THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 048/2003

In the matter between:

SHAUN PACKEREYSAMMY
APPELLANT

and

THE STATE
RESPONDENT

CORAM: MTHIYANE, NUGENT and CONRADIE JJA

HEARD: 21 NOVEMBER 2003
DELIVERED: 28 NOVEMBER 2003

Summary: Sentence – first offender – found in possession of 6157 abalone – sentenced to 18 months' imprisonment – whether there was a proper exercise of judicial discretion.

JUDGMENT

MTHIYANE JA:

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[1] The appellant was convicted in the magistrate's court at Caledon of possession of 6140 abalone in contravention of Regulation 38(3)(b) of the regulations published on 2 September 1998 under Government Notice R1111[1] and was sentenced to 18 months' imprisonment. He appealed to the Cape Provincial Division (before Ngwenya J et Louw J) against both the conviction and sentence. The appeal was dismissed and leave to appeal was refused. The appellant now appeals to this Court with special leave granted by this Court. The appeal is against sentence only.

[2] The facts are briefly the following. On 27 April 1999 the appellant was found in possession of 6157 abalone contained in 31 bags. In terms of Regulation 38(3)(b) ('the regulation') it is an offence for any person to:

> '(b) keep, control or be in possession of more than 20 abalone at any one time;'

Regulation 96 provides for payment of a fine or imprisonment for a period not exceeding two years.

[3] The appellant pleaded not guilty to the charge, admitted possession of 6157 abalone and agreed that the admission be recorded as such in terms of s 220 of Act

[1]Promulgated in terms of s 58 (4) of Act 18 of 1998 see Government Gazette No.19205.

51 of 1977.

[4] The sentence imposed on the appellant is assailed on five main grounds.
4.1. First, it was contended that the magistrate over emphasized the seriousness of the offence and underestimated the appellant's favourable personal circumstances. The submission is based on an inference drawn from the remarks made by the magistrate during his judgment on sentence when he said that our country's marine resources were being 'sabotaged' by illegal activities along the coastline and that this resulted in loss of income for the coastal communities. It was submitted further that this led the magistrate to solely consider direct imprisonment and to ignore other sentence options.

4.2. Secondly, it was argued that by imposing direct imprisonment the magistrate wanted to make an example of the appellant in order to deter other future offenders. This conclusion, submits counsel, is inescapable given the circumstances of the offence and the appellant's personal circumstances.

4.3. Thirdly, it was submitted that the sentence is disturbingly inappropriate because the appellant was a first offender and was to receive only R3 000 for having conveyed the abalone.

4.4. Fourthly, it was contended that the magistrate should have adopted an inquisitorial approach and played a more active role during sentencing in order to obtain information relevant to the consideration of other sentence options. It was submitted that by not adopting a proactive role he failed to give attention to all the objects of punishment and confined himself merely to retribution and deterrence.

4.5. Fifthly, it was argued that the magistrate should have sentenced the appellant as a first offender to a fine or to correctional supervision in terms of s 276(1)(h) or to community service in terms of s 297(1)(a)(i)(cc) or to a suspended sentence on

one or more of the conditions set out in s 297 of Act 51 of 1977.

[5] Before discussing the above submissions it is necessary to restate briefly the well known approach to be adopted by a court of appeal when dealing with the question of sentence. Punishment is pre-eminently a matter for the discretion of the trial court. The court on appeal is not to erode such discretion; on appeal no general right exists to interfere with a sentence imposed by the trial court. It will only interfere if the discretion has not been judicially and properly exercised. This will be so only where the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate.[2]

[6] Against this background I turn to consider each of the appellant's submissions *seriatim*. I do not agree that the magistrate misdirected himself or that his remarks about our country's marine resources being sabotaged, led to an over-emphasis and the under-estimation of the appellant's personal circumstances. It seems to me that the remarks were made simply to emphasize the gravity of the threat to our marine resources associated with poaching. The offence is without doubt very serious and the magistrate did no wrong in stressing the seriousness thereof. It also appears that the magistrate was informed by his knowledge of illegal abalone activities in his jurisdictional area, albeit expressed in strong language. There can be no question that the magistrate was entitled to take judicial notice of the general incidence of the crime in his area of jurisdiction and to use such knowledge in imposing sentence.[3]

