

SOUTH AFRICA / JUDGMENT

Louw v S (A327/2009) [2018] ZAGPJHC 23 (15 February 2018) [2018] ZAGPJHC 23

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher, Mashile

CASE / FILE NUMBER

A327/2009

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

no: A327/2009
15/2/2018
Not
reportable
Not
of interest to other judges
In

the matter between: LOUW,
WILLRICH
EAMON APPELLANT
and
THE
STATE RESPONDENT

JUDGMENT

FISHER J, (MASHILE J Concurring):

INTRODUCTION

- [1] The appellant was charged in the District Court: Boksburg with one count each of theft, forgery, and uttering. He pleaded guilty to all charges on 2 September 2008 and on 02 October 2008 he was sentenced to three years imprisonment half of which (i.e. 18 months) was suspended for 5 years on condition that he not be found guilty of theft or forgery during that period. At the time of sentencing he was 51 years of age. He is now aged 60. This is an appeal against sentence with leave of the trial court. The appellant has been on bail since he was charged.

THE**FACTS**

- [2] The appellant was working for the Department of Justice as a clerk at the time of the offences. On the day he committed the offences he was tasked with the receipt from and reimbursement of funds to the public, for fines, bail bonds, and the like. He was in straightened financial circumstances and decided that he would steal monies in an amount of R 500 which he came into possession of in the carrying out of his functions. His theft of the cash involved also his forging of documents in a bid to create a documentary trail to conceal the theft. When confronted about the theft, forgery, and uttering by his superiors he confessed. He thus lost his employment with the Department. It appears that he has found further employment.
- [3] He pleaded guilty to all charges and undertook to return the money. There is no doubt that the appellant appreciates the seriousness of his crime and that he has expressed remorse. He experienced shame, in that he has kept the conviction from his siblings with whom he was close. He seemed also to have a close mutually supportive relationship with his life partner of many years. He has a minor child aged 15 whom he supports. His other children are adults. He has a previous conviction for reckless and negligent driving and thus was treated as a first offender in relation to an offence of dishonesty.
- [4] The Magistrate correctly took into account the fact that he was in a position of trust in relation to public funds, that the offence was serious and prevalent and that it had to be deterred.
- [5] A Correctional Supervision Report compiled in terms of section 276A(1)(a) was submitted for sentence. It was not placed in dispute

by the State. The author of the report concluded that the accused did indeed qualify to be considered for correctional supervision.

APPLICABLE PRINCIPLES

[6] In *S v R*[1] Kriegler AJA declared that:

“the Legislature has unequivocally indicated by the shift of emphasis which is apparent from the amending Act as a whole, that punishment, reformatory but if necessary highly punitive, is not necessarily or even primarily to be achieved by incarceration”. One of the more enduring aspects of the decision has been the assertion that the legislature has distinguished between offenders who need to be removed from society and those who deserve punishment but do not need to be removed.[2]”(Translated from the original Afrikaans)

[7] In *S v Mathe*[3] the court held that, given this legislative distinction, “the first duty of a sentencing court is to decide into which category the accused falls.” The court went on in this case to state that it had “anxiously considered” inter alia the reports from the authorities and the submissions of counsel for the accused but that despite the recommendation of the probation officer, the accused fell into the category of those who must be removed from society.

[8] It has been held that the two important questions to be asked in making this assessment are: is the offender a danger to society[4] and is the crime so serious that imprisonment is unavoidable?[5] To my mind, such an approach is helpful and should be embarked upon when there is an indication that correctional supervision could be appropriate.

[9] The Magistrate, however, relied on the report only in relation to establishing the circumstances of the appellant. Having done this, he did not embark on any enquiry as to the appropriateness or otherwise of correctional supervision in relation to the circumstances of the appellant. Indeed he specifically stated that he would not consider the option of correctional supervision. The Magistrate thus did not exercise his discretion in this matter either properly or at all.

[10] In *S v Siebert*[6] it was held that if more than 3 years’ imprisonment is not needed, correctional supervision should only be rejected after

careful consideration.

[11] Trollip JA in *S v Pillay*[7] had the following to say in relation to an appeal against sentence:

“The essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence.”

[12] The appellant is clearly not a danger to society. The seriousness of the nature of the crime should be balanced against the shame and remorse shown by the appellant, his confession to his employers soon after the crime, his plea of guilty, and the relatively small amount stolen. These factors, taken with the attitude, age, family structure, and maintenance obligations of the appellant, are such that he would indeed be a proper candidate for rehabilitation within the community. It would not be in the interests of society that such a person be exposed to hardened criminals in prison, even for a short period of time. It is preferable that he be allowed to keep working so that he can support his family and be rehabilitated within the community. He should, ideally, be employed in community service in an appropriate way.

[13] The Correctional Supervision Report which served at the sentencing hearing was compiled more than 9 years ago. The relevant

circumstances of the appellant have, no doubt, changed substantially in this period. Accordingly, it is necessary that a fresh report be compiled. This Court is thus not in a position to determine the conditions which should apply to the correctional supervision and these aspects are best dealt with by the trial Court.

ORDER

[14] The following order is made:

- (a) The sentence is set aside.
- (b) The matter is remitted to the trial Court to sentence the appellant afresh to a term of correctional supervision in terms of s276(1)(h) of the Criminal Procedure Act, after a new and up to date report in terms of section 276A(1)(a) has been produced.
- (c) the conditions of such correctional supervision shall be within the discretion of the trial Court, but the period to be served shall not exceed 18 months.

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree,

MASHILE J

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

For the Appellant: Adv. A Mavatha

Instructed by: Justice Centre Johannesburg.

For the Respondent: Adv. N kowlas

Instructed by: The Director of Public Prosecutions, Johannesburg

Date of Hearing: 01 February 2018

Date of Judgment: 15 February 2018

[1] 1993 (1) SACR 209 (A)

[2] at 221g-h.

[3] 2014 (2) SACR 298 (KZD) at para 32.

[4] S v Mtshali 2012 (2) 255 (KZD) at para 20 (one of the considerations was that the offender was no danger to society).

[5] Eg, S v Phama 1997 (1) SACR 485 (E) at 487a-b.

[6] 1998 (1) SACR 554 (A) at 557c-d

[7] 1977 (4) SA 531 (A) at 535E - G.)

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Prepared on 10 October 2026 · Esheria