

SOUTH AFRICA / JUDGMENT

Mndebele v S (A287/16) [2017] ZAGPPHC 538 (31 August 2017) [2017] ZAGPPHC 538

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse, L M Molopa-Sethosa, C J Collis

CASE / FILE NUMBER

A287/16

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A287/16

DATE: 31 August 2017

Not reportable

Not of interest to other judges

Revised.

ZENZELE CLERENCE MNDEBELE Appellant

v

THE STATE Respondent

JUDGMENT

MABUSE J: (Molopa-Sethosa J and Collis AJ concurring)

- [1] This is an appeal against sentence. The appellant was granted leave to appeal by the Supreme Court of Appeal on petition.
- [2] The appellant, Mr. Zenzele Clarence Mndebele, appeared before a Regional Court Magistrate in Piet Retief where he was charged with stock theft of 28 sheep. He was accused 1 in the Court a quo and appeared with accused 2, 3 and 4. Despite his plea of not guilty to the said charge the appellant was convicted accordingly. Upon his conviction he was sentenced to eight years' imprisonment.

- [3] An application for leave to appeal against the sentence imposed by the court a quo was unsuccessful and so was his petition for leave to appeal to this Court.

THE

BACKGROUND

- [4] Having pleaded not guilty to the charges, the appellant, through his legal representative, made a plea explanation in terms of the provisions of section 115 of the Criminal Procedure Act 51 of 1977 ("the CPA"). In such plea explanation, the appellant denied that he was involved in the commission of the offence or in the theft of the stock. He added that on 1 May 2010 he was contacted by accused 3 who told him that he had sheep for sale. Because he had on a previous occasion bought sheep from him, he decided to buy three sheep from him and told accused 3 accordingly. Around 15h30 the same day, accused 3 came, in the company of accused 4, to deliver the three sheep he had ordered from him. He received the three sheep, slaughtered two of them and kept one alive.
- [5] He made certain admissions and had no objection to the relevant admissions being recorded in terms of s 220 of the CPA. He admitted
- that he was found in possession of the carcasses of two sheep and one sheep; that the two carcasses together with the one live sheep
- belonged to the complainant, a certain Pieter Lafras Moolman Rabe ("Rabe"); that all the three sheep had been stolen from the complainant. He was not aware that the sheep had been stolen.
- [6] The complainant told the court that after he discovered, during May 2010, that his flock of sheep had been stolen, he launched an investigation. This led him to the gate that was completely broken in order to facilitate the removal of the sheep. He followed the tracks of the animals. They led him to Driefontein. In a place called Tshablala there he found four of his sheep. He looked around in the area where he found the sheep and saw the tracks of a motor vehicle. He took photographs of this tracks and continued with the investigation.
- [7] The investigation led him to the appellant's house where the appellant was present. It is the tracks that led him to the appellant's house which was located three kilometres from where some of the sheep were loaded. He called the police. The police did not come. Ultimately a certain Laurie of the Stock Theft Unit in Wakkerstroom arrived.
- [8] They approached the appellant and asked him if he did not see his sheep or he did not have them. The appellant told them that there were no sheep at his place. On noticing a blood spot in the appellant's premises they asked him for an explanation. He told them that his family had a feast of some kind and for that they had slaughtered an animal. As they continued with their investigations in the appellant's yard they noted, under the canopy of a bakkie, fresh dung and two or four foetuses of lambs. There was also fresh dung in both his new Quantum kombi and the outside toilet. As they continued with their investigation they discovered two sheep carcasses in a blue plastic drum. At the back of the appellant's yard he

saw a live sheep tied to the fence. At this stage the appellant then called accused 2.

[9] He asked the appellant how he could slaughter an ewe in lamb but the appellant told him that he simply bought the sheep. He asked him several questions, among them, whether he had only three sheep. On this question he answered that he only had three sheep. The police discovered the fourth sheep under a drum in the appellant's premises. It was in fact a carcass. He knew that the one sheep that was found in his yard was his because it had a tattoo. His tattoo was GER.

