

SOUTH AFRICA / JUDGMENT

Mncube v S (A71/2017) [2019] ZAMPMHC 7 (15 October 2019)

[2019] ZAMPMHC 7

COURT

Middelburg High Court, Mpumalanga

BEFORE

TV Ratshibvumo, N Mali

CASE / FILE NUMBER

A71/2017

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG LOCAL SEAT

CASE

NO: A71 / 2017

In

the matter between:

THEMBINKOSI
D MNCUBE
APPELLANT
and
THE
STATE RESPONDENT

Summary:

Criminal
Law and Procedure – Appeal against the sentence –
Competent verdict – Housebreaking with the intention
to steal
and theft – whether an offence of c/sec 37 of Act 62 of 1955 is
a competent verdict – Appeal court jurisdiction
to hear appeal
on merits when petition is granted in respect of the sentence.
Role
of previous convictions in sentence. Confirms the principle.
Appellant
pleading guilty to contravening sec 37 of Act 62 of 1955 –
receiving stolen property knowing it to be stolen –
items
valued at R5 200 and sentenced to 8 years imprisonment.
Held

– Appeal court’s jurisdiction to hear appeal on conviction limited to a review of the trial court proceedings and not the refusal of the petition.

Held

further – previous convictions not a reason for an offender to be sentenced for his past crimes; but that the sentence may not be blended with mercy as though he is a first offender.

J

U D G M E N T

RATSHIBVUMO AJ:

1.

Introduction:

This

is an appeal against the sentence imposed by the Regional Court sitting in Volkrust, on Mr Mncube (the appellant). He was convicted and sentenced on a different charge than what he was initially charged with. This aspect became the subject of the submissions made before us. Suffice for now to state that he was convicted of contravening section 37 of Act 62 of 1955 – receiving stolen

property (the value of which was R5 200) knowing it to be stolen. Following his conviction on a “guilty”

plea, he

was sentenced to eight years imprisonment. His application for leave to appeal against the sentence imposed, was refused by the trial

court. He petitioned the Judge President of the Gauteng Division and petition on sentence was granted per

Makgoka et

Keightley JJ.

2.

When

the matter came for hearing on appeal, few aspects were brought to our attention regarding the procedure adopted that led to the

conviction of the appellant. The appellant, who was legally represented by an attorney, Mr. Biyela was charged with a crime of

housebreaking with the intention to steal and theft and this is the charge he pleaded guilty to. When the legal representative confirmed

the plea, the presiding officer invited him to read a statement in terms of sect 112 (2) of the Criminal Procedure Act[1] (the Act) asking, “is that on the alternative Mr. Biyela?”

and the legal representative confirmed. A statement was read into the

record regarding the facts upon which he pleaded which in essence amounted to receiving stolen property knowing it to be stolen. No

reference to Act 62 of 1955 was made until the presiding officer

counsel to give
substantiated response
as follows:

invited the legal representative to insert the
same in the statement,
which he did.

3.

There was in fact no alternative charge to
the charge of housebreaking with the intention to steal and theft.
When the matter came
before us, we formulated the questions for the

3.1

Is the offence of contravening section 37
of Act 62 of 1955 a competent verdict on a charge of housebreaking
with the intention
to steal and theft?

3.2

If so, can a verdict on a competent verdict
be returned without evidence being led?

3.3

Since the answers to the above two
questions impacts directly on the conviction and this matter is
before us on petition on sentence
only, does this court have the
jurisdiction to hear the appeal on conviction?

4.

Expansion of the grounds of appeal on
sentence to cover the conviction.

Both

counsel submitted in full agreement with each other that the court
had the inherent jurisdiction to hear appeal on conviction
even when
the petition was only sought and granted in respect of the sentence.
They did not refer us to any authority.

5.

