REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

8 September 2023

DATE SIGNATURE

CASE NUMBER:

A27/2023

In the matter between:

JACOBUS ADRIAN SMITH APPELLANT

and

THE STATE RESPONDENT

Summary

Criminal Law - Appeal on sentence – Fifteen years imprisonment reduced to four years imprisonment where an informer involved in a s252 of the Criminal Procedure Act 51 of 1977, abused the trust afforded to him by the South African National Parks to facilitate and orchestrate the infiltration of a rhino poaching syndicate - sentence imposed by the Court *a quo* is disturbingly inappropriate and does induce a sense of shock – appeal in respect to sentence is upheld – the order of the Court *a quo* is set aside and substituted as follows: The accused is sentenced to four years imprisonment.

JUDGMENT

DOSIO J:

Introduction

[1] This is an appeal against the sentence imposed by the Randburg regional Magistrate Court on 8 February 2022. The appellant pleaded guilty to a charge of theft and on 25 August 2022, the appellant was sentenced to 15 year's imprisonment and was declared unfit to possess a firearm.

[2] On 22 September 2022, the appellant launched an application for leave to appeal his sentence. The application was refused on 7 October 2022. On 15 November 2022, by way of petition, the appellant was granted leave to appeal his sentence.

[3] The appellant was legally represented.

Background

[4] The appellant was charged with theft in the following circumstances, namely:

(a) An agent of an undercover operation was authorized in terms of s252A of the Criminal Procedure Act 51 of 1977 ('The Criminal Procedure Act') to make use of a trap and to engage in an undercover operation with the purpose to detect, investigate, or uncover the commission of an offence of illicit dealing in rhino horns. The appellant, together with a certain Mr Pepler, were used by the agent to contact potential buyers for the rhino horn and to effect the sale of the rhino horn.

(b) The appellant, together with Mr Pepler, succeeded in selling the rhino horn for R290,000.00 and received the money from the buyer on 20 February 2019.

(c) The appellant had to hand over the amount of R290,00.00 to the agent, but instead, failed to disclose the transaction to the registered agent and kept the money for himself, paying Mr Pepler an amount of R10,000.00.

[5] The appellant then bought a Ford Bakkie to the value of R150,000.00.

[6] Mr Pepler was later used to trap the appellant. Mr Pepler informed the appellant that he had received an extra R200,000.00 from the buyer and that the appellant and Mr Pepler should split this amount, each receiving R100,000.00. The appellant met Mr Pepler at an Engen Garage where he was arrested for theft of the R290,000.00.

Ad sentence

[7] It is trite that in an appeal against sentence, a Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.

[8] A sentence imposed by a lower court should only be altered if;

(a) An irregularity took place during the trial or sentencing stage.

(b) The trial court misdirected itself in respect to the imposition of the sentence.

(c) The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.[1]

[9] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[10] In the matter of *S v Malgas*,[2] the Supreme Court of Appeal held that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.'

[11] In *S v Salzwedel and other*[3] the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.[4]

[12] If an appeal court finds that the sentence of the trial court is disturbingly inappropriate or is violated by a misdirection, it will follow as a matter of course that the sentencing discretion was not properly applied.[5]

[13] The grounds of appeal are as follows:

(a) That the learned acting regional Magistrate erred in not sufficiently considering the

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[1] See *S v De Jager and Another* 1965 (2) SA 616 (A), *S v Rabie* 1975 (4) SA 855 (A) and *S v Petkar* 1988 (3) SA 571 at 574 C.

[2] *S v Malgas* 2001 (1) SACR 496 SCA.

[3] *S v Salzwedel and other* 1999 (2) SACR 586 (SCA).

[4] Ibid at page 588a-b.

[5] *S v Romer* [2011] JOL 27157 (SCA).

personal circumstances of the appellant and did not consider sufficiently the personal circumstances of the appellant individually, with specific reference to the fact that he is a first offender.

(b) That the learned acting regional Magistrate in fact concluded that the personal circumstances of the appellant cannot take preference and that retribution and deterrent aspects of sentence must be emphasized.

(c) That the learned acting regional Magistrate erred in not sufficiently, or not at all, taking into consideration the content, conclusion, and subsequent recommendation regarding sentence, which were made by the psychologist, Ms Anna-Elmarie Pieterse, with reference to *inter alia* the following:

i. the appellant is not a violent criminal;

ii. the appellant does not suffer from personality pathology;

iii. that the appellant is an integrated member of society with good family support;

iv. that the appellant has a long history of law abiding behaviour;

v. that the appellant can do community service and should be given a non-custodial sentence;

(d) The learned acting regional Magistrate erred in not taking the recommendation of a witness called by the state, Mr Mario Scholtz or the state prosecutor regarding a non-custodial sentence.

