REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE

7/09/17
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DATE

CASE NUMBER: A 147/2017

In the matter between

BAREND J VENTER **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

WINDELL J.

INTRODUCTION

[1] The appellant stood accused in the Krugersdorp District Court on a charge of Theft.

[2] Appellant pleaded guilty and was convicted as charged. He was sentenced to 36 months imprisonment in terms of s 276(i) of the Criminal Procedure Act, Act 51 of 1977 ("the CPA") .

[3] The appellant now come before this court with leave to appeal by the court *a quo* in respect of sentence only.

[4] It is trite that a court of appeal will only interfere with the discretion of the trial court if the trial court misdirected itself or did not exercise its discretion judicially and properly, or if the sentence is startlingly inappropriate or that the interest of justice require it. *In S v Pillay 1977 (4) SA 531 (A)* at p 535 E-F Trollip JA noted the following:

> *"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."*

[5] With these principles in mind, I now turn to the circumstances of this case. The appellant was employed by E.P.R Armed Response Security at the time of the offence. On 7 October 2016 the appellant responded to an alarm at the complainant's residence. The complainant is a client of E.P.R Security. At the complainant's premises the appellant inspected the premises and found two spot lights lying in the yard. He stole the two lights. His employer was later called and asked about the lights. The appellant returned the lights to the complainant and was later arrested for theft. The value of the lights is R 3000.

[6] The court *a quo* took into consideration the personal circumstances of the appellant namely, that he is 35 years old, single, has two children, and that he lost his employment as a result of the incident. The court *a quo* also took into consideration that the appellant is a first offender and that he pleaded guilty.

[7] In aggravation of sentence the court a quo took into consideration that the appellant betrayed the trust and the reputation of his employer and that the crime was committed whilst he was on duty. The court a quo also took cognisance of the fact that this type of offence is prevalent and the repercussions for the community.

[8] The court a quo considered the aims of punishment namely deterrence, prevention, reformative and retribution and sentenced the appellant to 36 months imprisonment ito s 276(i) of the CPA. A sentence under s 276 (i) is not a "softer option" that an ordinary sentence of direct imprisonment.[1] It merely grants the commissioner the latitude to consider an early release after a sixth of the sentence is

[1] S v Truyens 2010 (1) SACR 79 (SCA)

served and only if the personal circumstances of the offender warrant it. The advantage of s 276(i) on the other hand is that it achieves the object of sentencing unavoidably entailing imprisonment but mitigates it substantially by creating the prospect of early release on appropriate conditions under correctional supervision.[2]

[9] The question is whether the magistrate exercised his discretion properly and reasonably when he imposed direct imprisonment. Did the magistrate over emphasize the seriousness of the offence, is the sentence so shockingly inappropriate or grossly disproportionate that it induces a sense of shock, and is appellate interference warranted?

[10] In assessing an appropriate sentence it is necessary to have regard not only to the main purposes of punishment, but also to the individual concerned, the circumstances of the crime committed and society's interest, whilst at the same time blending such sentence with a measure of mercy. In *S v Du Toit* [3] Rumpff CJ said the following:

> "Wanneer die aard van die misdaad en die belang van die gemeenskap oorweeg word, is die beskuldigde eintlik nog op die agtergrond, maar wanneer hy as strafwaardige mens vir oorweging aan die beurt kom, moet die volle soeklig op sy persoon as geheel, met al sy fasette, gewerp word. Sy ouderdom, sy geslag, sy agtergrond, sy geestestoestand toe hy die misdaad gepleeg het, sy motief, sy vatbaarheid vir beïnvloeding en alle relevante faktore moet ondersoek en geweeg word. En hy word nie met primitiewe wraaksug beskou nie, maar met menslikheid en dit is hierdie menslikheid wat in elke geval, hoe erg ook al, vereis dat versagtende

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[2] S v Scheepers 2006 (1) SACR 72 (SCA)
[3] 1979 (3) SA 846 (AD) at 857H-858A

> omstandighede ondersoek moet word. Hierdie versagtende omstandighede, indien daar is, skep die genadefaktor waarna in hierdie Hof vantevore verwys is en wat dan na oorweging van alle ander relevante omstandighede, moet lei tot 'n gepaste vonnis."