Sight

need not be lost of the fact that if petition is sought on both the
conviction and the sentence and only granted on one of
these, it
essentially means that petition was refused by the two judges on the
one that is not granted. In *S v Fourie*[2],
the Supreme Court of Appeal (the SCA) dealt with an appeal in which
the trial court had granted leave to appeal only in respect
of one
conviction and refused it in respect of others. A petition to the SCA
to expand the grounds of appeal had previously been
dismissed. Upon
presenting his argument on appeal, the appellant submitted that if
the scope of the appeal is not extended to cover
appeal the
convictions in which leave to appeal was not granted, it might result
in some injustice. In support of this argument,

the SCA was reminded of its inherent reservoir of power to regulate procedure in the interests of the proper administration of justice.[3]

The SCA refused to expand the grounds of appeal when it held that the power to regulate its procedure does not include the power to hear a matter which is not the proper subject of an appeal. This is simply because the court's appellate jurisdiction is not an inherent jurisdiction.[4]

6.

In

S

v Van der Merwe[5],

the High Court sitting as a court of appeal was also asked to expand the appeal to cover an appeal on conviction even though the petition

to the Judge President on conviction was already refused by the two judges. The court held that if the decision taken by the judges who

had dealt with the petition was considered to have been judicial in nature, the court would not have jurisdiction to exercise its review

powers, since the proceedings of the High Court were not reviewable; and a decision in terms of s 309C of the Act was indeed judicial in

nature. Consequently, the court could not employ its review powers to hear an appeal against conviction

when the petition on it was

refused. While decisions of a Lower Court are reviewable, decisions of the High Court are not. The court went further to hold that

Section 173 of Constitution of Republic of South Africa, does not confer additional rights on a

High Court to grant leave to appeal

over and above clear provisions and processes created by statutes and Rules of Court.

7.

The reason for this approach is that in

expanding the appeal to cover that which was refused on petition, the court reviews the

decision to refuse it. That does not mean the

decision to refuse a petition will stand even when the appellant would suffer injustice

due to the decision to refuse petition. This

needs to be approached the same way a decision by a magistrate to refuse leave to

appeal in circumstances where the accused would

suffer injustice if the matter does not go on appeal. The accused needs to look

into appealing the decision to refuse leave to appeal through petition provided for in section 309C of the Act. Equally, the decision to refuse petition can be appealed against through further petitioning the SCA.

8.

Section

16(1)(b) of the Superior Court Act[6]

provides,

16.

Appeals generally

(1)

‘Subject to s 15(1), the Constitution and any other law –

...

(b)

an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal...’

It

is through this provision that several matters where a petition was refused by the High Court on one or more grounds were subjected to further petition to the SCA.[7]

9.

In

S

v Moyo,[8]

the Gauteng Division of the High Court, Johannesburg took a different approach. The circumstances in Moyo can however be distinguished from Van der Merwe

in that in Moyo,

the court took an approach to the effect that the judges who dealt with the matter on petition dealt with the appellant’s appeal

against the conviction; and when the matter came on appeal, it transpired that there was irregularity in respect of trial procedure

in that the court was not properly constituted. The appeal court dealt with a review of the procedure adopted by the magistrate which

until then had not been dealt with by the court that dealt with the petition. On petition, the court had allowed the appeal on sentence

and refused it on conviction. Having established the irregularity in the trial proceedings, the appeal court reviewed the proceedings in

terms of sec 304(4) of the Act and set aside the conviction irrespective of the fact that the matter

had been before it as a

petition.

10.

In the present case, the court is not called upon to revisit a decision of the High Court on petition since there was no petition on conviction. The issues raised in the first two questions deal with the procedure adopted in trial and not the merits of the case that culminated in the conviction of the appellant. If Moyo is followed, it entails that in the absence of any irregularity in the procedure adopted by the trial court, the appeal court does not be at liberty to review the conviction with a view to set it aside in terms of section 304(4) of the Act. Based on answers we give to the first two questions, it would not be necessary to deal with this matter in terms of section 304(4) of the Act. It will therefore be dealt and finalised in terms of section 309C of the Act.

11.

