THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 00424/2015
Not reportable

In the matter between:

RAINIER HILDEBRAND **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Hildebrand v The State* (00424/15) [2015] ZASCA 174 (26 November 2015)

Coram: Bosielo, Tshiqi and Swain JJA

Heard: 04 November 2015

Delivered: 26 November 2015

Summary: Appeal against sentence – appellant convicted of two counts of assault with intent to cause grievous bodily harm on two young children – sentenced to 30 days imprisonment on each count – Section 51(5) of the Criminal Law Amendment Act 105 of 1997 not precluding a sentencing officer from suspending the sentence imposed where minimum sentence departed from.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoba J and Jansen AJ sitting as court of first instance).

a) The appeal is upheld.
b) The order of the court a quo is set aside and replaced with the following order:
The appeal is upheld and the sentence imposed by the Gauteng Regional Court is set aside and replaced with the following sentence:
'The appellant is sentenced to imprisonment for 30 days on each count. Both sentences are suspended for a period of 5 years on condition that the appellant is not convicted of assault with intent to cause grievous bodily harm, committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine'.

JUDGMENT

Bosielo JA (Tshiqi and Swain JJA concurring)

[1] The appellant was convicted by the regional magistrate, sitting at the Gauteng Regional Court, Benoni, on 27 June 2012 following his plea of guilty on two counts of assault, with intent to cause grievous bodily harm, perpetrated on two minor children. He was sentenced on 10 September 2012 by the regional magistrate to imprisonment for 30 days on each count. His appeal against sentence to the North Gauteng High Court, Pretoria having failed, he now appeals to this Court with the leave of the court below.

[2] A brief background to this case will suffice. The appellant is the fiancé to the complainants' mother. The complainants are twelve years and six years old respectively. He was staying with them in a flat with their mother. On 11 February 2011, upon returning home, the appellant found the complainants throwing articles out of the flat's window onto the neighbours' premises. It was not the first time that they had done this. As the appellant had previously admonished them against this conduct he lost his temper and out of frustration grabbed a broken bat and hit both children on their buttocks. There is no clarity regarding the size and nature of the broken bat which the appellant used. According to the appellant, he did not intend to hurt the children but did so spontaneously in an attempt to discipline them.

[3] However, the two medical reports which were admitted as part of the evidence with the appellant's consent, show that the two complainants suffered the following injuries;

(a) ML, the 12 year old complainant, sustained a 10x4 cm bruise on her left buttock;

(b) DL the 6 year old sustained three bruises, a 7x8 cm bruise on his left buttock; a 9x7 cm bruise on the whole of his right buttock and a 8x5 cm bruise on the right upper leg, just next to the buttock area.

[4] The Probation Officer, Ms Mbulawa-Kama interviewed the appellant and compiled a pre-sentence report. She also testified in court. Based on her interview with the two victims, the appellant, his fiancé (the mother to the two victims), the victims' stepmother and the victims' maternal grandparents, she recommended a sentence of correctional supervision in terms of s 276(1)(*h*) of the Criminal Procedure Act 51 of 1997 (CPA).

[5] The regional magistrate sentenced the appellant to 30 days' imprisonment on each count. She justified the sentence as follows:

'I cannot for one minute believe that society would expect this court to take you out of society, but sir, as I have quoted to you, I have a problem I can defer from that prescribed sentence, and certainly I will, but according to the Criminal Procedure Act, I only have incarcenation as an option. I cannot replace it with correctional supervision, I cannot suspend the sentence it is prohibited, I cannot postpone sentencing it is also prohibited.'

[6] Before us the appellant's counsel submitted in the main that the regional magistrate erred in considering herself bound by the minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1977 (the Act) even after she had found that there were substantial and compelling circumstances which justified a departure from the minimum sentence. He concluded by contending that the regional magistrate misdirected herself by finding that she was precluded by s 51(5) of the Act from suspending part of the sentence she had intended to impose on the appellant.

