

/CCC

CASE NO 581/92

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE
DIVISION)

In the matter between:

ERROL NOEL LANGLEY

APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN, NESTADT JJA et NICHOLAS AJA

DATE HEARD: 14 SEPTEMBER 1993

DATE DELIVERED: 29 SEPTEMBER 1993

J U D G M E N T

NESTADT, JA:

The appellant was convicted in the Magistrate's Court, Pretoria, of malicious damage to property. He was sentenced, to six months imprisonment.

He unsuccessfully appealed to the Transvaal Provincial Division. This is a further appeal (against sentence only). It is before us with the leave of this Court.

The incident which gave rise to the appellant's conviction occurred on the morning of 18 April 1991. The appellant was driving his vehicle along a public road in Pretoria. He overtook a car being driven by the complainant, a Mrs Pretorius. The appellant passed her on her left hand side. She testified that having done so, he cut in front of her, forcing her to swerve to her right to avoid a collision; and that she reprimanded him by sounding her hooter once when this happened and again a little later as he went off onto a side road. In his evidence the appellant denied that he drove in this manner. Though admitting that after having overtaken her he proceeded over to the

right hand side of the road, his version was that he did so in a safe manner. He alleged, however, that this notwithstanding, the complainant "came right up on my tail...hooted and...I thought she was going to hit me".

The magistrate made no finding as to which of these two accounts was the truth. It matters not. It is what happened afterwards that is important. And in this regard the facts are largely common cause. The appellant, apparently annoyed with the complainant, turned round and (in his words) "went after her". He caught up with her car at a circle. He stopped his vehicle, jumped out and went up to her. She was still sitting in her car. He banged on the window of the driver's door because "I wanted to ask her what her problem was, why she was trying to force me off the road...She provoked me to such an extent that I

was...very cross". The complainant did not react; she remained sitting in her car and said nothing. Apparently this incensed the appellant further. He then broke or ripped off a rear view mirror affixed to the side of the complainant' s car. Having done that he threw it to the ground, walked back to his car and drove off. The conviction of malicious damage to property related to the breaking off of the mirror.

The magistrate's judgment on sentence is so -brief that I propose to quote it in full.

It reads:

"The court takes into consideration your personal circumstances. You are 36 years of age, married with two children, you are working and your income is R2 100. You told the court that you will pay the damage you caused to the vehicle of the complainant and as you were not in time this morning, you did not pay anything because the complainant left after the court issued a warrant of arrest for you.

The court must also take into consideration the previous conviction. You were sentenced on 2 May 1980 to twelve months' imprisonment suspended for five years and this was also for malicious injury

to property.

The court is of the opinion that the following sentence is an appropriate sentence in your case. You are SENTENCED TO SIX MONTHS' IMPRISONMENT."

The magistrate's approach calls for critical comment. It is, of course, desirable that a judicial officer's reasons for sentence be reasonably full (cf R vs Dematema 1967(4) SA 371(R) at 375 B-C and S vs Immelman 1978(3) SA 726(A) at 729 A-C). In casu, I do not think that the reasons given measure up to this standard. There is no apparent consideration of any alternative forms of punishment. Thus there is no reference to a fine or periodical imprisonment or a community service order or even to a suspended period of imprisonment. What then were the magistrate's reasons for sentence? Obviously one was the appellant's previous conviction. But it was more than eleven years old and should not have carried much, if any, weight as an aggravating factor (S vs Mqwathi 1985(4) SA 22(T)

which should now be read in the light of the new sec 271 A of the Criminal Procedure Act 51 of 1977).

The other reason for the sentence imposed is, as appears from what has been quoted, the appellant's failure to compensate the complainant for the damage to her car (amounting to R300). The appellant did give an undertaking to do so. On his conviction on 11 October 1991 he asked, however, that he be given until the end of the following month to make payment. This is because he was "running a tight budget". The magistrate was not prepared to accede to this request and postponed sentence until 1 November 1991 "to enable accused to pay complainant". I can understand the justification for this attitude. The amount was not large; and the appellant had had some months to save up

the money. It is what happened at the resumed hearing on 1 November that calls for adverse comment. It appears that the appellant was late for court. It appears further that in his absence the complainant told the court that the appellant had not paid her anything. Hence the reference in the judgment to the appellant "not (being) in time this morning". I shall assume that it was not the magistrate's intention to take this factor into account in sentencing the appellant. Were she to have done so, it would, of course, have been a gross misdirection. But there was nevertheless another misdirection. Though telling the appellant that the complainant alleged that she had still not been compensated for the damage to her car, the magistrate did not ask him whether this was true. Nor did she invite the appellant to explain why, if it was true, he

had not yet paid. The magistrate should have done so, particularly seeing that the appellant was unrepresented. In these circumstances the magistrate was not entitled to hold it against the appellant that he had not paid the complainant.

But even if the magistrate was justified in taking account of what we now know to be the appellant's failure to compensate the complainant, I do not think that a prison sentence was warranted. I do not underestimate the loutish behaviour of the appellant. However frustrated and annoyed he may have felt, the manner in which he sought to take the law into his own hands falls to be strongly condemned. What he did must have been very upsetting to the complainant. He should have curbed what appears to be an aggressive nature. For not having done so more than a nominal sentence was called for. But not imprisonment (for six months) . In

my opinion such a sentence was unduly severe and this is a further reason for concluding as I do that the magistrate failed to properly exercise her discretion as to sentence. It seems to me that the general reluctance of our courts to impose short term imprisonment, at least on a first offender (S vs Abt 1975(3) SA 214(A) at 219 in fin; S vs Scheepers 1977(2) SA 154(A) at 159 A-C) was not sufficiently taken into account. A fairly substantial fine coupled with a short, conditionally suspended period of imprisonment would have been more appropriate. This is the type of sentence I propose to substitute.

One last observation. A degree of impatience or irritation with the appellant on the part of the magistrate is to be detected from the record. This should have been guarded against and if possible avoided

(S vs Sallem 1987(4) SA 772(A)).

The appeal succeeds. The sentence of the trial court is set aside. The following sentence is substituted:

The accused is ordered to pay a fine of R1 000 or undergo three months imprisonment. In addition he is sentenced to three months imprisonment suspended for five years on condition that (i) he pay the sum of R300 as compensation to the complainant to the clerk of the trial court within one month of this judgment and (ii) he is not found guilty of malicious damage to property committed during the period of suspension and in respect whereof he is sentenced to imprisonment without the option of a fine.

NESTADT, JA

VAN HEERDEN, JA) NICHOLAS, AJA) CONCUR