

SOUTH AFRICA / JUDGMENT

Lukas and Another v S (A417/2010)

[2010] ZAWCHC 495 (15 October 2010)

[2010] ZAWCHC 495**COURT**

Western Cape High Court, Cape Town

BEFORE

Le Grange, Laubscher

CASE / FILE NUMBER

A417/2010

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE HIGH COURT, CAPE TOWN)****CASE****NUMBER: A417/2010****DATE: 15 OCTOBER 2010****In****the matter between:**

GERSHWIN

LUKAS

.....1s'

Appellant

CHRISTIANO

PLAATJIES

.....2nd

Appellant

and

THE

STATE

.....Respondent

JUDGMENT

LE GRANGE. J:

The two appellants in this matter were charged in the District Court of Calitzdorp with one count of housebreaking with the intent to steal and theft. Both appellants were legally represented in the court a quo. The first appellant who was 16 years old at the time, pleaded guilty in contravening the provisions of section 36 of the General Law Amendment Act 62 of 1955, also commonly known as the possession of stolen goods. The second appellant, who was 17 years old at the time, pleaded guilty in terms of section 1(i) of the Criminal Law Amendment Act 1 of 1988. Both appellants were convicted on their plea of guilty and were each sentenced to a term of three years direct imprisonment.

The court a quo refused to grant the appellants leave to appeal against their sentence. The appellant then petitioned the Judge President of this division and leave to appeal against sentence was granted. Counsel for the appellants, however, argued that insofar as the first appellant is concerned, the court a quo erred in convicting him of contravening section 36 of the General Law Amendment Act 62 of 1955. It was contended that the written

plea-explanation of first appellant does not admit all the elements of the crime as envisaged by section 36. The definition of section 36 provides as follows:- "Any person who is found in possession of any goods, other than stock or produce as defined in section 13 of the Stock Theft Act 26 of 1923, in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft." If the reference pertaining to the stock theft in the section is ignored, for the purpose of this case, then the elements of the

crime can essentially be described as follows. The goods must be found in possession of a person, there must be a reasonable

suspicion that the good have been stolen and the person must be unable to give a satisfactory explanation of the possession. In this regard see also Criminal Law by C R Snyman, 4th Edition, at page 513 and further. The following relevant facts were recorded in the plea-explanation of the first appellant, and I refer to paragraph 4 and 5 of his written plea-explanation. "4. Ek erken dat ek op 29 November 2009 en te St Helena, Calitzdorp, in die distrik van Calitzdorp, wederregtelik en opsetlik in besit was van gesteelde goedere, te wete n laptop, vir welke besit ek nie in staat was om voldoende rekenskap te gee nie.

5. Die volgende het gebeur. Christiano Plaatjies het die skootrekenaar die betrokke dag daar gebring en my gevra om dit vir horn te verkoop. Alhoewel ek nie horn gevra het waar hy dit gekry nie. het ek geweet dat hy dit iewers moes gesteel het. Dit was dan ook die rede hoekom ek nie vir horn gevra het nie." In my view, the admissions tendered by the first appellant, satisfied essential requirements of section 36. The first appellant admits that he was found in

possession of the laptop He also admits that second appellant brought the laptop to his house and he had a strong suspicion it must have been stolen somewhere. The reasonable suspicion requirement that the goods have been stolen was, in my view, properly admitted The first appellant also gave an account of his possession, which in fact borders on admitting theft. In my view if the court a quo erred, then it erred on the side of caution in convicting the first appellant of contravening section 36 and not of a more serious

offence. Returning to the appeal against sentence. The first appellant, at the time of committing the offence, was 15 and 16 years old when sentenced. He resides with his mother and her partner He is the second eldest of five children and the family survives on the income of the mother, who earns approximately R250.00 per month. The appellant has six previous convictions, of which three are relevant, being housebreaking with the intent to steal and theft. The probation officer's report stated the following: "Met inagneming van die SAP 69 van die beskuldigde. was hy reeds 12 jaar oud to hy by misdaad betrokke geraak het. Hy het reeds ses vorige veroordelings, maar nooit was daar oorweging gebied aan die verwysing van 'n jeugsorgsentrum om sodoende die beskuldigde se sterk punte uit te bou nie, ten einde positiewe gedragsverandering te weeg te bring. As daar gelet word na die datums wanneer die beskuldigde misdade gepleeg het, was dit ongeveer een jaar uitmekaar. Dit is 'n baie duidelike aanduiding dat die beskuldigde rehabiliteerbaar is in die gemeenskap met die nodige ondersteuning. Hy is nie n geharde kriminele nie en is ook geen gevaar vir die gemeenskap nie. Die beskuldigde is huidiglik 16 jaar oud en het 'n baie groot akademiese agterstand, dus sal die verwysing na n jeugsorgsentrum nie in die beskuldigde se guns tel nie. Vonnisopsie waaraan oorweging geskenk word is die van 'n opgeskorte vonnis, aangesien die beskuldigde nie n eerste oortreder is nie. Hy kan vir rehabilitasie inskakel by die lewensvaardigheidsprogramme, onder leiding van n assistent proefbeampte." Despite the social ills that may prevail in the community where the appellant resides, society demands that the courts impose

appropriate sentences where crimes of this nature are committed, taking into account the well established principles on sentencing.

