REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO .

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

06/03/2018

DATE

SIGNATURE

CASE NO: A420/16

In the matter between:

MAZIYA BONGANI GEORGE

and

THE STATE

JUDGMENT

MTATI AJ:

Introduction

[1] The Appellant in this matter applied for leave to appeal against both conviction and sentence which was subsequently dismissed on 2 February 2015. Appellant directed a Petition to the Judge President, where after leave to appeal against his convictions was dismissed but granted against sentences.

Background

[2] The Appellant was convicted in the Gauteng Regional Court held at Benoni on the following charges:

(a) Count 1: Housebreaking with intent to steal and theft which was committed on 16 January 2013;

(b) Count 2: Housebreaking with intent to steal and theft which was committed on 20 May 2013;

(c) Count 3: Housebreaking with intent to steal and theft which was committed on 18 June 2013;

(d) Count 4: Theft of a motor vehicle which was committed on 16 July 2014;

(e) Count 5: Housebreaking with intent to steal and theft which was committed on 20 August 2013;

(f) Count 6: Housebreaking with intent to steal and theft committed on 3 September 2013; and,

(g) Count 7: Housebreaking with intent to steal and theft committed on 10 September 2013.

[3] All the offences proffered against the Appellant, except count 4, were committed at Etwatwa, within the Regional Division of Gauteng. Count 4 relating to the theft of a motor vehicle was committed at Witbank but Appellant was arrested at Etwatwa for this offence.

[4] The Appellant was sentenced to 5 years imprisonment for each offence on counts 1 to 3 and an order made that these sentences run concurrently. He received a sentence of 10 years imprisonment on count 4. On counts 5 to 7, he was sentenced to 8 years imprisonment for each of the counts and an order made that these sentences run concurrently. The Regional Magistrate further ordered that a period of 7 years on each of the counts in 5 to 7 be served concurrently with the sentence of 10 years imprisonment on count 4. Accordingly, Appellant was to serve a period of 18 years imprisonment.

Issues

[5] The main issue to be decided is whether the court *a quo* erred in differentiating between the effective sentences in respect of counts 1 to 3 and counts 5 to 7 which was argued on behalf of Appellant to be shockingly harsh.

[6] The other issue is whether, as argued on behalf of Appellant, the sentence of 10 years imprisonment on the theft of a motor vehicle was equally shockingly harsh.

Differentiation between the sentences in count 1 to 3 and count 5 to 7

[7] The Court struggled to elicit an explanation from the Respondent's Counsel on what was the motivation for the different sentences on counts 1 to 3 and 5 to 7. It was instead conceded that the sentence of 5 years imprisonment on all these charges and an order for them to run concurrently was appropriate except for charge 4.

[8] In ***S v Rabie***[1] Holmes JA held as follows with regard to sentence:

> *"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-*

[1] 1975 (4) SA 855(A) at 857

(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court', and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate"

[9] The word '*misdirection*' was remarked upon by Trollip JA in ***S vPillay***[2] when he said:

> *"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 enquiry 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"*

[10] The Court has then to investigate whether or not the Magistrate may have misdirected herself in sentencing the Appellant to the extent justifying this Court to interfere with her ruling. It must be stated that the Magistrate is required to properly motivate her findings in order for the Court not to unnecessarily interfere with the sentences[3] imposed.

[11] In examining the record, the Magistrate does not appear to have had any justification or advanced any reasons why she differentiated between the sentences of 5

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[2] 1977 (4) SA 531 at 535

[3] S v Maake 2011 (1) SACR 263 (SCA)

and 8 years imprisonment. She rather saw Appellant as a dishonest person that requires removal from society for a long time of incarceration.

[12] In the case of ***S v Maake***,[4] Navsa JA and Tshiqi JA remarked as follows on the need to provide reasons by presiding officers:

> *"[19] It is not only a salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions…*
>
> *[20] When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order which he did. Broader considerations come into play. It is in the interest 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 administration of justice"*

[13] It is trite that when considering sentence the Court has to take cognizance of the seriousness of the offence, the interest of the accused as well as the interests of society. Courts should be very weary of over-emphasizing public opinion more than the interest of society. In my view, the Magistrate fell in the trap of looking at the public opinion too heavily rather than the public interest inclusive of the interests of the Appellant. As remarked in the case of ***S v Makwanyane***[5]:

> *"[P]ublic opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public."*

It is my view that the differentiation of sentences in respect of these charges should have been motivated, to say the least, by the Regional Magistrate.

