In the High Court of South Africa
(Western Cape Division, Cape Town)

High Court appeal case number: A200/2022
Magistrate's Court case number: 849/2018
Magistrate's Court appeal number: 01/2021

In the matter between:

NICKLAAS BEGINSEL Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 8 AUGUST 2023

VAN ZYL AJ:

Introduction

1. The appellant, Mr Beginsel, was convicted in the Robertson Magistrate's Court on 12 counts of theft. The appellant had legal representation throughout the trial, and pleaded not guilty to the charges.

2. He was sentenced to 8 months' imprisonment on each count, half of which was suspended for a period of 5 years on condition that he was not convicted of an offence of which theft was an element committed during the period of

suspension. Effectively, therefore, the appellant was sentenced to 4 years' direct imprisonment. This is because sentences generally run cumulatively unless there is an express order that they are to run concurrently. Sections 280(1) and (2) of the Criminal Procedure Act 51 of 1977 ("the CPA") provide as follows:

(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently. (Emphasis supplied.)

3. The appellant was aggrieved by the convictions and sentences. His application for leave to appeal was unsuccessful in the Magistrate's Court. On petition to this Court, leave to appeal against the convictions was refused, but leave was granted to appeal against the sentences imposed. It is therefore only the issue of sentence that now serves before this Court.

4. It appears from the record that the appellant is on bail pending the determination of this appeal.

5. I proceed to set out the background to the matter in relation to the charges brought against the appellant, and the subsequent sentences.

The charges and the relevant evidence underpinning them

6. The appellant was charged in the Magistrate's Court with 12 individual counts of theft involving shortages of sugar or cash at the store where he had been the manager, namely the Robertson Shoprite U-Save. The appellant was, amongst others, responsible for the financial systems of the business.

7. The value of the stolen goods amounted to just over R27 000,00. Excessive stock shortages over several months, notably in relation to the stock of sugar, prompted an investigation into the specific store.

8. In terms of a prescribed procedure in-store which is to be followed in the normal course of business, when a transaction has been rung up by a cashier, but could not be completed for some reason (for example, the customer did not have enough money), the manager may "save the transaction". This "saving" places the transaction on hold until it is later "recalled" by the manager and either completed by the cashier (where the customer comes to collect the purchase) or voided by the manager.

9. The 12 counts against the appellant arose from instances where transactions had been saved by the appellant, and later voided by him, although the stock in question had left the store. The *modus operandi* underlying the counts were the same.

10. The appellant was not charged with a "General Deficiency" as envisaged in section 100, read with section 243 of the CPA. Section 100 provides that on "*a charge alleging the theft of money or property by a person entrusted with the control thereof, the charge may allege a general deficiency in a stated amount, notwithstanding that such general deficiency is made up of specific sums of money or articles or of a sum of money representing the value of specific articles, the theft of which extended over a period."*

11. Section 243, in turn, provides for the evidence that would be sufficient for a conviction on a charge of "General deficiency".

12. He could have been so charged, but that is water under the bridge, and the magistrate could not interfere with the manner in which the State had decided to pursue the case.

13. The appellant acknowledges that the lower court could not change the

manner in which he had been charged, but argues that the Court should, given the nature of the offences and the fact that the Court had regard to the shortfall or general deficiency in the stock in question in convicting the appellant, have tailored the sentences so as to avoid an excessively heavy sentence in total, in the particular circumstances of the case.

Should the sentences be reduced on appeal?

14. The test on appeal in relation to sentence is "*whether the court* a quo *misdirected itself by the sentence imposed or if there is a disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed had it been the trial court that it so marked that it can properly be described as shockingly, startling or disturbingly inappropriate*" (*S v Van de Venter* 2011 (1) SACR 238 (SCA) at para [14]).

15. Sentencing is about achieving the right balance between the crime, the offender and the interests of the community (S *v Zinn* 1969 (2) SA 537 (A) at 540G-H). A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others (see *S v Banda* 1991 (2) SA 352 (BG) at 355A).

16. Where a person is convicted of multiple offences, such as in the present case, a Court should be careful to arrive at a balanced sentence, as was pointed out in *S v Moswathupa* 2012 (1) SACR 259 (SCA) at para [8]: "*Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe.*"

17. The question is essentially whether, on a consideration of the particular facts of the case, the sentences imposed are proportionate to the offences, with reference to the nature of the office, the interests of society and the circumstances of the offender.

18. In *S v Pillay* 1977 (4) SA 531 (A) at 535E-F the Appellate Division (as it then was) held that the word "misdirection" simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry on appeal against sentence is not whether the sentence was right or wrong, but whether the court that imposed 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. The misdirection 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 discretion on sentence.

19. In the present matter the appellant contends that the sentences imposed, viewed as a whole, induce a sense of shock. He submits that the magistrate should have taken the counts upon which he was convicted together for the purposes of sentence.

20. The appellant suggests, too, that a sentence of correctional supervision in terms of section 276(1)(h) should rather have been imposed.

