IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. 291/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE 5 February 2019
SIGNATURE

In the matter between

Muzi Sibongiseni Ndlovu — Appellant

and

The State — Respondent

Heard : 06 November 2018

Delivered : 05 February 2019

Coram : Munzhelele AJ, Maumela J

JUDGMENT

MUNZHELELE AJ

[1] This is an appeal by Appellant, Muzi Sibongiseni Ndlovu against sentence. The appellant was charged and convicted of Arson at Evander Regional Court.

He was sentenced to 5 years imprisonment. The appellant applied for leave to appeal the sentence at the court a quo, which was dismissed.

[2] A petition was filed with the North Gauteng High Court for leave to appeal the sentence before Madam Justice Molopa- Sethosa and Janse van Niewenhuizen. which was granted on 4 April 2017.

[3] Facts of this case were narrated as follows: Mr Brian Bonginkosi Dube is the complainant. He was in a love relationship with the appellant's girlfriend (Pretty Mvubu). Pretty Mvubu was a girlfriend of the complainant, but still staying with Muzi (appellant) as she was in a love relationship with him. Brian (Complainant) was staying alone at Extension 20, Embalenhle, Mpumalanga Province in a one roomed house. On 27 October 2014 he went out from his residence to his cousin who lives 150 meters away from his homestead at around 16: 00. While he was away, Miss Pretty Mvubu came and slept in his house. At about 22:30, complainant received a call from Miss Pretty Mvubu who told him that his house was on fire. He ran to the house and found the neighbours who were trying to extinguish the fire. The fire could not be extinguished and the whole house burnt down.

[4] All the properties including the television, two beds, wardrobe, blankets, and clothes which were inside the house, burnt down. The estimated value of the damage is R50 000. 00 (Fifty thousand rand).

[5] During the night of the fire Miss Pretty Mvubu was at the complainant's place sleeping on a couch. When she woke up she found the door open. The appellant was pouring petrol inside the whole house including the place where

she was sleeping including her body. She was able to run away from the appellant to the neighbour's house. While at the neighbour's house the appellant set the house on fire and went away.

[6] The appellant denied setting the house on fire. He pleaded alibi, but the court a quo found that the state was able to prove a case against appellant beyond reasonable doubt and convicted him for Arson.

[7] The court a quo considered the triad and the interest of the victim in order to find an appropriate sentence in the circumstances of this case. The trial court was also guided by the Supreme Court of Appeal and High Court case law on similar cases regarding sentence, albeit, in S v Romer 2011(2) SACR 153 (SCA) at para 22, 23-31it was emphasized that the trial court is not bound by sentences imposed by other courts including higher courts. The court a quo sentenced the appellant to five years imprisonment. In this case, the appellant is appealing against the said sentence.

[8] It is trite that sentencing is inherently within the discretion of the trial court. The appeal court has limited powers to interfere with such discretion of the trial court, unless it has become clear that no reasonable person ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity of the offence, or that it induces a sense of shock, or that the trial court has not exercised its discretion properly, or that it was in the interest of justice to alter it (see *S v Fhetani* 2007 (2) SACR 590 (SCA) at para5; *Director of Public Prosecutions, Kwazulu Natal v P* 2006 (1) SACR 243 (SCA) at 254c-f; S v

Malgas 2001 (1) SACR 469 (SCA) at para12; *S v Anderson* 1964 (3) SA 494 (A) at 495D-E).

[9] On behalf of the appellant, counsel Kgokane submitted that the trial court erred in sentencing the appellant to an effective five years imprisonment. He further argued that the trial court over-emphasized the seriousness of the offence. interest of the society and underemphasizes the personal circumstances of the appellant. It was further submitted by the counsel that the sentence is harsh and induces a sense of shock.

[10] The counsel further submitted that the appellant is a first offender who has children and not a hardened criminal. He further argued that the appellant should have been given a sentence with the aim of rehabilitating him. Counsel further submitted that the trial court erred in approaching the sentence for the appellant without blending it with a measure of mercy.