[7] The sentence imposed on the appellant was severe, but is one which I do not regard as inappropriate in the circumstances of this case. It has been held that the severity of sentence is in itself not a sufficient ground to interfere. In the absence of any irregularity or misdirection a court will, on a question of severity, only interfere if it considers that there is a striking disparity between the sentence passed and that which the court of appeal would have imposed.[4] In contending for a lesser sentence counsel referred us to *S v Prinsloo*[5] a judgment of Thring J (sitting with Potgieter AJ) in which an accused in that case, found in possession of 50 abalone was sentenced to a fine of R5 000 or 1 200 hours periodical imprisonment wholly suspended for five years. We were urged to consider a similar approach. The *Prinsloo* case is clearly distinguishable on the facts from the present matter where the appellant had in his possession over 6 000 abalone.[6]

[8] The contention that because the appellant was going to be paid only R3 000 the magistrate should have given him a lesser sentence, is not easy to comprehend. The appellant was the only accused in the case. Although this may not have been the intention the submission appears to lend substance to the suggestion that

[2] *S v Rabie* 1975(4) SA 855(A) at 857D - F; *S v Pillay* 1977(4) SA 531(A) at 535E – G.

[3] *S v Muvangua* 1975(2) SA 83 (SWA) at 84A.

[4] *S v Berliner* 1967(2) SA 193(A) 200F – G.

[5] 2002 (SACR) 457 (C).

[6] Regulation 38 (3)(b) sets a limit of 20 abalone per person at any one time.

the appellant was probably a member of a syndicate. The submission was meant to convey that the reward which the appellant received for conveying the abalone, a payment of R3000, was disproportionate to the punishment that he received for his transgression. The link between the gravity of a crime and the reward derived by its perpetrator is often tenuous. Here, it seems to me, the real question is the importance of the role played by the appellant. The appellant placed no evidence before the Court to suggest that his role in the criminal project was not vital to its success.

[9] I turn to the contention that it appears that the magistrate decided before hand that he was going to focus solely on retribution and deterrence and have no regard to other sentence options. This is a sweeping conclusion which is not borne out by the record. For the submission that other sentence options were not considered by the magistrate counsel relied heavily on the judgment of this Court in *S v Siebert.* [7] In that case Olivier JA writing for the majority found that, having refused a request for a probation officer's report, the magistrate was left with insufficient evidence for him to have exercised a proper judicial sentencing discretion. The Court referred the matter back to the magistrate with directions that a probation officer's report be obtained in terms of s 276A(1) of Act 51 of 1977. The fact that the magistrate did not mention other sentence options does not mean that he did not consider them. In *S v Pillay*[8] this Court said:

> '…merely because a relevant factor has not been mentioned in the judgment on sentence, it does not necessarily mean that it has been overlooked, for "no judgment can ever be perfect and all-embracing"… Moreover, the value to attach to each factor taken into account is also for the trial Court to assess.'

In the appeal before us the appellant was legally represented and there is nothing in the record to suggest that there were any other mitigating facts which could have been placed before the magistrate nor (as in *Siebert's* case) was the magistrate requested to order an investigation into any. There is also no reason to believe that because this was a serious offence the magistrate simply considered 'imprisonment as the first, last and only option.'- an approach which is strongly criticized in the *Siebert*[9] case.

[7] 1998(1) SACR 554 AD.
[8] 1977(4) SA 531(A) 535A-C.
[9] at 559e.

[10] Relying on the *Siebert* case counsel argued further that the magistrate should have played a more proactive role and elicited more information from the appellant in order to enable him to properly exercise his discretion. I do not consider that the magistrate was required to intervene in the present matter given that there was no reason for him to doubt that all mitigating facts had been placed before him.

[11] The submission that the appellant should, because of personal circumstances, have been sentenced to correctional supervision or community service or a suspended sentence ignores the fact that a sentencing court was required to consider not only the personal circumstances of the appellant but also the seriousness of the offence and the interests of the community.[10] In the present matter it cannot be said that the magistrate did not take all the relevant factors into account or that he did not adopt a perfectly balanced approach.

[12] The submission was made that because the appellant was a first offender he should have been given a sentence that would ensure that he was kept out of jail. A first offender has no right to be kept out of jail. It all depends on the circumstances of each case. It has been held that any serious offence can lead to imprisonment and frequently imprisonment is the only appropriate sentence which ought to be imposed.[11]

[13] The appeal is accordingly dismissed.

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KK MTHIYANE

JUDGE OF APPEAL

CONCUR:

NUGENT JA
CONRADIE JA

[10] *S v Zinn* 1969(2) 537(A) at 540G.

[11] *S v Holder* 1979(2) SA 70 (AD) at 77H-78A.