THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 200/2020

In the matter between:

NHLANHLA ARTHUR KUBHEKA	**FIRST APPELLANT**
ARMSTRONG NGIDI	**SECOND APPELLANT**
and	
THE STATE	**RESPONDENT**

Neutral citation: *Kubheka and Another v The State* (200/2020) [2021] ZASCA 25 (24 March 2021)

Coram: NAVSA ADP, DLODLO and MBATHA JJA, and KGOELE and WEINER AJJA

Heard: 25 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 24 March 2021.

Summary: Criminal law and procedure – appeal against sentence – high court set aside sentences imposed by regional court and increased length of imprisonment – no material misdirection – no indication that trial court exercised discretion improperly – no basis for high court to interfere – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vally J and Malungana AJ sitting as court of appeal):

1. The appeals against the increased sentences imposed by the high court are upheld.

2. The order of the high court in respect of the sentence is set aside and replaced with the following order:

'The appeals against sentence are dismissed.'

3. The result is that the sentences imposed by the Regional Division, North Gauteng, Randburg, set out hereafter, are reinstated:

'(a) Accused 1 is sentenced to 4 years' imprisonment of which 2 years is suspended for 5 years on condition that the accused is not convicted of theft or any offence involving an element of dishonesty during the period of suspension.

(b) Accused 2 is sentenced to 4 years' imprisonment.

(c) In terms of s 103(1) of the Firearms Control Act 60 of 2000, each accused is declared unfit to possess a firearm.'

JUDGMENT

MBATHA JA (NAVSA ADP, DLODLO JA, and KGOELE and WEINER AJJA concurring)

[1] On 12 October 2017, the appellants, Messrs Nhlanhla Arthur Kubheka (first appellant) and Armstrong Ngidi (second appellant) were each convicted in the Regional Division, North Gauteng, Randburg ('the regional court'), of one count of theft of a cellular telephone and an iPod out of a motor vehicle. On 23 January 2018, the first appellant was sentenced to four years' imprisonment, of which two years were suspended for a period of five years on condition that he was not convicted of theft or any offence involving an element of dishonesty during the period of suspension. The second appellant was sentenced to four years' imprisonment. The appellants were declared unfit to possess a firearm in terms of s 103(1) of the Firearms Control Act 60 of 2000. With leave of the trial court the appellants appealed to the Gauteng Division of the High Court, Johannesburg (the 'high court') in respect of both conviction and sentence.

[2] On 22 May 2019, the day of the hearing of the appeal, the high court called upon the appellants to provide reasons why each of their sentences should not be increased on appeal in the event that the appeal against conviction was dismissed. The hearing was adjourned to 20 June 2019. On that day the high court entertained the appeal.

[3] In its judgment the high court (Vally J, Malungana AJ concurring) restated the evidence that was adduced in the regional court. It was clear that the appellants had jammed the locking signal on the remote control of the Mercedes Benz vehicle that had been parked adjacent to their motor vehicle, a Chevrolet Aveo at the parking area of the Randburg Magistrates' Court, and had stolen the cellular telephone and an iPod. The high court reiterated that the State's case was advanced by the direct evidence of the security officer at the court, Ms Winnie Mutavhatsindi, who observed the appellants through CCTV monitors leaving their motor vehicle and opening the door of the Mercedes Benz. This was further supported by the uncontested evidence that the iPod belonging to Mr Anthony James Batistich, the complainant, was found in the backseat of the Chevrolet one of the appellants had hired, and in which they had travelled to the Randburg Magistrates' Court. One of the appellants had also demonstrated to the police officers how they used the remote jammers to prevent the locking of the doors of a motor vehicle.

[4] The high court concluded that the appellants' defences were correctly rejected by the regional court as not being a true account of the circumstances underlying the finding of the iPod in their motor vehicle. Consequently, it held that the court was correct in finding that the State had proven beyond a reasonable doubt, all the elements of the offence and dismissed the appeal against conviction. It, however, set aside the sentences imposed by the regional court and substituted it with the increased sentences of five years' and eight years' direct imprisonment, respectively. The high court based its decision principally on the prevalence of the offence and that the offence had been carefully planned and executed. It concluded that the regional court had downplayed the interests of society and overemphasised the interests of the appellants. The appellants petitioned this Court for special leave

to appeal against both conviction and sentence. They were however granted leave to appeal against sentence only.

[5] Before us it was pointed out on behalf of the appellants that the State had initially not opposed the appropriateness of the sentence imposed by the regional court. It was submitted that *S v De Beer* [2017] ZASCA 183; 2018 (1) SACR 229 (SCA) demonstrated the same error by the High Court, Johannesburg (Vally J and Siwendu AJ), namely, an unjustified increase in sentence on appeal that was later overturned by this court. Counsel on behalf of the appellants contended that the appellants were both professionals who ought to have been considered suitable candidates for a sentence of correctional supervision, in terms of s 276 (1)(*h*) or (*i*) of the Criminal Procedure Act 51 of 1977. It was submitted on behalf of the appellants that the high court had arbitrarily doubled the sentences of the appellants on the grounds of the seriousness and prevalence of the offence and the interests of society, with the consequence that the newly imposed sentences were disproportionate to the offence committed. It was contended that the high court had disregarded the personal circumstances of the appellants and that it erred in over-emphasising the interests of society and the gravity of the offence.

