

SOUTH AFRICA / JUDGMENT

Duda v S (A264/2017) [2018] ZAFSHC 4 (4 January 2018) [2018] ZAFSHC 4

COURT

Free State High Court, Bloemfontein

BEFORE

MBHELE, CHESIWE

CASE / FILE NUMBER

A264/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A264.2017

In

the Appeal between:

RESILE
KRESJAN
DUDA
Appellant
and
THE
STATE
Respondent

CORAM:

MBHELE,
J et CHESIWE, AJ
HEARD

ON:

04 DECEMBER 2017

JUDGMENT

BY: CHESIWE , AJ

DELIVERED ON: 04 JANUARY 2018

CHESIWE, AJ

- [1] The appellant was charged in the Regional Court in Smithfield for Contravention of Section 3(1) of the Stock Theft Act 57 of 1959, of receiving stolen stock or produce. The appellant pleaded guilty on 2 December 2016 and was on the same day sentenced to three (3) years imprisonment. The appellant appeals against the sentence imposed.
- [2] The basis for the appeal is that the trial court erred in not considering other available sentencing options.
- [3] The facts of the case are briefly that the appellant in 2014 exchanged his vehicle for 13 cattle. On 9 February 2015 the police

and the complainant arrived at the appellant's place. The owner of the cattle identified the cattle as his

- [4] Mr Botha, on behalf of the appellant, in his oral argument and in the Heads of Argument submitted that the learned Magistrate erred in only confining herself to section 15 of the Stock Theft Act 57 of 1959 read with section 300 of the Criminal Procedure Act 51 of 1977 when considering options for a compensation order. In this regard reference was made to the case of *S v SM Huhu*, Free State High Court Review, No 96/2012 para 4 as well as *S v Khoza* 2011 (1) SACR 482 (GSJ para 8).

- [5] He submitted further that the imposed sentence is shockingly inappropriate, and that the Magistrate at the trial court did not

take the provisions of Section 297 of Act 51 of 1977 into consideration when sentencing the appellant.

- [6] Mr Simpson, on behalf of the respondent; in his oral submissions and Heads of Argument submitted that the trial court correctly found that a wholly suspended sentence would not be appropriate in the circumstances of this matter. He contended further, that the trial court gave due consideration to the elements of punishment. He submitted that the seriousness of the offence and failure by the appellant to show remorse call for a custodial sentence.
- [7] The appellant requested the court aquo to impose a sentence that is coupled with a compensation order. From the record it appears that the trial court considered the appellant's ability to compensate the complainant in the amount of R20 000 as required by section 300. The appellant had five cattle and the value of these cattle was unknown to the trial court. Further that if such an order was granted the complainant would be burdened with an order that will be difficult to enforce as the trial court would not be able to bring the

appellant back to court for re-sentencing.

[8] Section 297 of the Criminal Procedure Act 51 of 1977 provide as follows:

"

- (1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-
- (i) on one or more conditions, whether as to- (aa) compensation;
- (bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss."

The provisions of section 297 provides for compensation of the victim of the offence and restoration of the status quo. On careful consideration the legal provisions of section 297, the nature of the offence and the manner in which the offence was committed, and the interests of the society, I am of the view that the offence calls for custodial sentence. The appellant kept the cattle in his possession from November 2014 till February

2015. The appellant, even though he pleaded guilty, did not report the matter to the police, but waited until he was arrested for possession of stolen stock theft to acknowledge his guilt.

[9] In *S v Stanley* 1996 (2) SACR 570 (A) at 574b-g, the court enquired into when a compensation order should be made, and that fairness and logic would require that there be a causal link between the offence and the damage in respect of which the compensation order is made. Stock theft is a serious crime and

a sensitive issue for farmers. The court takes cognisance that it is rife and prevalent around the Free State. (See *Truijens v State* 2012

(1) SACR 79 SCA at para 24; *Ntsiki v State* A165/2014 [2015] ZAFSHC (12 February 2015).