(e) The learned acting regional Magistrate erred in finding that the R290,000.00 which the appellant stole are the damages sustained by the state and that the complainant suffered an actual loss of a rhino horn valued at R900,000.00.

(f) The learned acting regional Magistrate erred in finding that the appellant had no remorse.

(g) The learned acting regional Magistrate erred in applying the principles regarding sentence in the matter of *S v Vilakazi*.[6]

(h) The learned acting regional Magistrate failed to attach appropriate weight to the children's best interests.

(i) The learned acting regional Magistrate erred in concluding that the only suitable sentence is direct imprisonment and did not give the appellant the option of a fine.

(j) The learned acting regional Magistrate erred in not finding that, given the personal circumstances of the appellant, he can be rehabilitated into a law-abiding member of society by imposing a non-custodial sentence.

(k) The learned acting regional Magistrate punished the appellant as if he is a poacher of rhino horns and that he is an illicit trader of rhino horns.

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[6] *S v Vilakazi* 2009 (1) SACR.

(l) The learned acting regional Magistrate then, with reference to the case of *S v Els,* [7] concluded that "regrettably a non-custodial sentence would send out the wrong message".

(q) The learned Magistrate with reference to *S v Lemtongthai*,[8] concluded that 'if we do not take measures such as imposing appropriate sentences for people such as the Appellant, these magnificent creatures would be decimated from earth'.

(r) That the learned acting regional Magistrate erred in imposing a sentence of 15 (fifteen) years imprisonment.

[14] The following factors were presented in mitigation of sentence, namely:

(a) That the appellant was 37 years-old, married with three minor children, aged 17, 13 and eight years old respectively;

(b) That he lost his job and was unemployed;

(c) That he pleaded guilty;

(d) That he is a first offender;

(e) That his wife fell ill due to cancer and that due to the medical expenses, the appellant became depressed;

(f) That he was maintaining his three children.

(g) The car that the appellant bought was forfeited to the Asset Forfeiture Unit.

[15] A pre-sentence report was obtained, compiled by Anna-Elmarie Pieterse, a psychologist, where it was recommended that he be given a non-custodial sentence.

[16] Mario Scholtz ('Mr Scholtz') was called by the State. He testified that he works as an investigating officer for the Environmental Crime Investigation Service of the South African National Parks ('SANParks'). He testified that the appellant was supposed to introduce him to the runners of the Chinese syndicate. The rhino horn valued at R900,000.00 which was handed over to the Chinese person was never recovered and neither was the amount of R290,000.00, which was paid to the appellant. This witness requested the Court *a quo* to order the appellant to pay back the R290,000.00 and referred this Court to another similar matter in the Daveyton Regional Court where the accused in that matter were sentenced to a fine of R200,000.00, payable to SANParks, together with a suspended sentence of five year's imprisonment. This witness stated that had Mr Pepler not been arrested, the appellant and the Chinese runner

[7] *S v Els* 2017 (2) SACR 622 SCA.

[8] *S v Lemtongthai* 2012 ZAGPJHC.

would have got away with everything, as the version of the appellant was that he had been robbed of the money and the rhino horn, which was clearly a lie.

[17] The state prosecutor also asked for a wholly suspended sentence of ten years imprisonment, coupled with a fine of R300,000.00.

[18] The Court *a quo* found that in the matter *in casu* took a long time to be finalised however, it is clear that this delay is attributable to the various legal representatives of the appellant withdrawing and the charge sheet being drawn up at a late stage in the proceedings.

[19] The fact that the appellant is a first offender does not entitle him to be given a non-custodial sentence. The facts of each case must be considered individually. The fact that the appellant is a non-violent criminal or that he does not suffer from a personality pathology cannot of itself guarantee a non-custodial sentence. The factual matrix in which the crime was committed is relevant in considering an appropriate sentence.

[20] A Court determining sentence is responsible to weigh up all factors and is able to impose a sentence commensurate with the seriousness of the offence committed, the personal circumstances of an accused as well as the interests of the community. Even though the State, the psychologist and Mr Scholtz requested a non-custodial sentence, the Court *a quo* still has a discretion to impose a custodial sentence.

