

SOUTH AFRICA / JUDGMENT

Magano v S (CA12/2020) [2024]

ZANWHC 254 (11 October 2024)

[2024] ZANWHC 254

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, A H Petersen

CASE / FILE NUMBER

CA12/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO: CA12/2020
REGIONAL
MAGISTRATES CASE NO: SRC 01/2017

Reportable: YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO
In

the matter between: OAGENG
JIM
MAGANO
Appellant
and
THE
STATE
Respondent

CORAM: HENDRICKS JP et PETERSEN J
DATE
OF HEARING
: 29
NOVEMBER 2023
DATE
OF JUDGMENT
: 11
OCTOBER 2024
FOR THE
APPELLANT
: ADV. CJ
ZWIEGELAAR
FOR
RESPONDENT
: ADV. WP
NDHLOVU

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 11 October 2024.
ORDER
In

the premises, the following order is made: (i)
The appeal against sentence is upheld.
(ii)
The sentence of seven years effective imprisonment is set aside and substituted with the following

sentence: 'Seven
years imprisonment of which three years imprisonment is suspended for a period of three years on condition that the accused (Mr. Oageng Jim Magano) is not convicted of housebreaking with intent to steal and theft or any of the competent verdicts thereto, which offence is committed during the period of suspension.'
(iii)
Mr. Oageng Jim Magano is declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.
(iv)
The sentence is antedated to 31 January 2017.
(v)
The appellant, Mr. Oageng Jim Magano, should be released forthwith if he is still in detention for this matter.

JUDGMENT

HENDRICKS JP

Introduction

- [1] In an endeavour to eradicate the backlog of criminal appeals, a project was embarked upon at the end of the fourth term of 2023. This appeal forms part of those appeals and was enrolled for hearing on 29 November 2023. The scribe assigned to pen the judgment for the Full Bench, Mr D Joubert AJ, failed to do so and the delivery of a judgment has consequently been delayed for more than ten months. This defeated the purpose of the project which had as its goal, the expeditious finalization of the backlog appeals. The delay in finalizing this appeal is indeed regrettable. On 04 October 2024, I deemed it prudent to re-allocate this appeal to a different panel of Full Bench judges. I further took it upon myself to pen this judgment, adjudicated on the papers as permitted within the purview of section 19 (1) (a) of the Superior Courts Act 10 of 2013, and indicated as such in the practice notes of both counsel for the appellant and the respondent (State).
- [2] This matter has a long and protracted history. The appellant was arrested on 09 November 2016, arraigned in the Regional Court, Stilfontein and charged with the offence of housebreaking with intent to steal and theft committed nearly eight (8) years earlier, during the period 20 to 23 March 2009. It was alleged that he broke into a distribution station of Eskom and stole bassbars with links to the value of R280.000.00. On 31 January 2017, he pleaded guilty and was sentenced to an effective term of imprisonment of ten (10) years on even date. He was also declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.
- [3] The appellant lodged an appeal to the Gauteng Division of the High Court, Pretoria, which at that time was seized with jurisdiction over Stilfontein. The appeal was upheld, and the sentence was set aside. The matter was remitted to the Regional Court, Stilfontein for reconsideration of the sentence based on new information that emerged. The Regional Court, after reconsideration of the sentence, imposed an effective term of imprisonment of seven
- (7) years imprisonment on 09 December
2019. The rationale behind the imposition of the seven (7) year term, was that the appellant already served three years of the sentence previously imposed on 31 January 2017. Leave to appeal against sentence was granted on 11 December 2019; hence the present appeal.
- [4] The sentence is assailed on the basis that it is shockingly severe and inappropriate, as it was based on the reasoning that the appellant served three years of the ten year' sentence imposed previously on 31 December 2017. It is contended that, in effect, it implies that the trial court would again have imposed a terms of 10 years imprisonment and by implication

ignored the additional information that was to be taken into account during reconsideration of sentence as ordered on appeal. To exacerbate this, the sentence was also not antedated to 31 January 2017, the initial date of sentencing. There is also in addition an alternative argument advanced that the appellant may will have been released on parole had the sentence been antedated, and even if he is released on parole, the matter is not moot as the record of previous convictions (SAP 69's) of the appellant needed to reflect the correct state of affairs. The appeal has therefore a real extant issue to be adjudicated, even though almost four years' and ten months have passed.

