

SOUTH AFRICA / JUDGMENT

Lungu v S (CA&R89/22) [2023] ZAECMHC 19 (2 May 2023)

[2023] ZAECMHC 19

COURT

Eastern Cape High Court, Mthatha

BEFORE

Zilwa, Potgieter

CASE / FILE NUMBER

CA&R89/22

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IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MTHATHA

Case

no: CA&R89/22

Court a

quo Case No. RCMF103/22

NOT

REPORTABLE

In the

matter between:

WISEMAN

MAYIBUYE LUNGU

Appellant

and

STATE

Respondent

JUDGMENT

ZILWA AJ

- [1] The Appellant, together with his co-accused, were convicted in the Regional Court, Mount Frere on 13 July 2022 after having pleaded guilty to the charge of contravening the provisions of Section 2, read with the provisions of Section 1, Sections 11, 12, 14 and 15 of Stock Theft Act[1]. He was found in possession of stolen 15 sheep valued at +- R22 500.00.
- [2] They were each sentenced to undergo eight (8) years imprisonment and were also declared unfit to possess a firearm in terms of Section 103 of the Firearms Control Act[2]. The Appellant has appealed against sentence only.
- [3] Leave to appeal was applied for which was refused by the court a quo on 08 September 2022. The Appellant was granted leave to appeal by this Court on 14 November 2022. The Respondent has opposed the appeal.
- [4] The grounds of appeal relied upon by the Appellant, have been couched as follows:
- “ 1. The Learned Magistrate erred and misdirected itself by not giving consideration at all to my personal circumstances as the Applicant, to my age (67), my illness (High Blood Pressure, HIV [...], status, Diabetic), sole breadwinner to my unemployed wife and two children, using the same confiscated vehicle bought cash with my pensions from mines, a year ago and first time offender.*
2. The Learned Magistrate further erred in not taking into consideration facts of the case, that is my involvement on the matter went as far as my vehicle being hired by accused No. 3 who pleaded not guilty and yet still to be tried and separation application of trials was granted as a result of us pleading with my driver, who is my co-accused herein.
3. The Learned Magistrate blatantly disregarded other sentencing options like, sentence with fine, part sentence, suspended or wholly suspend sentence over above the direct term of imprisonment as if such sentence options do not exist or are not deterrent especially on this type of offence. He exercised his unfettered discretion arbitrarily.
4. The Learned Magistrate over emphasized the prevalence of offence over my personal circumstances, and seriousness of the offence in present case in total disregard of circumstances of the offence as if its personal to the Magistrate and more so that he is also from same region and having stock also, which I submit is totally misguidance in the mind of the Magistrate herein.
5. The Learned Magistrate even on the decision to dismiss the Leave to Appeal further misdirected himself by saying sentence is not

shockingly inappropriate if one takes into account seriousness and prevalence of offence in the Region, which he happened also to be from same region and has livestock also, I am reliable informed.”

- [5] It is apposite to highlight in this judgment some of the Learned Magistrate's comments[3] that appear to support grounds number 3 and 4 as follows:

"...This is the dagger into the lives of the poor farmers of this community of this Court's jurisdiction. The poor farmers of this area, instead of taking the money to invest in other forms of business, they have invested in stock farming. When their stock gets stolen in this fashion, the following thing is their death. They die because of [indistinct] because of this kind of an offence and if you look around this offence is very high. It is not longer ... [indistinct] it is business now. People are ... [indistinct] situation or formation and they are doing business with other people's stock. Look how in the manner how this offence was committed..."

...People's kraal, stock kraals are empty in this area of this Regional Court's jurisdiction because if your stock is stolen, the next minute it is in Queenstown or Bloemfontein."

- [6] Having gone through the record of proceedings in the court a quo, no basis is apparent for the abovesaid finding by the Learned Magistrate who appears to have considered information extraneous to the record which the parties had no opportunity to deal with. This constituted a serious misdirection. Nonetheless, the Learned Magistrate also seems to have taken judicial notice of the reality that throughout the country, this is an offence that is prevalent. However, the Court should be careful not to over-emphasize this aspect and should be mindful of the regional incidence of the offence as indicated by as Wessels J in *S v Ndhlovu*[4], namely that :

"one should not overlook the fact that all things being equal one is likely to find that stock theft is committed more frequently in an area where farmers farm mainly with stock or poultry."

- [7] In order to reach a conclusion on whether the trial court imposed an appropriate sentence, it is important to have regard to what is commonly known as Zinn's triad as enunciated in the case of *S v Zinn*[5]. Owing to the trite known limits on an appeal court's power to interfere with a trial court's sentencing discretion, the issue on appeal is mainly is whether the Court a quo misdirected itself in any material respect. One of the enquires is whether the sentence that would have been imposed by the Appeal Court differs so substantially from that imposed by the Court a quo as to justify the sentence imposed being classified as shockingly or startlingly or disturbingly inappropriate, these being the only bases upon which an Appeal Court may interfere with a trial court's sentencing jurisdiction.[6]
- [8] It is this Court's view that the Magistrate's approach of over-emphasizing the impact of stock theft (which, in any event, was not based on the evidence led or part of the submissions made) constituted a misdirection.