[21] The retributive and deterrent aspect of sentence should not be emphasised to the detriment of the personal circumstances of the appellant. As regards the sentence which was referred to by Mr Scholtz in the Daveyton case, this Court cannot compare the matter *in casu* to those facts, as the facts of the matter in the Daveyton regional Court are not before this Court.

[22] The Court *a quo* referred to the decision of *Els*[9] and *Lemtongthai*.[10] In the matter of *Els*[11] the accused was charged with contravening the Limpopo Environmental Management Act 7 of 2003 and pleaded guilty. The accused was 39 years old at the time of the offence and was working as a game catcher and game management consultant. The same Mr Scholtz, as in the matter *in casu*, was called for aggravation of sentence and he addressed the issue of rhino poaching. The Supreme Court of Appeal decreased the sentence of eight years on counts five

[9] *Els* (note 7 above).
[10] *Lemtongthai* (note 8 above).
[11] *Els* (note 7 above).

and six, finding that counts five and six be taken together for purposes of sentence and imposed four years imprisonment. In the matter of *Lemtongthai,*[12] the appellant was charged in the regional Court with 26 counts of contravening s80(1)(i) of the Customs and Excise Act 91 of 1964, in that he traded illegally in rhino horns and 26 counts (counts 27 to 52) of contravening s57(1) read with, amongst others, ss101(1) and 102 of the National Environmental Management: Biodiversity Act 10 of 2004. The appellant pleaded guilty to the counts. The Supreme Court of Appeal sentenced the 43 year-old appellant to the following sentence:

'(i) In respect of count 1 to 26 the accused is fined R1 million or five years' imprisonment.

(ii) In respect of counts 27 to 52 a sentence of imprisonment of six months on each count is imposed.

(iii) Thus, the effective sentence is payment of a fine of R1 million plus a period of imprisonment of thirteen years, antedated to 9 July 2011 and failing payment of the fine to an effective period of imprisonment of 18 years.'

[23] It is clear that the Court *a quo* based its sentence taking into consideration the cases of *Els*[13] and *Lemtongthai*[14] which dealt with rhino poaching as opposed to theft in the matter *in casu.* The evidence of rhino poaching is irrelevant for the purposes of the matter *in casu,* as the appellant was not charged with rhino poaching or illicit trading in rhino horns. In sentencing the appellant the Court *a quo* took into account wide aspects pertaining to rhino poaching, which in my view, constituted a clear misdirection. The misdirection of the Court *a quo* is that:

(a) it placed emphasis on the fact that Mr Scholtz was dealing with a syndicate that involved buyers who were involved in the illicit trade of rhino horns;

(b) it placed emphasis on the fact that the rhino population in South Africa was being decimated which was largely caused by the illicit trade in rhino horns;

(c) it placed emphasis on the fact that there is a substantial cost insofar as the conduct of anti-poaching operations were concerned and that it is not possible to deal with this conviction in isolation without accepting the context within which this offence was committed;

(d) it placed emphasis on the fact that although the appellant was charged with theft, the matter was inextricably linked to the illicit dealing in rhino horns. The Court *a quo* stated the following:

'The Court, therefore was obliged to take cognisance of the extent to which rhino poaching and the illicit trade in rhino horn was destroying our natural heritage.'[15]

and further:

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[12] *Lemtongthai* (note 8 above).

[13] *Ibid.*

[14] *Lemtongthai* (note 8 above).

[15] Transcript page 300 (CaseLines 005-232) (line 4-7).

'…by allowing them to continue with their activities, he [the appellant] thus indirectly perpetuated the scourge of rhino poaching in the country by creating or allowing a market for rhino horn.'[16] [my emphasis];

(e) It placed emphasis on the fact that the complainant suffered actual loss of the rhino horn to the value of R900,000.00, even though the appellant was never charged nor convicted for theft of the rhino horn.

[24] This impermissible approach entitles this Court to interfere with the sentence. A further reason to interfere with the sentence is that the kingpin was later arrested and sentenced to ten year's imprisonment, yet a low ranking person like the appellant was sentenced to fifteen years imprisonment.

[25] In *S v M*,[17] the Constitutional Court gave a clear judgment on the duties of the sentencing court in the light of s28(2) of the Constitution, where the offender is a primary caregiver of minor children. The inability of the appellant's wife to look after the children of the appellant was not fully ventilated in the Court *a quo* or before this Court, and apart from stating that the appellant's wife was ill with cancer, there is no indication that she was not gainfully employed or that she will not remain as the primary caregiver should a custodial sentence be imposed on the appellant.

