

SOUTH AFRICA / JUDGMENT

Adams and Another v S (A174/2021) [2021] ZAWCHC 142 (18 June 2021)

[2021] ZAWCHC 142

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni, Kusevitsky

CASE / FILE NUMBER

A174/2021

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Source record

In
the High Court of South Africa
(Western
Cape Division, Cape Town)
Case
No: A174/2021
Magistrates
Serial number: 22/2021
In
the matter

between: ASHRAF
 ADAMS
 ACCUSED
 1
 MOEGAMAT
 ADAMS
 ACCUSED
 2
 and
 THE
 STATE

JUDGMENT

Delivered 18 June 2021

LEKHULENI AJ

INTRODUCTION

- [1] This matter comes before this court by way of automatic review in terms of the provisions of section 302 of the Criminal Procedure Act 51 of 1977 (“the CPA”). The two accused who were not legally represented after they elected to conduct their own defences were convicted in the Magistrates Court, Cape Town on 14 April 2021 on a charge of Theft out of a motor vehicle and were each sentenced to 18 months’ imprisonment in terms of section 276(1)(b) of the CPA. Essentially, this court is enjoined to consider whether the proceedings before the trial magistrate appear to be in accordance with justice.
- [2] The allegations against the accused were that on 11 August 2020 and at or near Victoria Road in Woodstock in the district of Cape Town, the accused did unlawfully and intentionally steal four car mats, four wheel caps, two knives and a car Jack out of a parked Toyota Etios, the property in the lawful possession of Christopher Kiebineyou. On 16 April 2021, the charge was put to both accused in terms of section 105 of the CPA and both accused pleaded guilty to the charge. The court then invoked the provisions of section 112(1)(b) of the CPA. Upon questioning by the court, both accused admitted all the elements of the charge and the trial magistrate accordingly convicted the accused as charged.
- [3] The State proceeded to prove previous convictions against both accused. Accused 1 had two previous convictions of theft which were committed in 2009 and 2011 respectively. He also has two previous convictions of possession of dagga committed in 2012 and 2016. He was given a wholly suspended sentence in respect of the 2009 theft charge

and he was sentenced to two years’ imprisonment in terms of section 276(1) of the CPA in respect of the 2011 theft charge. He was fined R300 or 30 days imprisonment in respect of the 2012 conviction on the possession of drugs and R400 or 5 days in respect of the 2016 offence. Accused 2 had the following previous convictions: theft committed in 2012 and was sentenced to 2 years’ imprisonment which was wholly suspended; theft committed on 30 October 2013 and was sentenced to 12 months’ imprisonment which was wholly suspended for three years on normal conditions; and theft committed on 10 November 2013 he was sentenced to 18 months’ imprisonment in terms of section 276(1)(I) of the CPA. He was also convicted of trespassing in 2014 and was sentenced to a fine. In 2015 he was sentenced to 18 months’ imprisonment which was wholly suspended for three years for possession of housebreaking implement and in 2020 he was sentenced to R500 or 30 days’ imprisonment for possession of dependence producing substance.

- [4] In mitigation of sentence, accused 1 informed the court that he is 38 years old. Has completed standard 5 at school. He left school and went to work as no one at home was employed. He did odd jobs including cleaning the yard. He committed this offence in order to get money to feed his wife and his child. He implored the court to impose a suspended sentence. Accused 2 informed the court that he completed standard 2 at school. He left school to start collecting scrap. He also did odd jobs of cleaning yards. He committed the offence in order to get money. He also pleaded for lenience from the court.
- [5] The prosecutor argued in aggravation of sentence that the offence is prevalent and that the only mitigating factor in this matter is that the accused pleaded guilty. He argued that the accused are not first offenders and that their previous convictions have not deterred them. He appealed to the court to impose a sentence of direct imprisonment

in terms of section 276(1) (I) of the CPA in respect of both accused. After listening to arguments from both sides, the magistrate

subsequently sentenced each accused to 18 months' direct imprisonment in terms of section 276(1)(b) of the CPA without giving

reasons for her judgment and explained their rights of appeal and review.

