THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 240/08
No precedential significance

CHRISTO MAROULIS Appellant

and

THE STATE Respondent

Neutral citation: Maroulis v The State (240/2008) [2008] ZASCA 161 (27 November 2008)

Coram : MPATI P, COMBRINCK JA and KGOMO AJA

Heard : 5 NOVEMBER 2008

Delivered : 27 NOVEMBER 2008

Summary : Sentence – on charge of attempted murder appellant pleaded guilty to assault with intent to do grievous bodily harm (count 1) – pleaded guilty also to malicious injury to property (count 2) – blunt object used in assault damaging front windscreen of complainant's vehicle – sentence of 5 years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 set aside and matter referred back to trial court for imposition of sentence in terms of s 276(1)((h).

ORDER

On appeal from: High Court, Eastern Cape (Grahamstown) (Liebenberg and Revelas JJ) on appeal from regional court, East London.

The appeal succeeds. The sentence imposed by the trial court is set aside and the matter is referred back to it for the imposition of a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977.

JUDGMENT

MPATI P (COMBRINCKJA and KGOMO AJA concurring):

[1] This is an appeal against sentence. The appellant was arraigned in the regional court, East London, on one count of attempted murder (count 1) and one count of malicious damage to property (count 2). The allegations in respect of count 1 were that on 2 April 2004 the appellant unlawfully and intentionally attempted to kill one Jean Pierre Rautenbach (the complainant in both counts) by hitting him with a brick and a fist on his face, head and body. In respect of count 2 it was alleged that on the same day he unlawfully and intentionally damaged the front windscreen of the complainant's BMW motor vehicle. The value of the windscreen was reflected in the charge sheet as R3 357.66.

[2] On count 1 the appellant pleaded guilty to assault with intent to do grievous bodily harm (a competent verdict on a charge of attempted murder). He also pleaded guilty to count 1. The state accepted the factual background upon which the pleas of guilty were based as set out in a statement handed in by the appellant's legal representative in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the Act). The appellant was thus convicted on both counts in accordance with his plea. The two counts were taken as one for purposes of sentence and the appellant was sentenced to 5 years'

imprisonment in terms of s 276(1)(i) of the Act. This meant that he could, at the discretion of the Commissioner of Correctional Services, be placed under correctional supervision after serving a portion of the five year term of imprisonment. The regional court magistrate also declared the appellant to be disqualified from possessing a firearm.

[3] The appellant's appeal to the Eastern Cape Division (Liebenberg J, Revelas J concurring) against sentence was dismissed. He is before us with leave of that court.

[4] The facts which formed the basis of the appellant's convictions may be summarised thus. The appellant and complainant shared a house at the relevant time. During the evening in question they went to a club together with the appellant's girlfriend where they consumed alcoholic beverages. In due course, the appellant became intoxicated and got involved in an argument with his girlfriend. He decided to return home but his girlfriend refused to accompany him. He slapped her once across the face. The complainant then encouraged her not to leave with the appellant. The appellant left without her and once home he imbibed more. He was already heavily intoxicated when he left the club. He called his girlfriend and enquired as to when she and the complainant would return home. His girlfriend was to be given a lift by the complainant but the latter refused to talk to him over the telephone. This angered the appellant. Repeated telephone calls brought him no joy. He continued to consume liquor and when the complainant ultimately arrived in the early hours of the morning without his (appellant's) girlfriend he enquired about her whereabouts. He became enraged when the complainant still refused to speak to him. He picked up an object which he thought was the metal lid of a dustbin and struck the complainant with it 'three or four times'. It is during this assault that the windscreen of the complainant's motor vehicle was damaged.

[5] It appears that in the process the appellant landed on the ground because he states (in his statement) that he 'got up from the ground' and went into the house. He states further that he was heavily under the influence of alcohol at the time of the incident and although he recalls what happened, there were some things that he did and about which he was told the next day.

[6] After the appellant's previous convictions (which I mention later) were proved, the state led the evidence of the complainant, who testified that the assault on him began whilst he was still sitting in his vehicle. It continued after he had alighted from the vehicle. Whilst he was sitting inside his vehicle he was struck with fists and when he alighted the appellant pinned him against the vehicle and hit him with a brick. The brick was also used to damage the windscreen of his motor vehicle. As a result of the attack on him he fell onto the pavement where the appellant continued to strike him. He lost consciousness

which he regained the next morning in bed, covered in blood. When he stumbled out of the house he saw the appellant who seemed to find his appearance quite amusing and who threatened that he 'would get' him.

[7] On 3 April 2004 the complainant was examined by a physician, who recorded his findings in a report which was handed in at the trial as an exhibit. According to the report the complainant sustained, inter alia, a severely bruised face with swelling around both eyes, lacerations on the right occipital scalp, right ear, left eyebrow and lower lip. Several photographs depicting the injuries sustained by the complainant were placed before the regional court magistrate. They support the physician's findings and evidence a severe assault on the complainant. The photographs were taken the next morning at the Fleet Street police station, East London. On 30 April 2004 the complainant was also examined by a dentist, who recorded 'a fractured upper left front tooth' which he repaired.

[8] At the end of May 2004 the complainant relocated to Cape Town. He testified that the move was as a result of his living in anxiety and fear since he believed that the appellant 'is a very violent person'. He had been unemployed at the time of the incident but found employment in Cape Town.

[9] The appellant was a 42 year old divorcee at the time of the incident. He has previous convictions of assault with intent to do grievous bodily harm and malicious injury to property, for which he paid an admission of guilt fine of R200. The magistrate said this about them:

'You have a previous conviction for the very same offences, although these convictions date back to 1991, almost 13 years before these incidents that we are dealing with. And also, the court has no information regarding those incidents of 1991 except to conclude that it would not appear from the sentence, the admission of guilt that you paid, that they were very serious. But nonetheless, they are on your record.'