[26] Reference by the Court *a quo* to the matter of *Vilakazi*,[18] is misplaced, in that the Supreme Court of Appeal was considering the sentence of an appellant who had been found guilty of the crime of rape in terms of s51(1) of Act 105 of 1997. This carries a mandatory sentence of life imprisonment. The facts of the matter *in casu* are clearly distinguishable, in that the charge is one of theft.

[27] As regards the ground of appeal that the learned acting regional Magistrate did not consider a fine, the Court *a quo* correctly found that the option of a fine was not feasible as it is clear the appellant did not have money to pay for a fine. To impose a fine on the appellant and allow the appellant to gather the money from someone else, would not amount to proper sentencing principles, as it is the appellant himself who must be punished, not a third party from who the money is obtained.

[28] The following aggravating factors are present, namely:

[16] Transcript page 300 (CaseLines 005-232) (line 10-13).

[17] *S v M* 2007(2) SACR 539.

[18] *Vilakazi* (note 6 above).

(a) The stolen money was not used for the benefit of the sick spouse or for the children but for the purchase of a vehicle.

(b) At the time of the commission of the offence, the appellant was aware he was the bread winner with minor children.

(c) The offence was serious and prevalent and had an element of premeditation.

(d) The appellant held a responsible position as an informer and he abused his position of trust and failed to disclose to the registered agent that cash had been received, in fact he lied and stated that he had been robbed of the money received, which accentuates his dishonesty. He in fact gave R10,000.00 of the money received to a runner. It is clear that the appellant succumbed to greed and elected to keep the proceeds of organised crime that was intended to destroy a syndicate trading in illegally obtained rhino horns. The appellant was only arrested when he attempted to take further money from Mr Pepler, that was also not due to him.

(e) Although the offence was non-violent in nature, the appellant facilitated a serious offence in that the loss of the rhino horn prevented SANParks from arresting the syndicate leaders.

(f) According to the evidence of Mr Scholtz, the appellant when arrested, although showing signs of remorse, was arrogant.

[29] The offence for which the appellant has been found guilty is a serious offence.

[30] In the matter of *S v Make*[19] the Supreme Court of Appeal held that:

'When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard a matter made the order which it did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice'.[20] [my emphasis]

[31] There is no case law which deals directly with the facts presented in the matter *in casu*. As a result, the facts will be considered within the framework of an employee that steals from an employer and abuses the trust placed in him/her. The only differentiation is that there is no contract in place between someone who is asked to participate as an informer in a trap as envisaged in s252A of the Criminal Procedure Act.

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[19] *S v Make* 2011 (1) SACR SCA 263.

[20] Ibid page 269 paras 20.

[32] In the matter of *S v Sinden*,[21] the Appellate Division (as it then was), confirmed an effective sentence of four years' imprisonment on a first offender, for stealing approximately R138,000.00 from her employer. The amount had been stolen over a period of 14 months. The appellant was married and had three minor children.

[33] In the matter of *S v Lister*[22] a thirty-four year old bookkeeper's sentence of four years' imprisonment was confirmed by the Supreme Court of Appeal after she had been convicted of theft of R95,700.00 from her employer, which she stole over a period of eleven months.

[34] In the matter of *S v Kwatsha*,[23] a 29-year-old local government employee was convicted of the theft of five blank government cheques with which he intended to draw R2 million. The sentence of seven years' imprisonment of which two were suspended was upheld on appeal. The High Court held that although the intrinsic value of the cheques was minimal, the potential prejudice to the Eastern Cape government had been substantial and if the appellant's scheme had succeeded, the State coffers would have been defrauded by a sum of R2 million. The appellant was unmarried and the father of a minor child yet he was still sentenced to a term of imprisonment. The appellant's actions had been premeditated and calculated and he had abused his position of trust.