[7] Counsel for the respondent conceded that the regional magistrate erred in finding that, although she would have preferred to impose a prison term wholly suspended, she was prevented from doing so by s 51(5) of the Act. She contended that once the regional magistrate found that there were substantial and compelling circumstances which justified a sentence other than the one prescribed as a minimum by the Act, she retained her unfettered discretion to impose any sentence which she regarded as appropriate, having considered the basic triad and purposes of punishment. The concession by the state is well-made.

[8] Section 51 of the Act provides for the minimum sentences for certain specified offences. Once a court finds that the offence for which an accused has been convicted falls under offences specified by s 51 of the Act, then that court has no option but to impose the minimum sentence prescribed unless it can find substantial and compelling circumstances. However, once it is satisfied that there are substantial and compelling circumstances which justify the imposition of a sentence other than the one prescribed by the Act, it can impose any sentence which it regards as appropriate (s 51(3) of the Act). This is so because as this Court held in *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) para 25A:

'Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).'

[9] Section 51(5) of the Act reads:

'The operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).'

[10] It should be clear that s 51(5) refers to 'a minimum sentence imposed in terms of this section'. Self-evidently, this section does not apply to sentences imposed after a finding that substantial and compelling circumstances exist, because such a sentence is not one imposed in terms of s 51. The sentence imposed by the regional magistrate accordingly did not fall within the restrictive provisions of s 51(5)

[11 The regional magistrate found that the appellant does not present as a serial criminal, nor as a person with a proclivity for violent conduct. Moreover, he is a first offender. There is no evidence that he is a danger to society. It is clear from

the Probation Officer's report that, although he is not the natural and biological father of the two complainants, he treated them with care and love. He would take them shopping and buy them clothes. Amongst others, he would also assist them with their lunch boxes and even drive them to school. Importantly, this is confirmed by both Mr and Ms Visser, the victims' maternal grandparents.

[12] Sight must not be lost of the fact that this assault was an isolated incident which happened on the spur of the moment. Against his previous warnings, the complainants threw articles through the flat's window onto the neighbours' premises. As he had warned them before, he lost his temper and in a momentary lapse of good judgment, gave in to his anger and frustration, and took a broken bat and hit them on their buttocks. There is nothing to gainsay his explanation that he did not intend to hurt them, but merely intended to discipline them and correct their aberrant behaviour. This is not to suggest that infliction of bodily injuries to young children should be condoned. The appellant as an adult and a parent needed to find alternative ways of disciplining the children. There is thus no doubt that he was wrong in his conduct and deserves to be punished.

[13] As the regional magistrate stated, the appellant is not prison material. The record shows that the regional magistrate agonised about the desirability and efficacy of direct imprisonment for a person of the appellant's calibre. She did not think that direct imprisonment was an appropriate sentence. Even the Probation Officer recommended correctional supervision instead of direct imprisonment. No doubt the sentence which she ultimately imposed was influenced by her wrong understanding of the provisions of the Act. Having found good grounds to deviate from the minimum sentences, the regional magistrate was at large to impose any sentence which she found appropriate, given the particular circumstances of this case. Furthermore, she was also free

to suspend the sentence, either wholly or in part, under any conditions which she may have regarded as suitable. It follows that the regional magistrate misdirected herself and this Court is accordingly at liberty to interfere with the sentence.

[14] It is true that the appellant had to be punished for the offences which he committed. However I am of the view that a sentence of direct imprisonment, due regard being had to all of the facts, was shockingly inappropriate, contrary to the conclusion reached by the high court.

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

a) The appeal is upheld.

b) The order of the court a quo is set aside and replaced with the following order:

The appeal is upheld and the sentence imposed by the Gauteng Regional Court is set aside and replaced with the following sentence

'The appellant is sentenced to imprisonment for 30 days on each count. Both sentences are suspended for a period of 5 years on condition that the appellant is not convicted of assault with intent to cause grievous bodily harm, committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine'.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	HL Alberts
	Instructed by: Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein
For Respondent:	S Scheepers
	Instructed by: Director Public Prosecutions, Pretoria Director Public Prosecutions, Bloemfontein