It is trite law that direct imprisonment for juvenile offenders should be the last resort. Taking into account the probation

officer's report and the first appellant's previous convictions, it is evident that not all appropriate sentencing options were

considered by the court a quo Moreover, it has not been established that the first appellant is a danger to society that warrants direct imprisonment. The court a quo, in my view, overemphasised the seriousness of the offence and the interest of the society at the expense of the appellant's personal

circumstances. The imposed sentence is also shockingly inappropriate and disproportionate to the interest of the society, the seriousness of the offence and the appellant's personal circumstances. A sentence in the form of correctional supervision in terms of the provision of section 276(1)(h) of the Criminal Procedure Act, would have been a more appropriate sentence in

the circumstances of this case. The first appellant is, however, in prison for almost 10 months to date. Taking into account all the relevant factors pertaining to sentence, I am of the view that a more just and equitable sentence is a term of 18 months imprisonment, of which a portion is suspended for a period on certain conditions. With regard to the second appellant, his plea of guilty was essentially that he was under the influence of drugs when committing the offence. The second appellant's personal circumstances are as follows. He was 16 at the time of committing the offence and at date of sentence. 17 years old He is the eldest of two children and resides with his mother. It appears that his negative behaviour stems from the poor conditions at home and the absence of a father figure. It is apparent from the probation officer's report that the second appellant does not have a good relationship with his mother The appellant has a scholastic achievement of Grade 7. The appellant is dependent upon his mother for his basic needs and the only source of income is the R240.00 child's grant she receives in respect of the second appellant's younger sister The second appellant has two relevant previous convictions The probation officer recommended that he was capable of rehabilitation within the community, provided he has the necessary support and recommended that a suspended sentence be considered. In crimes of this nature, it is expected that the courts must properly consider the personal circumstances of the offender in the determination of sentence. In *S v Kwalase* 2000(2) SACR 135 and at 137i-138a, the court held the following: 'In determining the appropriate sentence to be imposed upon an accused person in any particular case, it is the duty of the court to have regard, not only to the nature of the crime committed and the interest of society, but also the personality, age and circumstances of the offender. In the case of a juvenile offender, it is above all necessary for the court to determine what appropriate form of punishment, in the peculiar circumstances of the case would be best served, the interest of society, as well as the interest of the juvenile. The interest of society cannot be served by disregarding interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. To enable a court to determine the most appropriate form of punishment in the case of a juvenile offender, does become the established practice in a cause to call for a report on the offender by a probation officer in at least all serious cases.' The ideal is that no child should ever have to go to prison. In practice, however, there will always be cases so serious that

imprisonment is the only appropriate punishment, even for juvenile offenders. The approach to the treatment of juvenile offenders is to emphasise the wellbeing of the juvenile and to ensure that any reaction to juvenile offenders will be in proportion to the circumstances of both the offenders and the offence. In this regard see *Kwalase* supra, at 139c-d. The aggravating factors in this matter are that the value of the items that the appellant took, being the laptop and the DVD player, amounted to R5 600,00. The complainant's privacy was invaded. The prevalence of such offences occurs on a regular basis, it appears, in the district of Calitzdorp, and it appears that the appellant's personal circumstances, in particular his previous convictions, are also an aggravating factor. It is true that serious offences merit severe punishment and that the community expects offenders to be punished, but the community also expects at the same time that mitigating circumstances will be taken into account and that an offender's particular

position will be given thorough consideration. The imposed sentence of the second appellant also induced a sense of shock. Moreover, it is also evident that not all the appropriate

sentence options were considered by the court a quo, and it has not been established that the second appellant is a danger to society that warrants direct imprisonment. The court a quo, in my view, overemphasised the seriousness of the offence and the interest of the society, at the expense of the appellant's personal

circumstances. The opposed sentence is disturbingly inappropriate and disproportionate to the crime, the interest of society and the appellant's personal circumstances. With regard to the second appellant, I am also of the view that a sentence, in the form of correctional supervisions in terms of the provisions of section 276(1)(h) of the Criminal Procedure Act would have been a more appropriate sentence, having regards to the fact of this case. The second appellant is also in prison for almost 10 months to date. Taking into account all the relevant factors pertaining to sentence, I am of the view that a more just and equitable sentence is a term of 18 months imprisonment, of which a portion is suspended for a period on certain conditions. It follows that the appeal against the sentence must succeed. In the result the following order is made:-

- (a) The convictions of both appellants are confirmed
- (b) The appeal against sentence succeeds and the opposed sentence is set aside and substituted with the following. (c) Each of the accused is SENTENCED TO 18 (EIGHTEEN) MONTHS IMPRISONMENT in terms of the provisions of section 276(1)(i) of the Criminal Procedure Act 51 of 1977, OF WHICH 8 (EIGHT) MONTHS IS SUSPENDED FOR A PERIOD OF 3 (THREE) YEARS on condition that they are not again convicted of housebreaking with the intent to steal and theft committed during the period of suspension and where direct imprisonment is imposed without the option of a fine. LE GRANGE, J I agree. LAUBSCHER, AJ

The court a quo refused to grant the appellants leave to appeal against their sentence. The appellant then petitioned the Judge President of this division and leave to appeal against sentence was granted. Counsel for the appellants, however, argued that insofar as the first appellant is concerned, the court a quo erred in convicting him of contravening section 36 of the General Law Amendment Act 62 of 1955. It was contended that the written

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LE GRANGE, J

I agree.

LAUBSCHER, AJ

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