FACTUAL MATRIX

- [6] The facts of this case gleaned from the accused's response to the questions posed to them by the court are that on the day alleged in the charge sheet, both accused came from Woodlands Street and they saw the complainant's vehicle that was not locked. They opened the door and removed the items mentioned in the charge sheet from the vehicle. Both accused helped each other to remove these items from the vehicle. Accused 1 placed these items in a black bag and took them to the place where he sleeps. Later, police came and arrested him and seized the stolen items.
- [7] Upon perusing the record, I had no difficulty in respect of the conviction to conclude that it was in accordance with justice. Both accused admitted all the elements of the charge. However, in respect of the sentence imposed, I raised a query in terms of section 304(2)(a) of the CPA and requested the presiding magistrate to provide reasons for the sentence imposed as I held a view that the sentence imposed was so harsh and evoked a sense of shock. In her reasons for judgment, the magistrate explained that theft out of a motor vehicle is a highly prevalent offence in her jurisdiction and cases of this nature continue to be enrolled on a daily basis. She also alluded to the fact that while a reading of the allegations in the charge sheet especially with regards to the items taken and the value thereof might on face value suggest that this offence is not of a serious nature, in her view to take such a superficial view is misguided. She concluded that the eighteen months' imprisonment

imposed in respect of both accused is not harsh and in her view is in accordance with justice.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

- [8] A court sitting on appeal or on review cannot interfere with the discretionary function of the lower court unless the sentence imposed is unjust or unless there has been a gross misdirection. In this case, the court did not give reasons of its sentence when it imposed the 18 months' imprisonment in respect of each accused. As it stands, the two accused are in prison and they do not know the reasons why a sentence of 18 months imprisonment was passed.
- [9] The magistrate only gave her reasons of judgment on sentence when she was asked by this court in terms of section 304(2) of the CPA. In *S v Heuwel* 2018 (2) SACR 436 (WCC) at para 8 this court stated as follows:

"A judgment is an explanatory analysis of a decision of a judicial officer. Without that proper analysis, the pronouncement made is not transparent. In a judgment by a trier of fact, justice must be visible, ensuring that all the issues have been considered and have been carefully weighted thought out.... It must say what it means and mean what it says and it should leave nobody in doubt about why a decision was arrived at. There is nothing on record to show that the trial court applied a properly informed mind to its duty to sentence the accused."

- [10] From the reading of her reasons of judgment in terms of section 304(2)(a) of the CPA, it is apparent that the trial court over accentuated the seriousness of the offence and the interest of society at the expense of the personal circumstances of the accused. The general approach that courts are expected to take when determining an appropriate sentence remains the approach established in *S v Zinn* 1969 (2) SA 537 (A) namely, that the sentence is determined with reference to the triad consisting of the crime, the offender and the interests of society. A sentencing court should always be preoccupied in finding a balance among all the different interests involved. Sentencing therefore, is about achieving the right balance between the triad - See *S v Zinn* (supra) at 540 G-H. In *S v Banda* 1991 (2) SA 352 (BG) at 355A Friedman J, as he then was, noted with admirable brevity that 'the elements of the triad contain an equilibrium

and a tension. 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.'

- [11] In this case, the value of the stolen items was not proven or alleged in the charge sheet. However, it cannot be disputed that in monetary terms they were of paltry value. More importantly, the said items were recovered before the accused could liquidate them. In her reasons for judgment the magistrate noted that the seriousness or otherwise of an accused persons' conduct lies not only in the nature and value of the items taken but in the totality of the circumstances surrounding the commission of the offence. I agree with her observation however, that does not mean that in cases where the stolen items are of little value the court should lose sight of that fact. The court must consider the surrounding circumstances of each

case in totality and not on a piecemeal basis. The fact that the items were recovered surely should have weighed in favour of the

accused. The complainant has not suffered any financial prejudice. In the converse, if these items were not recovered, this should have aggravated the offence.

[12] It must be stressed that a sentence imposed must be proportional to the crime committed. In the same way the length of punishment must be proportional to the offence committed. In terms of section 12(1)(a) of the Constitution a person may not to be deprived of freedom without a just cause. The deprivation of liberty for an extended period of time must be proportional to the offence committed and must be justified by having regard to all the personal circumstances of an offender and other factors which could have a bearing on the seriousness of the offence and the culpability of the offender. This means that the length of punishment must be proportionate to the offence - See Terblanche 'Twenty Years of Constitutional Court Judgments: What Lessons are there about Sentencing?' PER / PELJ 2017 (20) at 15.