Should the charges have been taken together for the purposes of sentence, or should the magistrate have ordered that the sentences (or some of them) run concurrently?

21. In *S v Mokela* 2012 (1) SACR 431 (SCA) at para [11], the Court expressed the view, in relation to concurrent sentencing, that sentences are to run concurrently where *"the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent.*"

22. Akin to this is the possibility of taking the charges together for the purposes of sentence, given – as counsel for the appellant argues – the nature of and commonalities in the offences. Counsel argues that the magistrate erred in

not doing so in the present matter.

23. There is a practice in the courts to take charges together for the purposes of sentencing. This seems to have arisen from the provisions of section 94 of the CPA, namely that where it is alleged that an accused person, on divers occasions during any period, committed an offence in respect of any particular person, the State can charge that person in one charge with the commission of offences on divers occasions during the stated period, irrespective of the number of charges a person is alleged to have committed. As was stated in *S v Young* 1977 (1) SA 602 (A) at 610E-F:

"Appellant's counsel contended that counts 1 to 4 should be taken together for the purpose of imposing one sentence thereon, and that counts 5 to 7 should be dealt with similarly. That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act, 56 of 1955. Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions … the practice is undesirable and should only be adopted by lower courts in exceptional circumstances." (Emphasis supplied.)

24. This practice has, as is indicated in *Young*, been discouraged. This issue has been extensively dealt with by this Court in the matter of *Maqhaqha v The State* (unreported judgement delivered on 14 December 2021 under case number 837/2021). In paragraph [33] of the judgement the Court (per the Honourable Justice Henney) refers to the Supreme Court of Appeal's decision in *S v Rantlai* 2018 (1) SACR 1 (SCA) where, after having reviewed and summarised a number of cases on this point over the years the SCA confirmed the undesirability of this practice, but also reiterated that there is no absolute bar against the imposition of globular sentences:

"*[9] It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See S v Young 1977 (1) SA 602 (A) at*

610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer based on the peculiar facts of the case. However, our courts have on various occasions expressed some misgivings about such sentences particularly where an accused was convicted after having pleaded not guilty but subsequently having the conviction on some counts set aside on appeal. See Director of Public Prosecutions, Transvaal v Phillips [2011] ZASCA 192; 2013 (1) SACR 107 (SCA) para 27…See also S v Kruger [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 10.

[10] As it is clear from Young, Kruger and Phillips that there is no absolute bar against imposing globular sentences, there seems to be some unanimity in our courts that, depending on the facts of each case, it can be effectively used in exceptional circumstances. See S v Nkosi 1965 (2) SA 414 (C) at 416C. This is because there will be circumstances where for instance it can be used to ameliorate the effect of sentences which individually may appear to be shockingly inappropriate. Furthermore, such a sentence may be appropriate where an accused pleaded guilty on multiple offences which are closely connected in terms of time and common facts and in respect whereof the individual sentences may, cumulatively amount to a sentence that induces a sense of shock. There may of course be other cases where such a sentence might be appropriate." (Emphasis supplied.)

25. I am in the agreement with these sentiments in general. In this particular matter, however, I do not regard the fact that the magistrate had sentenced the appellant on each count as a misdirection. The magistrate was entitled to do so given the manner in which the appellant had been charged.

26. The offences were not committed on a single occasion, and were not closely connected in time. They were admittedly perpetrated at the same location and on the basis of the same *modus operandi*. The appellant's actions show some cunning – the offences were well-planned and premeditated. As indicated earlier, the offences were committed over a period of time. Although they occurred at the same business premises, they were discrete offences committed at intervals of about once a month. On each occasion there was a

renewed intent to steal. No one of the incidents are inextricably linked to any of the other. The appellant could have stopped stealing from his employer at any stage.

27. Having considered the evidence led at the trial, however, and the lower court's judgment in relation to whether the appellant ought to be convicted of the charges, this Court must be mindful of the fact that detailed evidence had effectively been led at the trial on only two of the 12 counts. In relation to the other counts, the magistrate found the appellant guilty based upon inferences drawn from, *inter alia*, the fact that the same plan of action had been followed in each instance.

28. There is no denying that there are many aggravating circumstances in this case. I agree with the lower court that the appellant had more than sufficient chance of discontinuing his conduct. Yet, he persisted, over a period of time, with the pilfering from the business. The appellant, moreover, persistently denied any wrong-doing in the face of the evidence that existed against him (unlike in the matter of *Troskie v S* [2016] ZAECGHC 53 (27 July 2016)), where the accused pleaded guilty from the outset). He has shown no remorse at any stage, not even after conviction. He failed to explain what the motive behind the conduct was. He caused the trial to run for many days, and caused blame to be imputed to other persons (in particular to those of lower "rank" than him) in the course of the cross-examination of the State's witnesses.

