

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A96/2014

In the matter between:

J S K[...]

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* MOTLOUNG, AJ

HEARD ON: 25 AUGUST 2014

JUDGMENT BY: LEKALE, J

DELIVERED ON: 4 SEPTEMBER 2014

[1] On 17 July 2013 the appellant was convicted by the Welkom Magistrate’s Court of contravention of section 31(1) of Maintenance Act 99 of 1998 in that he had failed to make monthly maintenance payments in accordance with court orders. He was eventually sentenced to 12 (twelve) months imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977. He feels aggrieved by the sentence and now approaches us on appeal against the same with leave granted by the trial court.

[2] On imposing the impugned sentence the court below found that the appellant failed to comply with the relevant maintenance orders in an arrogant manner regard being had to the funds that passed through his hands during the relevant period. The trial court, further, felt that the appellant’s crime in this regard was a form of domestic violence insofar as the Domestic Violence Act No 116 of 1998 defines economic abuse in section 1 thereof as including:

“The unreasonable deprivation of economic or financial resources to which a complainant is entitled under law.”

The court *a quo*, thus, found that the complainant and the two children in respect of whom the appellant was obliged to effect monthly payments were subjected to economic abuse.

[3] The trial court, further, found that a suspended sentence as well as correctional supervision was not appropriate as a sentence, because it would totally undermine the seriousness of the offence involved regard being had to the merits of the matter, the high prevalence of the offence in question and the fact that the sentence should fit both the appellant and the crime involved. The trial court further rejected a fine as an appropriate option while recognising that it was also one of the court's main purposes to try to rehabilitate a first offender outside prison.

[4] It was the trial court's view that the appellant wanted to punish the complainant by subjecting her to a form of domestic violence regard being had to the degrading and humiliating path she had to walk in order to hold the appellant responsible, the financial position the appellant was in and the arrogant way in which he held the court orders in contempt. The court below felt that it was important not only to rehabilitate the appellant as an individual, but also to send out a strong message to other people engaged in the commission of similar crimes.

[5] Mr Dreyer, for the appellant, contends that the trial court misdirected herself by treating the offence involved as a domestic violence case and failed to consider all available options when she imposed the sentence. In his view an appropriate sentence would be a suspended sentence coupled with a fine, because the appellant is now in a position to pay the fine as he has since the sentence been paying maintenance on regular basis. Periodical imprisonment would not be appropriate, in his view, because no employer would tolerate an employee who has to undergo imprisonment over weekends and this may lead to termination of the appellant's employment.

[6] The State supports the sentence with Mr Hiemstra pointing out that the court below had no option other than direct imprisonment to impose because the appellant did not even testify and was clearly determined to frustrate the complainant by maliciously defaulting on his maintenance payments with arrears being in the region of R80 000.00. There exists no reason for the court to interfere with the sentence although he could not find authority in support of direct imprisonment in a case of a first maintenance defaulter. In his view, periodical imprisonment would be appropriate because the appellant's default was deliberate and persistent in that it was of a long duration. He relies in this regard on the decision in S v Visser, 2004 (1) SACR 393 (SCA) at 399f.

[7] The gravity of the default in the instant matter is apparent from the evidence of the complainant who testified that an order for maintenance *pendente lite* was made in 2006 against the appellant and a maintenance order was made in 2008 when the parties divorced. The appellant failed to comply with the

orders in question since at least 2008 despite the fact that he was in the position to comply with the same as substantial amounts of money were paid into his bank account and he was at all material times gainfully employed. The appellant was declared insolvent at the instance of the complainant in February 2012. The appellant was in employment as at the date of sentence and effected payment of at least R4 000.00 in respect of maintenance before the commencement of the trial.

[8] The question in this matter is whether or not there exists cause for this court to interfere with the sentence imposed. I am persuaded by the facts in this matter that the trial court failed to strike a healthy balance between the crime, the criminal and the interests of society insofar as she appears to have overemphasised the gravity of the offence at the expense of the community and the appellant when she effectively lost sight of the interests of the relevant children, who stand to continue to be deprived of regular monthly maintenance if the accused goes to prison. In this regard Mr Hiemstra correctly conceded that the fact that the appellant stands to lose his employment and income if he goes to jail is a very important factor to take into consideration in the determination of the appeal in the instant matter.

[9] In my view a custodial sentence which is not suspended is not appropriate in the present matter as it only addresses the retributive purpose of sentence. Mr Hiemstra is probably correct in his submission that periodical imprisonment of which part is conditionally suspended may be appropriate as a sentence if the accused's financial position warrants an order for payment of arrears or part thereof as the case was in S v Visser. *supra*. It is further probably correct, as contended by Mr Dreyer, that a wholly suspended custodial sentence is appropriate regard being had to the fact that the appellant is a first offender and is employed. We are, unfortunately, not in a position to determine an appropriate sentence in the light of lack of information on the appellant's earning capacity as correctly submitted for the State.

[11] In conclusion Mr Hiemstra is correct in his view that the record paints a disturbing picture of how the trial was conducted with the prosecutor apparently not having consulted properly with the complainant and failing to present all available documentation and information before the trial court.

[12] The conviction cannot be faulted while the sentence falls to be set aside.

ORDER

[13] The conviction is confirmed.

[14] The sentence is, however, set aside and the matter is remitted to the trial court for determination of an appropriate sentence which keeps the appellant out of prison after investigation of his financial position.

L. J. LEKALE, J

I concur.

I.M.M.MOTLOUNG, AJ

On behalf of appellant: Adv N.J.G. Dreyer

Instructed by:

BLOEMFONTEIN

On behalf of respondent: Adv J.H.S. Hiemstra SC

Instructed by:

Director of Public Prosecutions

BLOEMFONTEIN