[10] When it considered sentence the regional court had the benefit of the views of a probation officer in the service of the state, Ms Andriette Ferreira. She is the head of social services in the Department of Correctional Services. She was called as a witness by the defence. From her report and her evidence it appears that the persons she interviewed and who were able to testify to the appellant's character said that the appellant was not inherently aggressive or violent. The appellant works on a commission basis and earns approximately R7000 per month. Although she merely concluded in her report that the appellant was a suitable candidate for correctional supervision under the provisions of s 276(h) of the Act, she recommended the imposition of such a sentence during her testimony.

[11] Mr Price, who appeared in this court on behalf of the appellant submitted, as he did in the court below, that the magistrate misdirected himself in certain respects. The first such misdirection, it was argued, was that the regional magistrate allowed the prosecutor, after conviction, to lead evidence in aggravation, which was inconsistent with the contents of the appellant's statement in terms of s 112(2) of the Act. This inconsistent evidence relates to the assault described by the complainant after he had allegedly fallen on the pavement until he lost consciousness, and the object allegedly used in the assault. Mr Price submitted that the prosecutor ought not to have been allowed to lead such evidence. He referred in this regard to this court's decisions in *S v Ngubane* 1985 (3) SA 677 (A) at 683 D-F and *S v Legoa* 2003 (1) SACR 13 (SCA) paras 26 and 27.

[12] The court a quo dealt with this submission as follows:

'The evidence led by the state after conviction, in my view, did not contradict the appellant's version in any material respect. The evidence by the complainant regarding the use of his fists and a brick by the appellant is in my view not a contradiction of the version of the appellant. The appellant stated that he used an object but was not at all clear as to what it actually was. His reference to the lid of a dustbin was vague and he himself expressed uncertainty. The evidence of the complainant, therefore, does not contradict the appellant's but supplements it and fills in the detail of what occurred. This is admissible in terms of the provisions of section 112 (3) of the Act (see *S v Swarts* 1983 (3) SA 261 (C); *S v Moorcroft* 1994 (1) SACR 317 (T)). In any event the magistrate did not make a specific finding that it was a brick, but accepted, as he should have, that the attack was with a blunt object.'

In the view I take of this matter, I find it unnecessary to enter into this debate. Suffice it to say that I agree with the last sentence of the passage just quoted.

[13] There are in my view at least two important misdirections in the regional court magistrate's judgment on sentence. The first is his comment that the appellant must have contemplated the attack 'long before complainant's arrival at home'. There is to my mind no basis for this observation. There is no indication that the appellant knew that the complainant would arrive home without his (appellant's) girlfriend. Indeed, the appellant's statement is to the effect that he confronted the complainant 'as to where my girlfriend was' and the complainant did not want to talk to him. He then states that 'I then became cross' and picked up the object which he used to attack the complaint.

[14] The second misdirection relates to the appellant's character. The evidence of the probation

officer was that the people that she consulted told her that the appellant was not inherently inclined to aggression or violence. Without any evidence to the contrary and purely on the basis of the attack on the complainant – possibly also from the previous convictions – the regional court magistrate disagreed and held that '. . . although you professed not to be inclined to aggression and violence, the Court is convinced that there is a definite need to address this problem of yours'. I consider these misdirections to be such as to entitle this court to interfere with the sentence.

[15] It is true that judging from the injuries sustained by the complainant as evidenced by the photographs referred to above, the attack on him was very serious indeed. But it does not necessarily follow that every serious assault should result in a custodial sentence. Whilst it is also true that where the seriousness of an offence makes it necessary that a clear message be sent to the community at large that resort to violence will not be tolerated (*S v Maleka* 2001 (2) SACR 366 (SCA) para 8), this must not be done at the expense of an accused person's personal circumstances. The appellant, at the age of 42 years, has only once been the subject of a prosecution before the present incident. The period between his previous conviction and the present matter is approximately 13 years. It can be inferred from this that until the incident which is the subject of this appeal and which, in my view, does have an element of provocation, the appellant had not been in conflict with the law over that period. He is employed and earns a commission-based income of R7000 per month. According to the report compiled by Ms Ferreira, the appellant has always been self-sufficient and financially independent.

[16] When all these factors are taken into consideration, it seems to me that a sentence of direct imprisonment would do more harm to the appellant and society at large than what is generally sought to be achieved by the imposition of a custodial sentence. In my view, the regional court magistrate overemphasised the elements of deterrence, prevention and retribution, whilst he overlooked the element of rehabilitation. It seems to me that had he not misdirected himself as indicated above, the regional court magistrate would in all probability have imposed a sentence of correctional supervision in terms of s 276(1)(h) of the Act. Such a sentence is not to be viewed as a light sentence as the regional court magistrate himself observed. He said:

'Correctional supervision is undoubtedly a stern form of sentence with the benefit that the offender is spared the humiliation of incarceration.'

These observations are indeed appropriate. The stringent conditions placed on an offender, such as house arrest, community service and the like afford such offender an opportunity to remain a member of society in gainful employment while not free to do as he/she pleases and also paying his/her dues to society. In my view, the present is a case where a sentence of correctional supervision would be an appropriate sentence.

[17] The appeal succeeds. The sentence imposed by the trial court is set aside and the matter is referred back to it for the imposition of a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977.

MPATI P

Appearances:

For appellant : T N Price

Instructed by

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Honey Attorneys, Bloemfontein

For respondent H Obermeyer

Instructed by

Director of Public Prosecutions, Grahamstown

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