Is the offence of contravening section 37 of Act 62 of 1955 a competent verdict on a charge of housebreaking with the intention to steal and theft? Competent verdicts on a charge of housebreaking with the intention to steal and theft are listed under section 262 of the Act and the offence of contravening section 37 of Act 62 of 1955 is not one of them. The offence of contravening section 37 of Act 62 of 1955 is however a competent verdict on a charge of theft according to section 264 of the Act.

12.

The crime of housebreaking with the intention to steal and theft has always been seen as two separate crimes committed through a single act. In *S v Maswetswa*[9], Wepener J referred to a quotation by Jennet J with approval regarding the separation between the crime of housebreaking and theft where the following was held, “Jennett J said in *S v Cetwayo* 2002 (2) SACR 319 (E) as

follows at 321:

'It is trite that housebreaking with intent to commit an offence is in itself a substantive offence (see s 262 of Act 51 of 1977) and that it is a separate offence from the actual offence, for the purpose of which the housebreaking was committed, if such be committed. The practice is, however, that, if the offences relate to what is in effect a single incident, they are, unless there is good reason to the contrary, charged as a single offence and a single punishment is imposed.

In confirmation of the above I need only refer, firstly, to *R v Chinyerere* 1980 (2) SA 576 (RA) where at 580A – C Lewis JP said the following: "One has to bear in mind, however, that housebreaking with intent to steal and theft are separate offences. This is made clear in *Hunt South African Criminal Law and Procedure* vol II. The learned author traces the history of housebreaking with intent to steal and theft and points out that under the old Roman-Dutch law housebreaking with intent to steal and theft was simply regarded as an aggravated form of theft. However, in the modern South African law this is no longer the case. The learned author at 644 says this: 'The effect of this development is that, unlike Roman Dutch law, house-breaking is no longer regarded as an aggravated form of theft. The house-breaking with intent to steal and theft are two separate offences, though they are in practice charged and punished as one offence, so that in such cases the result is the same.'

13. I am inclined to agree with the views expressed by Stegman J in *S v Maunye and Others*[10], when he held that an incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with housebreaking as a factor that tends to aggravate the seriousness of the offence and therefore the severity of the sentence.[11] Having said that, I am satisfied that the crime of theft can be seen as a separate and independent offence from housebreaking and as a result, competent verdicts applicable only to a charge of theft are consequently competent verdicts on a charge of housebreaking with the intent to steal and theft. The court in *S v Chauke*[12]

did not follow this approach. In Chauke, the High Court held that the offence of receiving stolen property was not a competent verdict on a charge of housebreaking with the intention to steal and theft.

14.

Chauke

was

however disapproved and not followed in many divisions. In S v Nell[13]

for example, it was held that contravention of s 36 of General Law Amendment Act 62 of 1955 (possession of suspected stolen goods without being able to give satisfactory explanation for such possession) was a competent verdict on a charge of housebreaking with the intention to steal and theft. In S

v Maunye[14],

the TPD as it then was said the following of Chauke,

“[The High Court] was of the view that to conceive of the latter charge as having separate components, with each component carrying a separate list of possible competent verdicts 'would amount to an improper splitting of charges'. In my respectful view,

Chauke

is not to be followed in this Division in regard to that particular point. There is a considerable weight of authority that has been

followed for many years, to the opposite effect.” I agree with this approach and therefore satisfied that the offence of receiving

stolen property knowing it to be stolen is a competent verdict on a charge of housebreaking with the intention to steal of theft. For

this reason, the approach in Chauke cannot be followed in this case.

15.

Can a verdict on a competent verdict be returned without evidence being led?

Section

264 of the Act provides that if evidence on a charge of theft does not prove the offence of theft but an offence under section 36 or 37

of the General Law Amendment Act, 1955 (Act 62 of 1955); the accused may be convicted of the offence so proved. The contention was based

on the fact that no evidence was let and the appellant submitted that the conviction was an irregularity since a guilty plea cannot be classified as evidence as intended by the Legislature.

16.

An answer to this question can be found in section 106 of the Act. Section 106 provides for various pleas that an accused person

can enter once charges are put against him. It provides,

106

(1) When an accused pleads to a charge he may plead-

(a)

that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or ... [My emphasis].