[6] It is trite that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Bogaards*[1], the Constitutional Court stated as follows:

'It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[1] *S v Bogaards* [2012] ZACC 23; 2012 BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41.

[7] It is clear that the trial court took into account all relevant factors in considering an appropriate sentence for the appellants. It took into account the appellants' personal circumstances which were as follows: the first appellant was 44 years old when the crimes were committed; he is a B. Com and B. Sc. Engineering (cum laude) graduate who is a member of the Professional Engineers of South Africa; he is a director of his own engineering company, which is based in KwaZulu-Natal with a staff component of 21 employees; he draws a net income of R1 million per annum; he is the father and sole-provider to eight children; and he was a first offender.

[8] The second appellant was 46 years old at the time when he was sentenced; he is married and a father of two children, who are dependent on him for financial support; after completing matric he acquired the relevant certificates in the hospitality industry and he runs a marketing and catering company together with his wife; his gross drawings totalled R69 000 per month; and his company employed four permanent staff members. He has two previous convictions for fraud and theft, though they had happened more than 17 years prior to the time of sentencing in the present case.

[9] As aggravating circumstances, the regional court took into account the nature and seriousness of the offence, the value of the items stolen from the motor vehicle, the prevalence of the offence, and that it required a skilled person to commit the offence. The individual sentences imposed by the regional court were appropriate as they took into account the purposes of punishment, which are aimed at rehabilitation, preventative deterrence and retribution.

[10] As stated above, the high court found that the sentence imposed by the regional court did not sufficiently appreciate the interests of society, the gravity of the offence, and that it was unduly and overly generous in assessing the interests of the appellants. It found that the crime was carefully planned, prevalent and was committed by sophisticated businessmen who used their technical skills to steal from the motor vehicle. Counsel for the State was hard pressed to point to any misdirection on the part of the regional court. She was reluctantly, but correctly, constrained to agree that the high court should not have interfered with the sentences imposed by the regional court. In substituting the sentences the high court failed to demonstrate that the regional court had not exercised its sentencing discretion at all or exercised it improperly or unreasonably. The high court itself was guilty of over-emphasising the seriousness of the offence and without due regard to proportionality. Counsel for the State conceded that the increased sentences were more severe than what high courts had in the past held to be appropriate in cases of this kind.[2] One of course, must be cautious about comparisons with other cases. Each case must be decided on its own merits. A court of appeal may, however, not substitute a sentence simply because it prefers it and thereby usurp the discretion of the trial court.[3] In the present case there was no basis to interfere with the sentences imposed by the regional court and doubling the sentences of direct imprisonment was unwarranted.

[11] Having regard to what is set out above, it is clear that having regard to the prevalence and seriousness of the offence and that the appellants could not have been

[2]For example, in *S v Smith* 2002 (2) SACR 488 (C), where there was theft from a motor vehicle, a 22- year-old was sentenced to 3 years' imprisonment, which on review was reduced to 18 months' imprisonment, of which 9 months were suspended for five years. In *S v Maritz* 1994 (1) SACR 456 (T) a 35-year-old, with previous convictions, was sentenced to 6 years imprisonment, which on review was reduced to a sentence of 6 years' imprisonment, of which 3 years were suspended for a period of 5 years. Counsel for the State informed us that regional court sentences for similar cases were in the region between 3 to 5 years' imprisonment.
[3]*S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A) para 12.

motivated by need but rather by greed, there is no room for concluding as suggested on behalf of the appellants that correctional supervision was a viable sentence. The regional court can thus not be faulted for imposing direct imprisonment.

[12] Accordingly, the sentences imposed by the regional court should stand, as they are proportionate to the offence committed by the appellants. In the circumstances, the order is as follows:

1. The appeals against the increased sentences imposed by the high court are upheld.

2. The order of the high court in respect of sentence is set aside and replaced with the following order:

'The appeals against sentence are dismissed.'

3. The result is that the sentences imposed by the Regional Division, North Gauteng, Randburg, set out hereafter, are reinstated:

'(a) Accused 1 is sentenced to 4 years' imprisonment of which 2 years is suspended for 5 years on condition that the accused is not convicted of theft or any offence involving an element of dishonesty during the period of suspension.

(b) Accused 2 is sentenced to 4 years' imprisonment.

(c) In terms of s 103(1) of the Firearms Control Act 60 of 2000, each accused is declared unfit to possess a firearm.'

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Y T MBATHA

JUDGE OF APPEAL

APPEARANCES:

For appellants:	J C Kruger
Instructed by:	BDK Attorneys, Johannesburg
	Symington & De Kok, Bloemfontein
For respondent:	E H F Le Roux
Instructed by:	The Director of Public Prosecutions, Johannesburg
	The Director of Public Prosecutions, Bloemfontein