[35] In the matter of *Piater v S,*[24] the appellant, a 41-year-old woman who was married and had two minor children, was convicted in a regional Court of 22 counts of fraud, seven counts of forgery and uttering and one count of theft. She was sentenced to an effective seven years' imprisonment. She appealed against the sentence. It appeared that she had worked as an administrative clerk at the local Magistrates' court and misappropriated numerous social grant payments amounting in value to R444,000.00. The appellant did not testify in mitigation but a presentencing evaluation report was prepared by a forensic criminologist. There were a number of mitigating circumstances, namely, that the likelihood of re-offending was low and that her prospects for rehabilitation looked good. However, there were also a number of aggravating factors, namely, that the offences had been committed whilst she occupied a position of trust. The offences were committed over a period of time, when she had an opportunity for proper reflection and to stop. After the theft was discovered and an investigation was under way, she tried to cover it up by falsifying bank deposit slips. Even though the Court of Appeal considered

[21] *S v Sinden* 1995 (2) SACR 704 (A).
[22] *S v Lister* 1993 (2) SACR 228 (A).
[23] *S v Kwatsha* 2004 (2) SACR 564 (E).
[24] *Piater v S* (A411/20110[2012] ZAGPPHC 366 (7 December 2012).

that the appellant had pleaded guilty and that a term of imprisonment would have had a negative effect on the minor children, the High Court on appeal still imposed a term of direct imprisonment, but reduced the sentence to four years' imprisonment.

[36] While a non-custodial sentence of correctional supervision in terms of s276(1)(h) of the Criminal Procedure Act is appreciable, I conclude that such sentence is inappropriate in light of the circumstances of the matter *in casu*. The broader community and SANParks itself has certain expectations. When a person is utilized as an informer in a trap, agreeing to the conditions set out in the trap, then he or she cannot unilaterally proceed to steal the money that is entrusted to them in ensuring the success of the trap. A sentence in terms of s276(1)(i) which entails imprisonment, but with the prospect of early release, is equally inappropriate in the matter *in casu*, as the gravity of the offence, coupled with the aggravating factors calls for a longer term of imprisonment.

[37] Having listened to the appellant's counsel, I am unpersuaded that a non-custodial sentence is called for. As stated in the matter of *S v Matyityi*[25] the Supreme Court of Appeal distinguished between circumstances in which there was genuine remorse demonstrated and the instances where there was self-pity and where the offender now faces incarceration and feels pity for the position he finds himself in. The court in *Matyityi*[26] also found that a plea of guilty is not necessarily a sign of remorse. The evidence may be so overwhelming that the offender has no option but to plead guilty. The Supreme Court of Appeal in *Matyityi*[27] further held that at the age of twenty seven, which incidentally is the age of the appellant in the matter *in casu,* such an appellant can hardly be described as a callow youth. At best for him his chronological age is a neutral factor.

[38] In the cases of *Sinden*[28] and *Lister,*[29] the amounts stolen were less than in the matter *in casu*, yet a term of four years imprisonment was still imposed. In the matter of *Piater*,[30] the amount stolen was more than in the matter *in casu* and seven years imprisonment was imposed. The difference in the three cases mentioned *supra* is that the offences occurred over a period of time. In the matter of *Sinden*,[31] *Kwatsha*[32] and *Piater,*[33] all the appellant's had minor

[25] *S v Matyityi* 2011(1) SACR 40 (SCA).
[26] *Ibid.*
[27] *Ibid.*
[28] *Sinden* (note 19 above).
[29] *Lister* (note 20 above).
[30] *Piater* (note 22 above).
[31] *Sinden* (note 19 above).
[32] *Kwatsha* (note 21 above).
[33] *Piater* (note 22 above).

children, yet a term of imprisonment was still imposed. In the matter of *Kwatsha*,[34] even though nothing was stolen, the abuse of trust resulted in a term of seven years imprisonment being imposed.

[39] As stated in the case of *S v Zinn*,[35] the sentence must fit the crime, the criminal and be fair to society. The sentence must also be individualised to fit the peculiar circumstances of the appellant.

[40] The mitigating factors alluded to by the appellant's counsel have been considered by this Court in determining whether the sentence imposed by the court *a quo* is appropriate. I am satisfied that in the circumstances of this case the sentence of fifteen years is too severe.

[41] In the premises, I find that the sentence imposed is disturbingly inappropriate and does induce a sense of shock.

[42] In the premises I make the following order:

The appeal in respect to the sentence is upheld.
The order of the Court *a quo* is set aside and substituted as follows:

The accused is sentenced to four years imprisonment.

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D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree, and it is so ordered

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[34] *Kwatsha* (note 21 above).
[35] *S v Zinn* 1969 (2) SA 537 (A).

W BRITZ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 08 September 2023

Appearances:

On behalf of the Appellant: Adv. J.G Van Wyk

On behalf of the Respondent:	Adv. N. Kowlas
Date Heard:	28 August 2023
Handed down Judgment:	8 September 2023