[13] In *S v Smith* 2003 (2) SACR 135 (SCA) at para 5 the court noted that the sense of proportion should not be lost and sentences be imposed which, by comparison, are too harsh. Meanwhile in *S v Dodo* 2001 1 SACR 594 (CC) at para 37, the court explained the importance of proportionality as follows:

"The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue." (the emphasis is mine)

It seems to me the magistrate in this case was influenced by the previous convictions of the accused in imposing this harsh sentence.

Section 271(4) of the CPA provides that 'If the accused admits such previous conviction or such previous conviction is proved

against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused

has been convicted'. Depending on the circumstances, the previous convictions may call for consideration of a severe sentence. However, a severe sentence does not mean a disproportionate sentence. In my view, the previous conviction of the accused must not enjoy pre-eminence over the triad which circumscribes factors which are relevant to a just sentencing. The two accused have served the sentences in respect of their previous convictions. In *S v Heuwel* (supra) at para 13, the court said that the fact that one is dealing with a repeat offender with previous convictions is not a sufficient reason to ignore the duty to balance the relevant factors and the purpose of punishment.

- [14] In this case, I repeat, the complainant did not suffer any prejudice. The accused were found in possession of the stolen items and the items were obviously returned to their owner. I appreciate the fact that this is a serious offence and that it is prevalent in the jurisdiction of the court as stated by the magistrate in her reasons for judgment however, this is not the only consideration of the triad. It is trite that courts must not overemphasise one factor of the triad against the other. What is expected is for the court to act judiciously by taking into account all of the relevant factors and competing interests involved, so as to arrive at a sentence which strikes an equilibrium of the triad. In *S v Kruger* 2012
- (1) SACR 369 (SCA) para 11 the court stated that ‘punishing a convicted person should not be likened to taking revenge. To this end, I agree with the views expressed by the court in *S v Pillay* 2018
- (2) SACR 192 (KZD), where the court stated that ‘every sentence that must be imposed must be tempered with a degree of mercy no matter the crime’.
- [15] More importantly, whilst it is accepted that it is in the interests of justice that crime should be punished, however, punishment that is excessive as is the case in this matter, serves neither the interests of justice nor those of society. The Supreme Court of Appeal in *S v Scott-Crossley* 2008
- (1) SACR 223 (SCA) at para 35 stated as follows:
- “Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.” (the emphasis is mine)*
- [16] I am of the view that the sentence of 18 months’ imprisonment is harsh and disproportionate to the offence committed by the accused. The prosecutor in the court a quo argued that the court should consider the triad as pronounced in *Zinn* (supra) and implored the court to impose a sentence of imprisonment in terms of section 276(1)(I) of the CPA. Notwithstanding, the court imposed a sentence of direct imprisonment for a period of eighteen months imprisonment without giving reasons for her judgment. In my considered view, this was a misdirection which demands interference by this court. It is further my considered view that the sentence imposed is not at all in accordance with justice and has to be set aside.
- [19] I consider it necessary to reconsider the sentence imposed. In my view, it is prudent not to remit the matter to the magistrate as all the relevant facts are on record. The remittance of the matter to the court a quo will unnecessarily delay the finalisation of this matter. I have considered the personal circumstance of the accused, their previous convictions as well as arguments from both sides as recorded and I am of the view that a sentence of eighteen (18) months imprisonment half of which is suspended for a period of three years on conditions that the accused are not found guilty of theft or attempted theft committed during the period

of suspension is appropriate in the circumstances.

ORDER

[20] In the result, I propose the following order:

20.1 The sentence of eighteen (18) months imprisonment imposed by the court a quo on the two accused is set aside and replaced with the following sentence:

20.1.1 The accused 1 and 2 are each sentenced to eighteen (18) months imprisonment half of which is suspended for a period of three years on condition that the accused persons are not found guilty of theft or attempted theft committed during the period of suspension.

20.1.2 In terms of section 282 of the CPA the sentence is antedated to 16 April 2021.

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

KUSEVITSKY J

JUDGE OF THE HIGH COURT

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