- [9] The following dicta in the case of *S v Pillay*[7] are apposite:

"[n]ow the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence ... [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 a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence"

[10] In casu the trial court clearly committed a misdirection of the nature and extent referred to in S v Pillay which therefore indicates that he did not exercise his discretion properly.

[11] The Court a quo further made a point of the impact the stock theft has on the community and society at large but he seemed to have accorded a little

consideration to the following remarks by Harms JA in S v Mhlakaza & Another[8]:

"The object of sentencing is not to satisfy public opinion but to serve the public interest. . . A sentencing policy that caters

predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."

[12] I will now turn to a brief survey of comparable cases dealing with theft of small stock such as goats and sheep for purposes of juxtaposing the sentences imposed by the Court a quo with the sentences imposed in those cases.

[13] The decision of this division, Vunati v S[9] the Appellant had been convicted of stealing 21 sheep. Petse AJ (as he was then), in confirming a sentence of five years'

imprisonment, took into account the seriousness of the offence of stock theft and the large number of sheep stolen by the Appellant 'in what on all accounts appears to be an organised theft motivated by nothing other than greed'.

[14] In S v Tyers[10] the Appellant had been convicted in separate trials of the theft of 15 and 18 sheep. He had been sentenced to 15 months' imprisonment

in respect of each conviction. When he appealed against these sentences, the court gave him notice that it was considering an increase in sentence. The Appeal Court held that the trial Magistrate had given insufficient weight to a number of aggravating factors,

namely the number of sheep stolen, the organised nature of the offences, the fact that the Appellant had not committed them out of economic need or hunger and that he had been motivated by greed. The sentences were increased to two years' imprisonment in respect of each conviction – a total of four years' imprisonment.

[15] In S v Molenbeek & Andere[11] the Appellant, two of whom were policemen, had between them stolen a total of six, five and eight sheep. One was only convicted of one count, three were convicted of two counts and one was convicted of all three counts. All were employed, were young – either 20 or 21 years old – and they were all treated as first offenders. They were all sentenced to 18 months' imprisonment on each count, of which ten months per count was suspended. In other words, the effective terms of imprisonment imposed were

eight months (in respect of one Appellant), 16 months (in respect of three Appellants) and 24 months (in respect of one Appellant). These sentences were confirmed on appeal.

[16] In *S v Oosthuizen*[12] the Appellant had been convicted of three counts of stock theft, involving one, four and 11 sheep, committed over one and a half

months. All of the sheep were ewes in lamb, the Appellant was a first offender, the offences were carefully planned and were committed out of greed. Kriegler AJA described the offences as ‘inherently serious’ and the sentences imposed as ‘robust,

particularly in their cumulative effect’. An effective sentence of four years’ imprisonment was confirmed on appeal.

[17] In *S v Oosthuisen & ‘n Ander*[13] the Appellants, having been convicted of the theft of six sheep, were sentenced to 18 and 12 months’ imprisonment respectively. The First Appellant was a 34 year old farmer who, as a result of an accident, had two artificial legs. He had two previous convictions

for stock theft. The Second Appellant, a 41 year old railway worker, was a first offender. The sentences were confirmed on appeal.

[18] From the above survey, it is clear that the sentences imposed in this case are substantially more severe than any sentence that this Court has been referred to or has been able to find in either the law reports and in unreported comparable cases.

[19] The Appellant, in mitigation, submitted that he is an elderly person who is 67 years old. He is a first offender who is suffering from a chronic illness, diabetes and is HIV [...]. In addition, during argument of the appeal, the Appellant’s legal

representative brought to the attention of the Court that the Appellant was admitted in hospital from 4 December 2022 to 8 March

2023 due to his ill-health which - so the argument ran – on its own is a clear indication that insufficient weight had been attached to his health when he was sentenced. Even though no documentary evidence was produced to that effect the submission was that this Court should have regard to this information which accords with the probabilities. There is no reason to doubt the veracity of this information which was conveyed by an officer of the court and was in line with the undisputed state of health of the Appellant at the trial. For the same reason there is no merit in the submission by counsel for the State that there is no indication that the hospitalisation resulted from any of the known ailments that the Appellant suffers from. This submission is not supported by the probabilities.