[11] Counsel for appellant referred the court to *S v Williams*[4] and *S v Siweya*[5] wherein the court dealt with facts similar to that in the present matter. In *Williams* the appellant pleaded guilty to the stealing of two rings to the value of R 219 000 belonging to her employer. The appellant was 40 years old and was a domestic worker. She was sentenced to three years imprisonment. On appeal the sentence was reduced to 6 months imprisonment wholly suspended on certain conditions. The court on appeal took into account that the appellant showed remorse and that both rings were retrieved. The court held that judicial officers should not regard people that have fallen foul of the law, as unworthy being treated with dignity and respect, especially where an accused person has taken full responsibility and surrenders himself to the mercy of the court. In *Siweya* the accused was sentenced to twelve months imprisonment for theft of cables. On review the twelve months imprisonment was wholly suspended and the court held that the fact that the accused pleaded guilty on his first appearance in court and asked for mercy, as well as the fact that the cable was retrieved and the accused was a first offender, should have been taken into account by the court a quo to reduce the sentence imposed.

[12] The State referred the court to *S v Prinsloo*[6], wherein Leveson J expressed the following view:

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[4] 2013 JDR 2101 (WCC).
[5] 2013 JDR 1671 (GNP)
[6] 1998 (2) SACR 669 (W)

> "In the world of commerce employers are compelled to trust in their employees. It is not possible for them to conduct all the business of their concerns themselves. If they were able to there would be no employment for the employees. No alternative remains to them but to repose confidence in their employees and when an employee breaches that trust his conduct must in my opinion be heavily penalized."

[13] The facts in *Prinsloo* are clearly distinguishable from the facts in the present matter. In *Prinsloo* the accused was convicted of a so called white collar crime. She was found guilty of seven counts of theft to the value of R 448 187.07. The accused stole from the bank where she was employed and the theft occurred over a period of one year. The theft was clearly premeditated and planned.

[14] The magistrate mentioned the elements to be considered during sentence, namely the appellants' personal circumstances, the seriousness of the crime and the interest of society. Although these sentiments expressed are in principle correct, the magistrate, in my view, merely paid lip service to these principles without having regard to the application of those principles to the facts of this matter. I am of the view that the magistrate did not properly consider and attached sufficient weight to each of the elements of punishment. He over-emphasized the effect of the appellant's crime and he underestimated the person of the appellant. I am of the considered view that the magistrate did not exercise his discretion judicially and properly.

[15] The court a quo failed to take into account the following mitigating circumstances:

1. The appellant clearly showed remorse for his actions. He pleaded guilty and immediately returned the goods when he was confronted. Remorse is a mitigating factor that can be taken into consideration when sentencing is considered. [7]
2. The appellant is a first offender. It is trite that a first offender will always be treated with mitigation.
3. The offence was committed in the spur of the moment. There is no evidence to suggest that the offence was planned and/or premeditated.
4. The complainant suffered no financial loss as the stolen items were retrieved.

[16] Aggravating of sentences to combat increasing prevalence of a particular crime must not lead to an inevitable negation of the accused's personal circumstances. See *S v Matoma.*[8] Having weighed the mitigating and the aggravating factors the following order is made:

1. The appeal against sentence is upheld.

2. The sentence of 36 months imprisonment in terms of s 276(i) of the CPA is set aside.

3. The appellant is sentenced as follows:

3.1. 18 (eighteen) months imprisonment suspended as a whole for five years on condition that the appellant not be found guilty of theft or attempted theft during the period of suspension.

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[7] *S v Matyityi, 2011 (1) SACR 40 (SCA)*
[8] 1981 (3) SA 838 (A).

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Windell J

I agree

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Siwendu J