17.

It

appears therefore that as long as the offence an accused pleads guilty to, is a competent verdict to a charge put against him/her, he/she is within his/her rights to plead guilty to that offence. Du Toit

Commentary[15] on the Act

under section 106 submits that section 106(1)(a)

is

wide enough to permit a plea of guilty to an alternative charge or a charge in respect of which a competent verdict is permitted by the

Act. But if the plea of guilty is a plea to an alternative charge or competent verdict, it is not a plea of guilty to the offence charged

and questioning in terms of s 112(1)(b)

is

not authorised unless

the prosecutor accepts the plea to the alternative charge or competent verdict

(S

v Peter 1996

(2) SACR 212 (C) 217b-c)

[My emphasis].

18.

Where

a prosecutor, before any evidence is led, accepts a guilty plea on an alternative charge or competent verdict, the ambit of the lis

between the prosecution and the accused is limited in accordance with this plea. The SCA held that a presiding judicial officer who rules

that the trial must proceed on the main charge, commits a 'gross irregularity' and interferes with the independence of the

prosecution.[16]

19.

In casu,

the public prosecutor made it clear that he accepted the plea on a competent verdict of receiving stolen property knowing it to be

stolen. Although question on whether a plea constitutes evidence or not is now rendered moot given the provisions of section

106 of the
Act; I deem it a necessary academic exercise to consider the
submissions by the counsel for the appellant who submitted
a volume
of authorities that suggest that the Legislature could not have
intended that a guilty plea by an accused person be regarded
as
evidence. The intention of the Legislature on how a plea should be
regarded can be construed from section 113(1) of the Act
which
provides,
“If
the court at any stage of the proceedings under section
112
(1)
(a) or (b) or 112 (2) and before sentence is passed is in doubt
whether the accused is in law guilty of the offence to which
he or
she has pleaded guilty or if it is alleged or appears to the court
that the accused does not admit an allegation in the charge
or that
the accused has incorrectly admitted any such allegation or that the
accused has a valid defence to the charge or if the
court is of the
opinion for any other reason that the accused’s plea of guilty
should not stand, the court shall record a
plea of not guilty and
require the prosecutor to proceed with the prosecution: Provided that
any
allegation, other than an allegation referred to above, admitted by
the accused up to the stage at which the court records a
plea of not
guilty, shall stand as proof in any court of such allegation.
[My emphasis].

20.

A similar provision exists in section 220
of the Act dealing with admissions which provides that an accused or
his/her legal adviser
or the prosecutor may in criminal proceedings
admit any fact placed in issue at such proceedings and any
such admission shall be sufficient proof of such fact.
It is my respectful view that the Legislature intended that
admissions made in a guilty plea should stand as proof of any fact
even after a plea may have been corrected to one of “Not
Guilty” in terms of section 113 of the Act. Admissions made
in
in terms of section 220 or those recorded before a plea is corrected;
carry the weight of evidence upon which a conviction can
stand even
if the case for the State is closed without further evidence being
led. I therefore conclude that a plea statement carries

the weight of
evidence in a criminal trial.

21.

Given the answers to the questions above,
the submission to the effect that the trial was irregular cannot
stand. Before dealing
with the petition on sentence, it is imperative
on us to remark on the role of the presiding magistrate which
resulted in this
whole debacle unfolding on appeal.

22.

Unrecorded discussions between the
defence and the magistrate.

The

root cause of doubt on whether the proceedings were irregular can be
traced to the magistrate having knowledge that is not borne
out of

the record. It would appear that there were discussions between the
magistrate and the accused or his legal representative
which are not

on record. The first time that we learn that the accused was to plead
guilty on an alternative charge (even though
there was none put or

read out by the public prosecutor), was from the magistrate himself.

Had he encountered this plea for the
first time in an open court and

on record, he would have been able to ask the questions that
unfortunately escaped the trial court's
attention and found

their way to appeal court. He would have been informed by the counsel
as to whether the plea was on the main,
the alternative charge or a

competent verdict. He would also have been able to question him
on why a plea was tendered on
an alternative charge while none was
levelled against the accused.

23.

We can only emphasise what is already a
standing practice to wit, judicial officers should avoid discussing
merits of the case with

counsel in any other forum, other than in
open court and on record. Had that been adhered to, I have no doubt
that most of the

questions that arose on appeal would have been
avoided. Discussions of matters outside the proper forum can lead to
unnecessary

and sometimes unfounded accusations being levelled
against the judiciary. The judicial officer risks his/her part of the
discussion

being wrongly relayed to the public. For this is the same
public amongst which are family members who wait in great anxiety to

hear the fate of their loved ones, or victims of the crime who eagerly await the dispensation of justice for the crimes they were subjected to.

24.

Appeal against the sentence.

It

was submitted on behalf of the appellant that the sentence imposed by the trial court induces a sense of shock. The respondent

however

submitted that the sentence imposed is appropriate and should not be interfered with. The major reason for the respondent's

contention is a long list of previous convictions that the appellant had when he was sentenced. Between 2005 and 2015, the appellant had

seven previous convictions on theft including one where he paid an admission of guilt fine. Out of these, he received wholly suspended

sentences in four of them; in one, he was sentenced to a fine of R3 000.00 half of which was conditionally suspended and in the

last one, a sentence of 12 months imprisonment half of which being conditionally suspended, was imposed. Some of the suspended sentences

can still be put in operation should there be such an application in that the appellant appears to have breached the condition for

suspension with the several convictions that took place during the period of suspension.

25.

At the time of the sentence, the accused

was 33 years old, single and a father of two children. He was self-employed; selling fire

wood earning an income of about R1 000.00

per month. He was responsible for maintaining his two children. It was not established

if he was the primary caregiver of his children

or not. There is no doubt that the sentence imposed is one of the harshest sentences

comparatively speaking. We could not lay our hands on any reported case in which a similar sentence was imposed for this offence.

It is obvious from the record that the court attached a lot of weight on the previous convictions the appellant had.

26.

Sight

was unfortunately lost on the role of previous convictions upon sentencing of an offender. Some of the previous convictions

taken

into consideration for sentence in this matter were older than 10 years and did not have to be considered in imposing the sentence in

terms of section 271A of the Act.[17]

The role of previous convictions can simply be explained as an offender who has exhausted a room for mercy from the courts. This does not entail that the offender has to be sentenced for his past wrongdoing since he received punishment for that. In S

v Baartman,
the following was held,
In a case such as this it

is necessary to be aware
of three considerations:

(a) the
accused should be sentenced for the offence charged and not for his
previous record;

(b) the
public interest is harmed rather than served by sentences that are
out of all proportion to the gravity of
the offence; and

(c) while
it may be justifiable up to a point to impose escalating sentences on
offenders who keep on repeating the
same offence, there are
boundaries to the extent to which sentences for petty crimes can be
increased... It all comes down to the basic principle
that the punishment should fit the crime.

27.

In

S

v Matiwane[18],

a 32 years old father of two children was sentenced to 3 years
imprisonment for theft of items valued at R111. He had a record
of 17

previous convictions of theft and housebreaking with the intention to
steal and theft. On appeal, the sentence was set aside
and replaced

with a caution and discharged. In S

v Mani[19]

and S

v Siebert[20],

the offenders who were all convicted of receiving stolen motor
vehicles knowing that they were stolen, were sentenced to no more
than 2 years imprisonment in one and in another, the SCA reverted the
matter back for the court to consider a non-custodial sentence
of

correctional supervision. In S

v Smith[21],

Erasmus J agreed with the approach in S

v Baartman[22]

when he held,

“I respectfully

endorse the views of my brother. I particularly underscore for the
benefit of the magistrate the dictum that an accused
must be punished

for the offence charged and not for other crimes committed in the past. Undoubtedly, previous convictions are relevant to sentence, but only in so far as they reflect upon the character of the accused. A person with a record such as that of the accused is obviously less deserving of mercy than is a first offender; he is also probably less amenable to rehabilitation.