[14] In reading the record, one can discern that the Magistrate did not want the sentences to be the same for fear of same running concurrently. The Court notes

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[4] Ibid

[5] 1994 (3) SA 868 (A)

however that whilst the Magistrate said a lot about concurrent sentences as if in doubt about the validity thereof, she applied the same principle in all the convictions when sentencing.

[15] No aggravating circumstances appear on record from the side of the State, particularly in respect of the convictions in counts 5 to 7, in order to differentiate these convictions from the convictions in counts 1 to 3. No person was injured in all the offences committed. The Court is aware of inherent dangers of breaking and stealing in people's houses whilst they are asleep but this cannot, in itself, be sufficient motivation for different sentences on the charges of housebreaking.

[16] The sentences of the trial Court are not, in my view, necessarily shockingly inappropriate but the lack of explanation or justification of the differential sentences for similar offences cannot be left unchallenged. Whilst sentencing is within the purview of the trial court[6], presiding officers should be discouraged to arbitrarily and without justification, impose sentences that are dissimilar for the same offences.

[17] This Court has a discretion to remit this matter to the trial Court for that Court to apply its mind and substantiate its reasons for the different sentences. In my view, this will be an unnecessary administrative burden where, such as in this case, the State made a concession that there is no justifiable reason to deviate from other sentences similar to charges in counts 1 to 3. In light of all the above and comparative case law, the sentences in counts 7 and 8 should therefore be interfered with.

Is the sentence of 10 years imprisonment appropriate for the theft of a motor vehicle?

[18] My view is that as regards the sentence in charge 4 there is no misdirection by the trial court in imposing the sentence of 10 years imprisonment. When imposing sentence, the trial court took into account all the factors traditionally to be considered when meting out sentence, that is, the nature and gravity of the offence, the personal circumstances of the offender and the interest of society. The trial court also took into

[6] S v Toms; S v Bruce 1990 (20 SA 802 (A) at 806H-I

account that, as far back as 1995, sentences imposed for motor vehicle theft were already in the region of 5 years imprisonment.

[19] The submission, in the current matter, is that the trial court ought to have considered the following factors in mitigation of sentence: that the appellant was a first offender, the theft of the motor vehicle was committed almost 10 months after the commission of the other offences he is convicted of; the motor vehicle was recovered with minor damages amounting to R3 000 to R4 000. In addition, the submission is that, on the basis of comparative case law, the trial court failed to consider that sentences imposed are today different from 1995. We were referred to the judgments in ***S v Gerbers*** [7] and ***S v Nxopo*** [8] providing guidelines as to sentences imposed recently by our courts.

[20] The question, therefore, is whether the sentence of 10 years imprisonment imposed for motor vehicle theft is shockingly harsh as argued on behalf of the appellant. The factors raised on behalf of the appellant in mitigation of sentence are overshadowed by the nature of the offence in that the offence was committed as part of other numerous offences. The argument that this offence should be taken in isolation from the other offences committed does not carry weight. The appellant was on a crime spree. The fact that he committed this offence 10 months after the other offences is no indication that he was about to stop with his criminal activities. More than anything else, it is an indication that he was continuing and rules out the possibility of rehabilitation.

[21] It is trite that each case stands against the setting of its own facts and circumstances. The comparative case law referred to by the appellant's counsel does not assist the appellant's case at all. The sentences imposed in those judgments are only guidelines and are not binding on this Court.

[22] In the circumstances I suggest the following order:

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[7] 2006 (1) SACR 618 (SCA)
[8] 2012 (1) SACR 13 (EGC)

HEARD ON 29 JANUARY 2018

JUDGMENT DATE

FOR THE APPELLANT: ADV M BOTHA

INSTRUCTED BY: LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT: ADV M.J. NETHONONDA

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS

Order

[22] It is ordered that:

(a) The Appeal against sentence is partially upheld;

(b) The Magistrate's sentence is altered to read as follows:

1. The Appellant is sentenced to a period of 5 years imprisonment on each of counts 1 to 3 and counts 5 to 7;
2. The sentences in counts 1 to 3 as well as counts 5 to 7 are to run concurrently.
3. The sentence of 10 years imprisonment in count 4 is confirmed;
4. The sentence is antedated to 10 November 2014.
5. The accused is unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.

MTATI AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

KUBUSHI J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA