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IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA& R 86/17
Heard on: 12/03/2018
Delivered on: 11/05/2018

In the matter between:

S. R. D.

APPELLANT

And

THE STATE

RESPONDENT

Coram: Tlaletsi JP et Mamosebo J

Summary: Appeal against sentence – appellant convicted of murder read with s 51 (2) of the Criminal Law Amendment Act 105 of 1997 committed on a newly born baby - sentenced to 10 years direct imprisonment.

On appeal- sentence set aside and substituted.

JUDGMENT: APPEAL ON SENTENCE

MAMOSEBO J

- [1] The appellant was convicted by the regional magistrate, sitting at the Springbok Regional Court, on 20 October 2016 following her plea of guilty to murder read with s 51(2) of the Criminal Law Amendment Act¹. She was acquitted on count 2 of concealment of birth. She was on 26 April 2017 sentenced to direct imprisonment of 10 years having been found that there were substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of 15 years. The appeal is with leave of the court a quo. For reasons not clear from the record the court a quo ordered the appellant to continue to serve the sentence until the outcome of the appeal.
- [2] The main grounds of appeal by the appellant are that: (a) the regional magistrate over-emphasized deterrence as a form of punishment despite the extra-ordinary circumstances of the appellant; (b) the uncontroverted medical evidence of Dr Petrovsky confirmed that she was suffering from depression at the time of the commission of the offence which the regional magistrate either failed to consider or did not attach adequate weight to.
- [3] It is apposite to provide a brief background to this case. The appellant is an unmarried and unemployed 23 year old parent of two boys aged 6 and 4 years. On 05 October 2014 she single-handedly gave birth to a baby boy in the toilet of her parents' home at P. N.. The baby was alive when it

¹ Act 105 of 1997

dropped into the toilet bowl wherefrom she pulled him and inflicted a bruise and several incisions on his neck with a knife. The bruise was caused by blunt force. Dr Adin Surtie conducted a post mortem on the body on 09 October 2014 and concluded that the cause of death was multiple incisions on the neck. The post mortem report was admitted by consent.

- [4] The paternal grandmother of the appellant's children, Ms B. C., and Mr D. C., the father of the two surviving children and the deceased baby, also testified. They both urged the Court to consider a non-custodial sentence to enable the appellant to raise her young children. She will also be able to continue with her family responsibilities of assisting her mother who had recently suffered a stroke, and taking care of her two siblings. They both testified that although they were hurt by the incident they have forgiven the appellant. They need her to maintain a healthy relationship with her minor children.
- [5] During sentencing proceedings the regional magistrate called Dr Zygnunt Petrovsky, the psychiatrist, to testify. He evaluated the mental state of the appellant for the 30 days of her observation in July 2015 in terms of sections 77, 78 and 79 of the Criminal Procedure Act² (CPA). In his evidence and relevant to sentencing, he indicated that the accused at the time of the commission of the offence suffered from depression although she was later found fit to stand trial. The doctor clarified that she was not posing any further risks to anyone because the condition is unlikely to recur. Her depression is unrelated to any genetic mental disorder but was as a result of the impending surrounding circumstances particularly relating to the pressure over a further unwanted pregnancy and being told

² Act 51 of 1977 as amended

by family that she must never get pregnant under such dire circumstances at home.

- [6] The Correctional Officer, Mr Gideon Engelbrecht, whose report was admitted by consent, recommended the appellant for correctional supervision in terms of s 276(1) (h) of the CPA stating that: she is young; a first offender; remorseful; has a strong support system and has a confirmed residential address.
- [7] The Probation Officer, Ms Levican Swarbooi, testified and explained that she interviewed the appellant and her parents, Mr and Mrs D., the appellant's 6 year old child, Mr D. C. the deceased's father, Ms B C., the deceased's paternal grandmother, the appellant's high school principal as well as the South African Police Service members. She also had sight of the report of the clinical social worker and court documents to prepare her pre-sentence report. She recommended correctional supervision in terms of s 276(1)(h) of the CPA.
- [8] The regional magistrate took into consideration the triad consisting of the crime, the offender and the interests of society. In addition to the personal circumstances appearing in para 3 (above), the regional magistrate considered that the appellant passed her matric in 2011 and N2 level in the electrical field. At the time of sentencing she was employed as a cleaner on a temporary basis earning about R400.00 per week. The appellant pleaded guilty to the charge which is a sign of remorse. The regional magistrate took into account the evidence of Dr Petrovsky that the incident was triggered by the appellant being overburdened and financially constrained within her family. She considered the impact of this offence on the C. family. She took into consideration that the

children's paternal grandmother will be able to look after them during her incarceration. Ms Swartbooi and the local social workers were ordered to arrange foster care of the two minor children when the appellant is serving her custodial sentence.

- [9] The regional magistrate justified the deterrent aspect before imposing the 10 years direct imprisonment as follows:

“All in all the facts call for punishment of the [appellant] for the gruesome murder of the helpless newly born baby. **The facts are even calling for deterrence for it would be quite useful that even the would be offenders would refrain from embarking on a similar offence. They further call for deterrence so that the concerned, that is the [appellant], who is an adult, has to own up in bringing up the child to life...**” (Own emphasis)

- [10] The powers of this Court in an appeal against sentence were aptly stated as follows by the Supreme Court of Appeal in *S v Malgas*³:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were 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 discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate

³ 2001 (1) SACR 469 (SCA) at 478d – h (para 12)

court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’. It must be emphasised in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.” See also *S v Kgosimore* 1999 (2) SACR 238 (SCA) at 241a-h (para 10).

- [11] Counsel for the respondent, Mr Kgatwe, submitted that the magistrate’s sentence was appropriate. He was, however, constrained to concede that the appellant was suffering from depression at the time of the commission of the offence which may have contributed to her action. Appellant’s counsel, Mr Schreuder, submitted that the regional magistrate misdirected herself in that: she over-emphasized the deterrent aspect of sentencing at the expense of the appellant’s personal circumstances; secondly, she failed to attach adequate weight to the appellant’s state of depression at the time of the commission of the offence. Counsel urged us to consider correctional supervision as a suitable sentence which is in line with the recommendations of both the probation and the correctional officers.
- [12] At stake in this appeal are also interests and welfare of the appellant’s two minor children. Section 28(2) of the Constitution⁴ stipulates that a child’s best interests are of paramount importance in every matter concerning the child. In *S v M (Centre for Child Law and Amicus*

⁴ The Constitution of the Republic of South Africa, 108 of 1996

Curiae)⁵ the Court, faced with the need to consider the interests of children during the sentencing proceedings of an accused who is a mother of minor children, made the following authoritative pronouncements:

“Focused and informed attention needs to be given to the interests 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 mind-set. 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 interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.”

The court continued at para 35 to state:

“[35] Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children’s interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.”

[13] There is evidence that the children have been cared for by their paternal grandmother when the appellant was detained for mental observation. The regional magistrate has also considered this aspect during the

⁵ 2007 (2) SACR 539 (CC) at 559a-c

sentencing phase. It appears that this aspect weighed unduly heavily in influencing the regional magistrate in imposing a sentence of direct imprisonment.

[14] The only reference to the probation officer's report by the regional magistrate in the judgment is when reference is made to the foster parenting plans to identify the immediate needs of the children after their mother's incarceration. Nothing is said about the recommendation on correctional supervision as a sentencing option and why the regional magistrate does not agree with it. There is also no mention of the correctional officer's report. For the judicial officer to ignore or brush aside the pre-sentence reports is a misdirection. See *S v Grobler*⁶ where the Supreme Court of Appeal commended the regional magistrate for having carefully and correctly considered correctional supervision as an appropriate sentence and further distinguished between offenders who ought to be removed from society by incarceration and those who should not be removed.

[15] In the case before us the appellant's circumstances provide a compelling case for a consideration of a non-custodial sentence. The regional magistrate referred to premeditation by the appellant in her judgment which may have influenced her to over-emphasize the seriousness of the offence without considering other sentencing options properly. The period of 10 years direct imprisonment is, in my view, unwarranted under these circumstances and shockingly inappropriate thereby calling for interference by this Court.