Furthermore, the criminal history of an accused is relevant to the prospects of his repeating his offence, which is a consideration relevant to sentence, but which cannot be taken too far. Preventive imprisonment is not part of our law. Sentences therefore cannot escalate indefinitely beyond the point where they are out of proportion to the crime. Prevalence of the offence is a consideration when it comes to sentences, but care must be taken not to punish an accused for the crimes of others.”

28.

As

a general rule, a court of appeal would be disinclined to interfere with the sentence because sentencing falls within the exclusive discretion of the trial court. It is only when there is a serious misdirection on the part of the trial court, failure to exercise the

discretion properly or when the sentence imposed is startlingly inappropriate that a court of appeal is invited to interfere.[23]

I have no doubt that the court a quo overemphasised the previous convictions of the appellant and in the process disregarded his personal circumstances. The discretion of the sentencing court was therefore not exercised judiciously.

29.

In view of the fact that the appellant has been in custody for over 18 months now, I would consider a sentence of 19 months imprisonment as appropriate.

30.

In the result I would make the following

order:

30.1 Appeal against the sentence is upheld.

30. 2The sentence imposed

by the trial court is set aside and replaced with the following:

30.3 Accused is sentenced to 19 months imprisonment.

30.4 This sentence is antedated to 15 March 2017.

No order is made in terms of section 103 of Act 60 of 2000 (the accused is automatically declared unfit to possess a firearm).

TV
RATSHIBVUMO
ACTING
JUDGE OF THE HIGH COURT
I
agree and it is so ordered.

N MALI
JUDGE
OF THE HIGH COURT
FOR THE
APPELLANT
: ADV I ERASMUS
INSTRUCTED
BY
: LEGAL AID BOARD
MBOMBELA
FOR THE
RESPONDENT
: ADV VAN DER MERWE
INSTRUCTED BY
: DIRECTOR OF PUBLIC
PROSECUTIONS
MPUMALANGA
DATES
HEARD
: 06 & 13 SEPTEMBER 2019

JUDGMENT

DELIVERED : 15 OCTOBER 2019

[1] Act no. 51 of 1977.

[2] 2001

(2) SACR 118 (SCA)

[3] See S v Malinde and Others 1990

(1) SA 57 (A) at 67B; Sefatsa and Others v Attorney-General, Transvaal and Another 1989 (1) SA 821 (A) at 834E.

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- [4] See Fourie (supra) at para 13. See also S v Gentle and another 2003 (1) SACR 395 (C) and S v Khumalo 2009 (1) SACR 503 (T).
- [5] 2009 (1) SACR 673 (C)
- [6] Act no. 10 of 2013.
- [7] See for example S v Khumalo 2019 JDR 0008 (SCA) where the High court had refused petition on conviction but allowed it on sentence only. Special leave of the SCA was allowed to appeal against the decision to refuse the petition on conviction but it dismissed the appeal.
- [8] 2018 (1) SACR 658 (GJ)
- [9] 2014 (1) SACR 288 (GSJ)
- [10] 2002 (1) SACR 266 (T).
- [11] See S v Maunye and Others (Supra) at 277f – 278b
- [12] 1998 (1) SACR 354 (V)
- [13] 2009 (2) SACR 37 (C)
- [14] 2002 (1) SACR 266 (T)
- [15] See E Du Toit et al, “Commentary on the Criminal Procedure Act,” sec 106
- [16] See Tshilidzi v S [2013] ZASCA 78 (unreported, SCA case no 650/12, 30 May 2013) at [5], [6] and [8].
- [17] See S v Segwati 2019 JDR 0637 (SCA).
- [18] 2013 (1) SACR 507 (WCC).
- [19] 2002 (2) SACR 393 (E).

[20] 1998

(1) SACR 554 (SCA).

[21]

[2000] JOL 7026 (E).

[22] 1997 (1) SACR 304 (E).

[23] S v Michele and Another 2010 (1) SACR 131 (SCA) at 135a-b

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