[20] From the record the Appellant clearly demonstrated how he found himself embroiled in the commission of the offence. Even his plea explanation revealed that he played a very minimal role in the commission of the offence. It was his vehicle, which he purchased

with the money he received from his pensions pay-out, that was hired by his co-accused. He drove with him from Ntabankulu to Mount Frere and it is where the sheep were taken and loaded in the vehicle. Nothing suggests that the Appellant partook in any stealing of these sheep. As they were driving back to Ntabankulu they were stopped by the members of the South African Police Services who demanded proof of ownership of the stock. They were arrested because they could not account for the stock.

[21] Counsel for the State, Mr Methuso, correctly conceded during argument that he was unable to find any authority that supports the sentence imposed by the Court a quo. Mr Tshitshi, who appeared for the Appellant, also made this point. It was therefore common cause that the sentence imposed upon the Appellant was disproportionate and that, by implication, warrants interference by this Court.

[22] Mr Methuso referred to the case of *S v Solani*[14] which dealt with stock thieves which is clearly distinguishable from the case before us. It is trite that the Court has to look at the blameworthiness of the accused in question. The present matter is clearly different from a case dealing with actual stock theft and accused who actually participated in the commission of the offence. This is an important consideration which was not borne in mind by the Court a quo when imposing sentence on the Appellant. The Respondent has conceded that we are not dealing with a stock thief in this appeal. To that extent the Court a quo materially misdirected itself.

UNFITNESS TO POSSESS A FIREARM

[23] The circumstances of this case do not show a propensity to violence or crime by the Appellant. In fact, nowhere in the evidence has it been shown that there was an act of violence on the Appellant's part. It was therefore inappropriate to declare him unfit to possess a firearm in terms of section 103 of the Firearms Control Act 62 of 2000. The offence of the contravention of section 3 of the Stock Theft Act does not resort under either section 103(1) or Schedule 2 referred to in section 103(2) of the Firearms Control Act. The Appellant must therefore be deemed fit to possess a firearm since the legislation does not prescribe an inquiry into his fitness to possess a firearm. I will however for clarity's sake make an order in this regard since he was previously ordered to be unfit to possess a firearm.

ORDER

- 1) The appeal against sentence is upheld.
- 2) The sentence and order dated 13 July 2022 is hereby set aside and replaced with the following:
 - a) In terms of section 14 of the Stock Theft Act 57 of 1959 read with section 92(1)(b) of the Magistrates Court Act 32 of 1944 the

Appellant is sentenced to R5 000.00 (five thousand rands) or 12 (twelve) months imprisonment.

- b) In addition, the Appellant is sentenced to 12 (twelve) months imprisonment which is wholly suspended for 3 (three) years on condition he is not again convicted of the contravention of the Stock Theft Act 57 of 1959 by receiving stock or produce knowing the same

to have been stolen; or inciting, instigating, commanding or procuring another person- (i) to steal such stock or produce; or (ii)

to receive such stock or produce; or knowingly disposing of, or knowingly assisting in the disposal of, stock or produce which has been stolen or which has been received with knowledge of it having been stolen; or contravening sections two or three of the Stock Theft Act 57 of 1959 and which offences were committed within the period of suspension.

- c) The Appellant is deemed fit to possess a firearm in terms of the Firearms Control Act 60 of 2000.

H ZILWA

ACTING JUDGE OF THE HIGH COURT

I concur

D POTGIETER

JUDGE OF THE HIGH COURT

Heard : 24 April 2023

Delivered : 02 May 2023

Appearances:

For the Appellant: Mr Tshitshi Instructed by Mkata Attorneys 77 Nelson Mandela Drive MTHATHA Ref: Mr S. Tshitshi For the Respondent: Mr Methuso Instructed by Director of Public Prosecutions 94 Sissions Street Fortgale MTHATHA Ref.:Unknown

[1] 59 of 1959.

[2] 60 of 2000.

[3] This is an extract copied and pasted from the transcribed record which forms part of the bundle.

[4] S v Ndhlovu 1961 (2) SA 637 (N) at 638C.

[5] S v Zinn 1969

(2) SA 537 (A).

[6] See : S v Kgosimore 1999

(2) SACR 238 (SCA) para 10.; S v Malgas 2001

- (1) SACR 469 (SCA) para 12.
- [7] S v Pillay 1977
- (4) SA 531 (A) at 534H-534G.
- [8] S v Mhlakaza & Another 1997
- (1) SACR 515 (SCA) at E-G.
- [9] Vunati v S [2003] JOL 11171 (E).
- [10] S v Tyers 1997
- (1) SACR 261 (NC).
- [11] S v Molenbeek & Andere 1997
- (2) SACR 346 (O).
- [12] S v Oosthuisen 1993
- (1) SACR 10 (A).
- [13] S v Oosthuisen & 'n ander 1996
- (1) SACR 475 (C).
- [14] S v Solani 1978 (1) SA 432 (TK).
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