157/76

O.F.A. A. 448.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

G. P MAKAPELA

Appellant.

versus/teen

STATE

Respondent.

Appellant's Attorney _____ *Respondent's Attorney* P.G (JHB)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate _____ *Respondent's Advocate* _____
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 4-8-1977
Op die rol geplaas vir verhoor op

(WLD)

The Court dismisses the appeal

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

GREATERMAN MAKAPELA — Appellant

and

THE STATE — Respondent

Coram: HOLMES, MULLER, et KOTZÉ, JJ.A.

Heard: 4 March 1977

Delivered: 18 March 1977

J U D G M E N T

HOLMES, J.A. :

This is an appeal against sentence.

In every appeal against sentence the issue is whether it can be said that there was an improper exercise of judicial discretion by the trial Court. This can be said where the sentence is vitiated by irregularity or misdirection; or, failing these, if it is so severe that it induces a sense of shock, or is disturbingly inappro= priate - to mention but two of the accepted tests; see S. v. Rabie, 1975(4) S.A. 855 (A.D.) at page 857 D, and S. v. M., 1976(3) S.A. 644 (A.D.) at page 649 in fin.

/The .....

The appellant was tried in the Witwatersrand Local Division on two charges of theft. The first charge related to a lorry and to sixty-nine cartons of clothing. The second charge related to three cartons of clothing and skins. He was represented by Senior Counsel. He pleaded guilty, on count 1, to a con= travention of section 37 of Act 62 of 1955 in respect of 135 "slax suits"; and on count 2, to a contravention of the same statutory provision, in respect of 34 fox skins.

These pleas were accepted by counsel for the State, who informed the Court that there was evidence on record (the preparatory examination) that the crimes were committed, save in regard to the identity of the owner of the fox skins. The State accordingly called the managing director of a certain company to prove such ownership. The witness also said that the cost price

/of the .....

of the fox skins was R2 074. He added, as a matter of interest, that they have to be tanned and processed to become furs. Counsel for the State also informed the Court (without objection by the defence) that the value of the clothes was R3 432. The Court entered verdicts of guilty of contravening section 37 (1) of Act 62 of 1955. These were competent verdicts on charges of theft, in terms of section 200 of Act 56 of 1955 as substituted.

The sentence on each of the two counts was imprisonment for two years, "the sentences to run cumulatively". In his report under section 367 of Act 56 of 1955, the learned trial Judge indicated that his intention thereby was that the sentences were to run consecutively; see section 333 (2) of the said Act. Indeed, this was how counsel for the appellant understood it in his heads of argument.

/The Court .....

The Court a quo granted leave to appeal.

Section 37 (1) of Act 62 of 1955 reads as follows -

"Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section 13 of the Stock Theft Act, 1923, without having reasonable cause, proof of which shall be on such first-mentioned person, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly autho= rized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory."

/In .....

In this Court, counsel for the appellant contended that the trial Court had misdirected itself in two respects.

Firstly, the charge, in count 1, alleged the theft of 69 cartons of clothes; and, in count 2, the theft of three cartons containing skins and clothes. The appellant's plea of guilty (which was accepted) related to lesser quantities, namely 135 slax suits on the first count, and 34 fox skins on the second count, as aforementioned. In the judgment on sentence, the opening words were -

> "The accused was charged with theft of goods on two counts. The goods were imported clothing to the value of R3 432 on the first count and R2 074 on the second count."

Wherefore counsel on appeal contended in this Court that the learned Judge "sentenced the

/appellant .....

appellant on the basis that the appellant had been found in possession of all the goods which had been stolen". This, submitted counsel, gave rise to the inference that the appellant was more closely associated with the actual theft than may have been the case in truth; and that such an inference may well have had some bearing upon the learned Judge's finding that the appellant knew that the goods had been stolen or acquired in an illegal manner.

In my view the answer is twofold. First, ex facie the record at page 2, the learned Judge was at pains to ascertain and record just what it was in respect of which the appellant pleaded guilty. And Senior Counsel, who appeared for the appellant at the trial, gave it as 135 slax suits and 34 fox skins. And counsel for the State, who also appeared in this Court, informed the trial Court that the appellant was found in possession of the articles to

which he pleaded guilty. Second, as counsel for the State pointed out in this Court, the trial Judge, in his judgment on the application for leave to appeal against sentence, mentioned at page 11 that the charges of theft related to much larger quantities, but the appellant was found in possession only of the quantities to which he pleaded guilty. The judgment proceeds :

> "It was submitted that there was a misdirection in that I failed to take into account that the quantities of goods found in his possession were much smaller than those stated in the charges of theft. I did in fact not take that into account and do not see the relevance thereof. He was sentenced in respect of the quantities admitted by him through his plea of guilty." (My italics).

/In my .....

In view of all of the foregoing, it does not appear to me that there was a misdirection as contended for. The most that can be said is that the opening words of the judgment on sentence, supra, commencing, "The accused was charged ..... " were not very well put; but on a full conspectus of the record there can be no doubt but that the learned Judge well knew that the goods found in the possession of the appellant were not all the goods that had been stolen, and that he sentenced the appellant only in respect of the goods found in his possession and covered by his plea of guilty.

The second misdirection contended for was that the trial Judge, in sentencing the appellant, said -

> "I am of the view that he did know that these goods had either been stolen or had been acquired in an illegal manner."

/It was .....