- [5] It is trite law that a court of appeal will not likely interfere with the sentencing discretion of a trial court. It will only do so in limited instances where a misdirection has been committed by the trial court or where, for example, the sentence is shockingly severe and excessive and totally out of proportion to the crime committed.

See: *S v Mtungwa en 'n Ander* 1990

- (2) SACR 1(A).

S v Malgas 2001

- (2) SA 1222 (SCA).

[6] The grounds on which a court of appeal may interfere with a sentence on appeal are:

- (i) where the sentence is disturbingly, shockingly inappropriate; and/or
- (ii) where the sentence is so badly out of proportion to the magnitude of the offense(s) and/or
- (iii) where the sentence is significantly disparate; and/or
- (iv) where the sentence is vitiated by a misdirection showing that the trial court exercised its discretion unreasonably; and/or
- (v) where the sentence is otherwise such that no reasonable court would have imposed it.

See: *S v Giannoulis* 1975

- (4) SA 867 (A).

S v Kibido 1998

- (2) SACR 213 (SCA)

S v Salzwedel & Others 1999

- (2) SACR 586 (SCA)

S v Matyityi 2011

- (1) SACR 40 (SCA)

S v Dodo

[2001] ZACC 16; 2001

(3) SA 382 (CC)

[7] In the main, it is contended that the trial court erred in failing to antedate the seven year' effective term of imprisonment to 31 January 2017. Section 282 of the Criminal Procedure Act ('CPA') provides as follows:

"282 Antedating sentence of imprisonment

Whenever any sentence of imprisonment imposed on any person on conviction for an offence is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified."

[8] In this regard, it is contended on behalf of the appellant, that although section 282 does not empower a trial court to antedate the sentence, that Regional Court in casu, having been directed by the High Court to impose sentence afresh was empowered to antedate the sentence. Reliance was placed on *S v Seekoei* [1997] 1 All SA 40 (NC) and *S v De Boer* 1968 (4) SA 867 (A).

[9] The question therefore arises whether it would have been competent for the trial court to antedate the sentence which it imposed afresh. It appears common cause that the Regional Magistrate deducted the period of three years imprisonment already served from the sentence she regarded as a just sentence, to wit, ten years imprisonment. This was done, I presume, on the basis that as the trial court, the Regional Magistrate was not empowered to antedate the sentence.

[10] Generally, antedating a sentence cannot take place at trial (*Director of Public Prosecutions, Gauteng Division, Pretoria v Plekenpol* [2017] ZASCA 151 at [21]). It is strictly limited to new sentences imposed on review or appeal. Section 282 is directed at courts of appeal and review. Trial courts are not empowered to invoke the section. It is clear that in the context of the present matter, that only if the sentence of imprisonment is set aside and any other sentence of imprisonment is imposed that such sentence of imprisonment may in terms of section 282 of the CPA as amended, be antedated.'

See: *S v Harthorne* 1980

(1) SA 521 (A).

S v Sileni 2005

(2) SACR 576 (EC).

Hiemstra's Criminal Procedure, Albert Kruger, Issue 1, page 28-43.

[11] In S v Masango 2017

(1) SACR 571 (GP) at paragraph 19, the order of a Full Court of the Gauteng Division was instructive to the trial court on antedating any new sentence of imprisonment imposed, after the Full Court referred the matter back to the trial court to consider sentence afresh. The order at paragraph 19 of Masango reads as follows:

"[19] I, in the result, would make the following order:

1. The appellant's appeal against sentence succeeds.
2. The sentences imposed against the appellant are set aside.
3. The matter is remitted back to the High Court to consider the appellant's sentences afresh after hearing evidence and/or obtaining facts in mitigation envisaged in terms of s 274(1) of Criminal Procedure Act 51 of 1977 relevant to the imposition of sentences.
4. The sentences imposed on counts 1, 3, 4 and 5 the appellant is found guilty of respectively, must be backdated to the date of the original sentences."

(my emphasis)

[12] Similarly, a court of review of the Western Cape Division, in S v Ndzishe & another 2023

(2) SACR 419 (WCC) at paragraph 30, upon remitting the matter to the trial court, ordered that "... (c) Should the accused still plead guilty and be convicted — in sentencing, the court should consider the time already spent by the accused in custody serving sentence. The court may also consider antedating the sentences..."

