicted for possession of illegal substances.
27. It follows that the appeal must fail.

Accordingly, the following order is granted:

1. The appeal against sentence is dismissed.
2. The sentence imposed by the court a quo is confirmed.

MAHOMED, AJ

Acting Judge of the High Court of South

Africa, Gauteng Local Division,

Johannesburg

I concur and it is so ordered

DIPPENAAR J

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

[1] 2000

(1) SA 786 SCA at 790 B-F

[2] 2001

(1) SACR 496 SCA

[3] 2011 SACR 40 SCA AT 53 E-F

[4] 1996

(2) SA 537

[5] 2009

(1) SACR 522 SCA

[6] 1997

(4) SA 531 (A)

[7] 2013

(2) SACR 165 SCA

[8] 2001

(1) SACR 469 SCA 477 C

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