[10] The appellant testified. He called no witnesses to testify on his behalf. He stuck to his version that he did not steal the sheep but only bought them from accused 3. During his testimony the appellant contradicted himself in many respects, and for that reason the court a quo rejected his version. As indicated earlier it convicted the appellant accordingly and sentenced him to eight years imprisonment.

[11] With regard to an appeal against sentence the starting point is *R v Maphumulo and Others* 1920 AD 56 where the Court stated that:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal and we should be slow to interfere with its discretion."

[12] There are of course instances in which the Appeal Tribunal may interfere with the discretion of the trial court. These instances

have been set out in many cases, among them, *R v S* 1958 (3) SA 102 at page 104 as follows:

"There are well recognised grounds on which a Court of Appeal will interfere with a sentence:

where the trial Judge - or magistrate, as the case may be, has misdirected himself on the law or facts, or has exercised his discretion capriciously or upon a wrong principle or so unreasonably as to induce a sense of shock."

See also in this regard *Ex parte Neethling and Others* 1951 (4) SA 331AD at page 335; *Rex v Zulu and Others* 1951 (1) SA 489 (N) 496,497:

"Where no such ground exists, however, the appeal court will not interfere merely because the appeal judges consider that they themselves would not have imposed the sentence."

[13] The court a quo correctly pointed out that the assessment of an appropriate sentence required a consideration of the following factors: the crime or seriousness of the crime; the personal circumstances of an accused person; and the interest of the society. These factors are called the "triad" according to *S v Zinn* 1969(2) SA 537 (A). It is required of the court assessing an appropriate sentence to put all these three factors in the imaginary scale, to weigh them giving each one of them equal weight and to distil from them what in its view is an appropriate sentence. In weighing all these three factors the Court should avoid over- or

under emphasizing any one of the factors at the expense of the others unless it commits a misdirection. In *S v Theron* 1986 (1) SA 884 (A) at 896, Botha JA, as he then was, set out this position as follows:

"Die opweging teenoor mekaar van die verskillende faktore wat tersake is by die vasstelling van 'n gepaste vonnis ... is deel van die diskresie wat aan die Verhoorregter toekom om oor 'n bepaalde vonnis te besluit Oorbeklemtoning van een faktor wat neerkom op 'n wesenlike mistasting (en sal 'n bevinding regverdig) dat hy sy diskresie nie redelik uitgeoefen het nie." In an article entitled "Crime and Punishment in South Africa 1975 at page 150, Nicholas J

stated as follows:

"A criminal sentence cannot in the nature of things, be a matter of precise calculation There are no scales by which these matters can be measured and there is no relationship which makes it possible to express them in terms of punishment. "

- [14] I now turn to the personal circumstances of the appellant that were placed before the court a quo. It was placed on record that the appellant had previous convictions. Although the record shows that the court was informed that the appellant had previous convictions; that he admitted them, they were not available before the appeal was heard. The trial court, however, found that such previous convictions as the appellant had were not applicable to the current conviction. The appellant was 27 years old at the time of the sentencing, he was still single although he stayed with a woman with whom he had two dependent children, one three years old and the other one two months old. He was his mother's taxi driver and earned an amount of R500.00 per week. These are all the personal circumstances that were placed on the record. From what was placed on the record it does not look like the trial court did its best to obtain more information about the appellant to put it in a better position to assess an appropriate sentence. It is the duty of the court to collect all the information that may be relevant for the purposes of the determination of a suitable sentence.
- [15] With regard to the seriousness of the offence, the court took into account, and admittedly correctly so, the prevalence of the offence and the fact that the stock theft in that particular area was committed by a syndicate. The prevalence of a crime or a particular kind of crime in a particular area or the frequent occurrence of it in a particular area may lead to increased severity in the sentence imposed by the court. See *S v M* 1997 (2) SACR 682 C at page 686 E-G; *S v Robberts* 2000 (2) SACR 522 (SCA) at paragraph 20. Accordingly the court a quo was correct in attaching more weight to the seriousness of the offence in particular to the fact that the offence of stock theft in that farming area was prevalent and the fact that the complainant suffered economic loss. In his heads of argument, counsel for the appellant referred the Court to the case of *S v Velebhayi and Others* 2015 (1) SACR 7 (ECG), where the court had the following to say:

"Stock then has generally been regarded as a serious form of theft. A number of factors contribute to its seriousness. Throughout the country it is an offence that is prevalent, although one should be careful not to overemphasise it."

She stated that the prevalence of the offence has led to the effect that as a general rule courts imprison first offenders in the absence of special circumstances for the theft of even one sheep for the period of six months to a year. In this case Rabe has lost all the 24 sheep of the 28 that were stolen. He has not been compensated. The kind of justice that was received by him has been the imprisonment of the appellant. In his heads of argument, counsel for the appellant submitted that the court a quo erred in that it failed to give due consideration to other forms of sentencing options like for instance imposition of the fine and correctional supervision in terms of s 276 (1) (h) of the CPA. There is no evidence on the record that the appellant brought this issue for consideration by the Court. Nowhere did the appellant's legal representative make the proposition that a fine could be imposed on the appellant and that the appellant would be in a position to pay such fine. It is accordingly unfair at this stage for the counsel to argue that point.

[16] The court a quo was correct to take into regard the fact that the appellant was not penitent. Of course it is accepted that the appellant has an

entrenched right to plead not guilty if he so honestly believes that he was not guilty and to attack the witnesses. The fact that he pleaded not guilty should not be held against him. Absence of remorse though demonstrates the unpreparedness of the appellant to repent and to be rehabilitated. Another aggravating factor is the fact that the appellant was motivated by greed when he committed the offence. He was employed and earning R500.00 per month. The motive with which an accused person commits an offence should be considered aggravating. "One of the most important considerations in sentencing an offender is his moral guilt and logically his motive in committing the offence bears strongly upon such moral guilt." See Moyo 1979 (4) 61 SA ZRA 63 D-E.

[17] On the other hand, the respondent conceded that the sentence imposed by the court a quo on the appellant induces a sense of shock and should be reduced. No reasons though were furnished for this concession.

[18] In our view the sentence imposed on the appellant is disturbingly inappropriate. Quite clearly the court a quo approached the imposition of sentence with vengeance. This should not have happened. Firstly the sentence imposed on the appellant completely overlooked the fact that he had a clean record insofar as the offence of stock theft was concerned. The court a quo shirked its responsibility to obtain all the relevant details of the appellant from whatever source to enable it to assess a proper

sentence to be imposed on the appellant. Secondly the court a quo over-emphasised the seriousness of the offence at the expense of the personal circumstances of the appellant. That constitutes a misdirection. In our view, there are valid grounds on the basis of which this Court may interfere with the sentence imposed by the trial court.

[19] Accordingly,

1. The appeal against sentence is upheld.
2. The sentence imposed by the court a quo on the appellant is hereby set aside and in its place is substituted the following:

"Accused 1 is hereby sentenced to four years imprisonment."

3. The sentence of four (4) years is antedated to 13 June 2013.
4. The order that the court a quo made in terms of section 103 of the Firearms Control Act No. 60 of 2000 shall remain in place.

P. M. MABUSE

JUDGE OF THE HIGH COURT

L.M. MOLOPA-SETHOSA

C.J.COLLIS

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellants: Adv. H van Wyngaard

Instructed by: Saayman Attorneys, Benoni

Phatsoane Henney Attorneys, Bloemfontein

Counsel for the 1st and 2nd respondents: Adv. FW van der Merwe

Instructed by: Director of Public Prosecutions, Johannesburg
Director of Public Prosecutions,
Bloemfontein

Date Heard: 18 August 2017

Date of Judgment: 31 August 2017

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