[13] The orders in Masango and Ndzishe, however, do not appear to accord with the body of authority, which includes a plethora of decisions of the Supreme Court of Appeal

(SCA). The genesis of authority in this regard from the SCA, is S v RO & another 2010

(2) SACR 248 (SCA), where the SCA held at paragraph 44, that:

"[44] The appellants have been continuously held in custody as convicted prisoners since 17 September 2002 when the regional court imposed the initial 'sentence'. That 'sentence' was set aside as invalid on 25 February 2005 (ie 2 years and 5 months into the 'sentence') and replaced by the sentence imposed by the High Court. The last-mentioned date is 'the date on which the sentence of imprisonment imposed on conviction was imposed' within the terms of s 282. If 15 years' imprisonment was the appropriate sentence then the terms of our order should be adapted to take account of both the statute and the true length of incarceration of the appellants."

[14] The position is, however, different when a sentence is set aside on appeal or review and a new sentence of imprisonment is imposed. In this regard the very purpose of section 282 of the CPA is to empower review and appeal courts to take into account any part of a sentence that has already been served (See: *S v Mashinini & another* 2012

(1) SACR 604 (SCA) at [30]; *S v Phillips* 2017

(1) SACR 373 (SCA) at [21]). In *Director of Public Prosecutions, Gauteng v Tsotetsi* 2017

(2) SACR 233 (SCA) at paragraph 33, for example, the SCA held that it was ‘in the interests of justice’ that the sentences imposed by the court had to be antedated to the date of the trial court’s original sentences, due consideration given to the fact that the appellant had been incarcerated even prior to her trial.

[15] It was submitted on behalf of the appellant that this Court, as court of appeal, ought to antedate the sentence of seven years imprisonment to 31 January 2017. That this Court, sitting as a court of appeal, is empowered to antedate the sentence in terms of the provisions of section 282 of the CPA behoves no argument. This Court may do so, in the exercise of its discretion, based on the principle of fairness to ensure that the sentence is just and equitable. This does not follow automatically but must be fact based. Each case must be decided on its own facts, circumstances and merits.

[16] In judgment on sentence, the Regional Magistrate stated:

‘The state was of the opinion as seeing, looking at the seriousness of the crime and the property involved that a 10 year imprisonment sentence was in order and should be imposed on you.’

‘The Court do no, the Court have no doubt that this sentence is an appropriate sentence of the crime for which you were convicted of, but however the Court, the Court taken into, has taken into consideration your circumstances placed before the Court. You have

already served 3 years on the sentence imposed on you during January 2017.’

[17] The Regional Magistrate steadfastly believed that a sentence of ten years imprisonment is a fair and just sentence. However, because three years were already served prior to reconsideration of sentence, a term of seven years was imposed. Objectively viewed, the reasoning of the Regional Magistrate constituted a serious misdirection. The Full Bench in Gauteng set aside the very sentence which the Regional Magistrate on reconsideration of sentence considered suitable, and from which she simply mechanically deducted three years because of the period already served by the appellant on the original sentence of ten years imprisonment imposed on 31 January 2017. This Court is therefore at large to interfere with the sentence imposed by the Regional Magistrate pursuant to the order of the Full Bench in Gauteng. The powers of this Court in section 282 of the CPA are therefore also applicable.

- [18] The following factors need to be highlighted in order to give proper perspective to the facts and circumstances of this case. The offence was committed between 20 and 23 March 2009. The appellant was out on bail and absconded. He was subsequently arrested and tried. He pleaded guilty and was sentenced to ten years imprisonment on 31 January 2017. He successfully appealed the sentence. The matter was remitted to the Regional Court for sentencing afresh. On 09 December 2019 (three years later) he was sentenced to seven years imprisonment. On 11 December 2019 leave to appeal the sentence of seven years was granted to the appellant. The appeal was only enrolled on 29 November 2023 (almost four years later). It is quite apparent that this appeal was not timeously prosecuted. Only after another passage of ten months is a judgment on appeal delivered, as alluded to earlier, by a differently constituted Full Bench.
- [19] The personal circumstances of the appellant is that he was a first offender aged 46 years during trial. He is the father of two minor children aged 10 and 16 years respectively during 2019, who were in the care and custody of their biological mothers. He was self-employed. He maintained his children and his family also assisted financially to maintain the children. He pleaded guilty and demonstrated remorse.

Order

[20] In the premises, the following order is made:

- (i) The appeal against sentence is upheld.
- (ii) The sentence of seven years effective imprisonment is set aside and substituted with the following sentence:
- (iii) Mr. Oageng Jim Magano is declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.
- (iv) The sentence is antedated to 31 January 2017.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

I agree.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

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