[11] On behalf of the respondent, counsel Wilsenach submitted that the trial court has considered all the relevant factors pertaining to sentence and has exercised its discretion judiciously. Counsel further submitted that the sentence imposed is appropriate.

[12] The trial court is expected to have regard to the triad and to blend same with a measure of mercy according to the circumstances of the case. In *S v Kumalo* 1973 (3) SA 697(A) at 698A where Holmes JA stated that:

'Punishment must fit the criminal as well as the crime, be fair to the society, and be blended with a measure of mercy according to the circumstances.'

[13] It was apparent from the record of the proceedings that the trial court was alive to the appellant's personal circumstances including the fact that he was 29 years during the commission of the offence and was of good health. His age was justifiably not regarded as a mitigating factor. I find this to be in accordance with what Ponnan JA said in the case of S v Matyityi 2011(1) SACR 40 (SCA) at 48 para 14E-G where he said:

'It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, . . . Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.*(my emphasis)*. At the age of 27 the respondent could hardly be described as a callow youth'.

[14] The trial court also considered that appellant was unemployed with three children whom he does not stay with. The trial court did not find this to be a mitigating factor more so because the children were staying with their mothers and receiving children grant from the government. The fact that the appellant during mitigation, mentioned that he has three children cannot automatically be regarded as a mitigating factor especially in the present case where he does not stay or maintain them as he is unemployed. While one has sympathy for children and the need for the children to be in the continued presence of their father, in circumstances such as this, 'their emotional needs' cannot triumph the duty on the State to properly punish criminal misconduct where an appropriate sentence is one of imprisonment (see *S v EB* 2010 (2) SACR 524 (SCA) para 14).

[15] The fact that appellant was a first offender was regarded as a mitigating factor according to the trial court. However, on the totality of evidence this fact alone could not sustain the appellant when the trial court balances same with other circumstances which should be taken into consideration when sentencing him. I

cannot fault the trial court in having considered the triad when sentencing the appellant as it is the correct way to arrive at an appropriate sentence. The trial court cannot only consider the personal circumstances of the appellant in order to arrive at an appropriate sentence. In *Shaun Packerey Sammy v State* Case no: 048/2003 where judgement was delivered on 28 November 2003 at para 12 Mthiyane JA deliberating on the submission that offender was a first offender:

> '.... A first offender has no right to be kept out of jail. It all depends on the circumstances of each case. It has been held that any serious offence can lead to imprisonment and frequently imprisonment is the only appropriate sentence which ought to be imposed (See also *S v Holder* 1979(2) SA 70 (AD) at 77H-78A).

[16] The trial court also took into consideration the interest of the complainant. His house burned down and he could not recover any item. The fact that it was a one roomed house does not minimise the importance and value of a roof over one's head. A right to housing is enshrined in the Constitution (see Section 26 of the Constitution of South Africa; *S v Isaacs* 2002 (1) SACR 176 (C) at 178B/C). Complainant was rendered homeless because of this Arson. This interest needed to be balanced with the personal circumstances of the appellant.

[17] I have found that the trial court had adequately dealt with all the requirements laid down in the case of *S v Zinn* 1969 (2) SA 537 (A) and *S v Isaacs* 2002 (1) SACR 176 (C) at 178B/C. He did not accentuate one element over the other as per the argument by Advocate Kgokane on behalf of the appellant. This appeal should not succeed.

[18] In the result the following order is made:

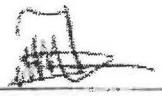
1. The appeal is dismissed.
2. The sentence imposed by the regional magistrate is confirmed.

M.M. Munzhelele

Acting Judge of the High court

PRETORIA

I AGREE



T. Maumela

Judge of the High Court

PRETORIA

Counsel for appellant: Advocate Kgokane
Instructed by: Legal Justice Centre Pretoria

Counsel for Respondent: Advocate Wilsenach
Instructed by: Director of the Public Prosecution