It was argued that "the Court could not find as a fact that the appellant knew that the goods were stolen". It is clear that, in expressing the view just mentioned, the learned Judge had regard inter alia to the record of the preparatory examination. I shall therefore deal first with the question whether the trial Court was entitled to have regard to such record. A copy of it was made available to this Court by the appellant's attorneys in case it were relevant. As it turned out, counsel for the appellant submitted that it was irrelevant, while counsel for the State sought to rely upon it.

As to that, Section 258 (1) (a) of Act 56 of 1955 reads -

> "(1) If an accused charged with any offence before any court pleads guilty to that offence or to an offence of which he

/might .....

might be found guilty on the charge, and the prosecutor accepts that plea, the court may -

(a) if it is a superior court, and the accused pleads guilty to any offence other than murder, sentence him for that offence without hearing any evidence;"

That section was commented upon by this Court in S. v. Jabavu, 1969 (2) S.A. 466 (A.D.). Botha, J.A., said at page 470 C to D -

"It is implicit in this section that a Superior Court is entitled, where it does not hear any evidence, to examine the evidence given at the pre= paratory examination in order to inform itself as to the proper sentence to be imposed. ..... The evidence given at the preparatory examination will, where a Superior Court does not hear any evidence, be the only material available

/from .....

> from which the Court is able to inform itself as to the proper sentence to be passed, and it could never have been contemplated that in such a case the Court is required to disregard the evidence taken at the preparatory examination and pass sentence without informing itself as to the proper sentence to be imposed."

The foregoing is consistent with the view expressed by this Court in R. v. Zonele and Others, 1959 (3) S.A. 319 (A.D.). In dealing with the Court's right, before passing sentence, to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed, the judgment of the Court states at page 330 F to H –

> "I do not consider that the word 'evidence' in the above section, was intended to have its strict meaning as would be the case in respect of evidence prior to con= viction. I agree with respect with the

/following .....

following remarks by Selke, J., - concurred in by Hathorn, J., - in Mbuyase and Others v. Rex, 1939 N.P.D., 228 at p. 231 :-

> 'Now to enable a magistrate, or for that matter, anyone exercising judicial functions, to decide upon what is an appropriate sentence in the case of an individual accused, he is entitled to avail himself of many circumstances affecting that individual, some of which it would not be proper for him to regard in coming to a con= clusion as to whether the accused were guilty or not guilty.' "

I therefore hold that, in the circumstances of the present case, in which the appellant pleaded guilty and did not give evidence or make a statement or call any witnesses in mitigation, the trial Court was entitled to have regard to the record of the

/preparatory .....

preparatory examination in deciding upon a proper sentence.

Counsel for the appellant went on to analyse the provisions of section 37 (1) of Act No. 62 of 1955, set out earlier herein. He submitted that the onus on an accused thereunder, who is proved to have acquired or received stolen goods, is to prove on a preponderance of probability that he in fact held the relevant belief; and that he had reasonable cause for holding it. This Court held that to be the position in S. v. Ghoor, 1969 (2) S.A. 555 (A.D.) at page 557, approving S. v. Kaplin, 1964 (4) S.A. 355 (T) at page 358 A - C. Counsel further submitted that where the conviction under section 37 (1) is an alternative verdict to a charge of theft under the common law, such verdict means that the State has failed to prove that the accused was dis= honest; and therefore that ordinarily, the offence should be viewed in a less serious light. Reliance

/was placed .....

was placed on S. v. Kaplin, supra, at page 358 G, and S. v. Setter, 1964 (1) S.A. 266 (T). It seems to me that a good deal will depend on the facts of each particular case. In the present case the position at the sentencing stage was that the appellant had given no evidence, either at the preparatory examination or at his trial; nor did he call witnesses or make a statement from the dock. He was not obliged to do so, of course; but it meant that all that the trial Court had, when it came to passing sentence after a plea of guilty, was the record of the preparatory examination. As to that, I agree with counsel for the State that it shows abundantly that the appellant was not bona fide in his receipt or acquisition of the goods of which he was found in possession, and that he did not believe them to be the property of the person from whom he received them, or that such person was authorized by the owner to dispose of them. The

trial Court was entitled to take this into account in assessing an appropriate sentence.

Counsel relied on Rex v. Mashalele and Another, 1944 (A.D.) 571 at page 583 in fin., to 584, to the effect that an accused's silence at the preparatory examination does not tend to show guilt. That is distinguishable, for here the question relates to sentence, and the record of the preparatory examination indicates the lack of any bona fide belief by the appellant; and at the time of sentencing there was no material whatever, either from that examination or from the trial, pointing the other way. In Mashelele's case, supra, the onus was on the Crown to prove guilt. In the present case, standing the record of the preparatory examination, it was for the appellant to point to any honest belief in mitigation of sentence; but from start to finish he is silent as to that: indeed the proof is the other way.

/Lastly .....

Lastly, counsel contended that, in any event, the sentence of imprisonment for two years on each count was "excessive" and "startlingly inappropriate". He pointed to the fact that the appellant had no previous convictions; that his profitable business, apparently a clothing shop, was now ruined; and that the value of the goods in respect of which he pleaded guilty was R3 432 on the first count, and R2 074 on the second count. The learned Judge had regard to the foregoing. And we were informed in this Court that the appellant's age was 33 years and that he is married with two small children. Bearing in mind all of these factors, together with the gravity of the two offences, and the absence of anything from the appellant pointing to mitigation, I am unpersuaded that the sentences are disturbingly inappropriate.

/To sum .....

To sum up the whole appeal, I am unpersuaded that the trial Judge exercised his judicial discretion improperly in the matter of sentence.

In the result, the appeal is dismissed.

G. N. HOLMES

JUDGE OF APPEAL

MULLER, J.A.)
KOTZé, J.A.) CONCUR