⁶ 2015 (2) SACR 210 (SCA) at 214 para 12

[16] Having found that the court a quo committed a material misdirection warranting interference with the sentence imposed, the question is whether the case should be referred back to the court a quo for sentencing *de novo*. Both counsel submitted that there is sufficient material on record for this Court to consider an appropriate sentence. The submission is well founded. This Court is in as good a position as the trial court to consider sentence afresh.

[17] In my view, and for reasons that will be advanced in due course, the appellant is a suitable candidate for a non-custodial sentence. Sachs J in *S v M*⁷ said the following:

“[59] Correctional supervision is a multifaceted approach to sentencing comprising elements of rehabilitation, reparation and restorative justice. The South African Law Commission (SALC) has underlined the importance of correctional supervision, observing:

‘There is increasing recognition that community sentences, of which reparation and service to others are prominent components, form part of an African Tradition and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment.’”

[18] In *S v Ningi*⁸ Scott JA held:

“The question is, therefore, whether in all the circumstances a sentence of correctional supervision would be appropriate. It is unnecessary to repeat what has been said before of the advantages of correctional supervision. They are well known. What I think must be acknowledged, however, is that in so far as a first offender in particular is concerned and leaving aside for the moment the practicalities of administering a non-custodial sentence, whether correctional supervision as opposed to direct imprisonment is to be imposed must depend ultimately on the seriousness of the offence and the particular circumstances in which it was committed. This is so because,

⁷ At 568 para 59

⁸ 2000 (2) SACR 511 (A) at para 8

whatever its advantages, correctional supervision remains a lighter sentence than direct imprisonment. Any contention to the contrary I think would be unrealistic.”

[19] The following are substantial and compelling circumstances which warrant deviation from the prescribed minimum sentence of 15 years imprisonment:

The appellant is a primary care-giver⁹. Regard being had to the impact a term of direct imprisonment is likely to have on the interests of the minor children, such punishment is not only focusing on the appellant and society but also on the best interests of her young children. At the time of the commission of the offence she was suffering from a depression which made her conduct morally less reprehensible. She is not a candidate to be removed from society. Imposing a lengthy term of imprisonment will not only punish the appellant but also her younger children. In the circumstances of this case it will also punish her mother who suffered from a stroke and a mental disorder and, to whom she provides home-based care. She is not only the breadwinner to her children she also cares for her two minor siblings. Both the probation officer and the correctional supervision officer have recommended that the appellant be considered for correctional supervision. She has further pleaded guilty and has shown remorse. She is 23 years old and a first offender. She is not a danger to the society and is unlikely to commit a similar offence again. All the aforementioned factors makes her a good candidate for rehabilitation.

[20] As much as punishment should fit the criminal as well as the crime, there is a need under these circumstances for this Court not only to blend the

⁹ A primary caregiver is described in *S v M* para [28] as the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.

punishment with an element of mercy but also not to allow the appellant to be sacrificed at the altar of deterrence when her circumstances dictate otherwise. Sending her to prison to serve a lengthy direct imprisonment will be a serious travesty of justice.

[21] The record shows that the appellant was ordered on 28 April 2017 to start serving her 10 year sentence pending the outcome of the appeal. She has been in custody since then. In the circumstances a sentence of three years' imprisonment in terms of s 276(1)(i), two (2) years of which is suspended for a period of five years on condition that she completes the correctional supervision and all the rehabilitative programmes and community services recommended by the Commissioner of Correctional Services, would be appropriate.

[22] In the result, the following order is made:

1. **The appeal against sentence is upheld.**
2. **The sentence imposed by the regional court on 26 April 2017 is set aside and replaced with the following:**
“The appellant is sentenced to three years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA) of which two (2) years is suspended for a period of five years on condition that she is placed under correctional supervision in the discretion of the Commissioner of Correctional Services.”
3. **In terms of s 282 of the CPA the sentence is antedated to 26 April 2017.**

MAMOSEBO MC

JUDGE

NORTHERN CAPE DIVISION

I concur

TLALETSI LP

JUDGE PRESIDENT

NORTHERN CAPE DIVISION

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