29. The appellant was a manager at the store, and was to be obeyed and respected by those serving under him. His employer relied upon him to oversee the proper control of financial systems to the benefit of the business. He has not offered to repay the stolen money (see, in contrast, *S v Barnard* [2003] ZASCA 65 (30 May 2003). Ultimately, the consumer, as an ordinary member of society – that same society that look up to the appellant – bears the brunt of his unlawful actions. As pointed out by counsel for the State, as input costs increase, so the price of consumables increases. There is, moreover, no rule that a first offender should be spared direct imprisonment in

appropriate cases (see, for example, *S v Krieling and another* 1993 (2) SACR 495 (A) at 497A-B).

30. One must, however, not over-emphasise the crime. I am of the view that the magistrate has done so. The interests of society include not only the broader community, but also the appellant's family, who are dependent upon him. He was a respected member of the Robertson community, assisting with children who are abusing drugs, and providing rugby coaching. He was a ward councillor in the local municipality – again, a position of trust in the community – and earned a salary of R32 000,00 per month.

31. In the arguments addressed to the lower court on sentence the personal circumstances of the appellant, the fact that he was a 47-year old first offender (for the purposes of the charges in question) with financial and family commitments were raised in argument, even though the appellant himself did not give evidence in mitigation of sentence. The appellant is the breadwinner of his household, and has a wife and five children to support. The sentence imposed will have the effect of his children effectively being fatherless for a period of 4 years. These aspects were squarely before the lower court for consideration in the course of the sentence proceedings. The personal circumstances of the appellants as set out in the pre-sentence reports, which form part of the record.

32. The aggravating factors should be carefully balanced against the mitigating factors. As submitted by the appellant's counsel, the appellant is not a criminal – he has bettered himself over the years. He is not the type of person who should be removed from society. He has community interests, and, even more importantly, is in fact supporting his wife and children.

33. Considered in context of the facts of the case as a whole, I do regard the cumulative effect of the sentences imposed to be unduly harsh, given the particular personal circumstances of the appellant. It seems to me, further, that the appellant is unlikely to be rehabilitated upon spending time in prison. Given his apparent desire to be involved in and respected in the community, I

am of the view that another sentence will properly serve as a deterrent so as to prevent the appellant from further unlawful conduct.

34. I have considered the possibility of correctional supervision, but I regard the administrative aspects connected therewith as unnecessary in this case. Rather, a prison sentence – such as that imposed by the magistrate – but wholly suspended for a substantial period should be as effective. It is by no means a light sentence. It is onerous. It will be sword hanging over the appellant's head. He will know that, should he put a foot wrong during the period of suspension, he will without doubt undergo direct imprisonment. Should the appellant refrain from criminal conduct, he will be able to keep his employment, retain his involvement with society, and be able to continue to support his family – a critical consideration in today's socio-economic climate.

35. Having considered all of the circumstances, I do not intend to interfere with the manner in which the magistrate approached sentence, that is, a sentence in relation to each count, and the sentence imposed in respect of each count. I do, however, propose that the sentences be suspended as a whole, for a period of 5 years, upon appropriate conditions. That will serve to lessen the cumulative impact thereof upon the appellant, and will have the benefits discussed above.

Section 302 of the CPA

36. The appellant's counsel argues that, "*if such a long period of direct imprisonment was considered by the court to be an appropriate sentence, the imposition of such a sentence would have triggered an automatic review of the sentence by a judge in chambers in terms of Section 302 of the CPA*". Thus, counsel argues, by sentencing the appellant to a period of imprisonment just below the threshold for automatic review on each count in circumstances where the counts should have been taken together for purposes of sentence, the appellant was unfairly deprived of this judicial oversight of the sentence.

37. Section 302 of the CPA does provide for the automatic review of certain sentences. Section 302(1) and (2) provide, in relevant part, as follows:

> "*(1) (a) Any sentence imposed by a magistrate's court-*
>
> *(i) which, in the case of imprisonment … exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;*
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> *(ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i),*
>
> *shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.*
>
> *(b) …*
>
> *(2) …*
>
> *(3) The provisions of subsection (1) shall only apply-*
>
> *(a) with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser."* (Emphasis supplied.)

38. The appellant had legal representation throughout the entire trial, both in relation to conviction and sentencing proceedings. Section 302 is therefore not applicable to him, and the Magistrate's Court did not "unfairly deprive" the appellant of any right under section 302 of the CPA (see *S v Jacobs and six similar matters* 2017 (2) SACR 546 (WCC) at para [7]).

Order

39. In the circumstances, I would propose that an order be granted as follows:

a. The appellant's appeal against the sentences imposed upon him

on 20 March 2020 in relation to 12 counts of theft is upheld.

b. The sentences imposed upon the appellant are set aside and the following sentences are substituted:

"*The accused is sentenced to eight (8) months' imprisonment on each count, which sentences are wholly suspended for a period of five (5) years on condition that the accused is not convicted of an offence of which theft is an element committed during the period of suspension.*"

c. The sentences are to be backdated to 20 March 2020.

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P. S. VAN ZYL AJ

I agree and it is so ordered.

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C. M. FORTUIN J

Appearances:

H. Scholzel for the appellant (instructed by Frank van Zyl Attorneys)
L. Snyman for the respondent (Director of Public Prosecutions, Western Cape)