[10] In *S v Khoza* 2011 (1) SACR 482 (GSJ) at para 8, Claasen J dealt with section 297 and 300 of the aforementioned Act. He highlighted in what manner a court can secure compensation to a complainant who had suffered damages to property and made the following observations:

"An order in terms of section 300 of the act would only be appropriate where the accused has sufficient property or executable assets to compensate the complainant in full, or to a large extent. Where an accused is unable to compensate the complainant in full, an order in terms of this section should not be made. If an accused is employed and able to repay in instalments, it would be more appropriate and practical to impose a sentence suspended on condition if periodical payments..... Compensation as a condition of a suspended sentence is too often not considered a condition of suspension is more flexible as it can be judicially adopted in the case of failure to pay, without the complainant having to incur the costs and bother of execution. Therefore courts should rather make use of section 297 opportunities to impose compensation as a suspensive condition of the sentence."

[11] However, in this matter, the Learned Magistrate found that there was no evidence that the appellant would be in a position to afford an amount of R20 000 offered for compensation. The appellant's legal representative at the trial court informed the trial court of a reasonable possibility that the appellant would be opening a tavern and was only awaiting the relevant papers. This was speculative; it is understandable that the Magistrate did not rely on assumptions of a business that was not operational.

[12] On reading the papers the trial court had given consideration as envisaged in section 300 (1) which provides that:

"Where the accused is to be sent to prison for a substantial period of time and he has no assets an order under section 300 is usually inappropriate."

In *State v Medal* 1977 (1) SACR 682 LPD, the court stated that

"as the accused did not have any means to comply with the compensatory order the trial magistrate should not have made such an order."

[13] In this instance the appellant did not have sufficient assets and would not have been able to compensate the complainant in full. There is no indication *ex facie* the record that the appellant was gainfully employed.

[14] In *S v Rabie* 1975 (4) SA 855 {A} at 857D-F, the Appeal Court stated that:

"1. In every appeal against sentence whether imposed by magistrate or judge, the court hearing the appeal -

- (a) should be guided by the principle that punishment is pre- eminently a matter for the discretion of the trial court; and
 - (b) should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised.
2. The test under (b) is whether the sentence is initiated by irregularity or misdirection or is disturbingly inappropriate."

[15] It is now trite that an appeal court can only interfere with a sentence of a trial court in a case where the sentence

imposed was disturbingly inappropriate, or there was irregularity or misdirection.

[16] When imposing a sentence, a sentencing court must consider the basic Zinn triad as propounded in *S v Zinn* 1969 (2) SA 537 (A), the accused personal circumstances, the nature and gravity of the offence and the interests of the community. These factors must be balanced against each other. In order to reach an appropriate sentence, the court should not place too much emphasis on one

factor and ignore the others. In addition the court must bear in mind the objectives of sentencing which are prevention, retribution,

rehabilitation and deterrence not only retribution and deterrence.

[17] I am satisfied that the trial court took cognisance of the personal circumstances of the appellant, as well as his inability to pay the compensation of R20 000, though the appellant had vaguely told the trial court he was prepared to pay a compensatory amount in whatever manner the court may deem fit. The information supplied was not sufficient to empower the court to make such an order, regard being had of the appellant's financial position at the time of granting the order.

[18] It is trite that the court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so. See *S v Osibi* 2005 (2) SACR 35 (W) at 35 i - j. As indicated, I see no reason to interfere and replace the sentence imposed.

[19] The sentence imposed is not only appropriate, but just.

[20] In view of the aforesaid I am not persuaded that the trial court misdirected itself or that the sentence is shockingly inappropriate.

[21] Therefore there is no justification to tamper with it. In the circumstances I make the following order.

ORDER

[22] The appeal against the sentence is dismissed.

[23] The sentence imposed by the trial court is confirmed.

S CHESIWE, AJ

I concur

NM MBHELE, J

On behalf of appellant: Mr Botha

Instructed by:

GJ Bredenkamp Attorneys

Bloemfontein

On behalf of respondent: Adv Simpson

Instructed by:

Director of Public Prosecution

Waterfall Building

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