

SOUTH AFRICA / JUDGMENT

Molakeng v S (A180/2009) [2011] ZAWCHC 397 (31 October 2011)

[2011] ZAWCHC 397

COURT

Western Cape High Court, Cape Town

BEFORE

N Saba, A Le Grange

CASE / FILE NUMBER

A180/2009

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REPORTABLE COVERSHEET

IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: A180/2009

In the matter between:

SPETA JOHANNES MOLAKENGApplicant

and

THE STATERespondent

Judgment

by: N Saba, AJ

For the Applicant: Adv. S Mohamed

Instructed by: The Director of Public Prosecutions

15 Buitenkant Street

CAPE TOWN

For the Respondent: Adv. ADR Stephen

Instructed by: The Director of Public Prosecutions

Date(s) of Hearing: 28 October 2011

Judgment

delivered on: 31 October 2011

REPORTABLE Republic of South Africa IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN) Case number: A180/09 In the matter between: SPETA JOHANNES MOLAKENGAppellant vs THE STATERespondent APPEAL JUDGMENT: 31 OCTOBER 2011 SABA, AJ

- [1] This is an appeal against sentence imposed by a Regional Magistrate in Cape Town on 17 January 2005.
- [2] On 3 September 2004 the appellant was convicted on one count of fraud and one count of malicious injury to property. On the count of fraud he was sentenced to seven years imprisonment and for malicious injury to property, he was sentenced to three years imprisonment, two years of which were ordered to run concurrently with the seven year period. The effective term of was eight years imprisonment. After his application for leave to appeal against sentence was refused in the court a quo, the appellant successfully petitioned this court and now appeals against the sentence of eight years imprisonment.
- [3] The facts leading to his conviction are mostly common cause that on 13 June 1998 the appellant drew a cheque in favour of Jeffery Madikane for a sum of R1 600, 00, well knowing that he had insufficient funds to meet it. Further that on 7 September 1998 at Cape Town Regional Court the appellant lost his temper in the court room, threw a microphone down, damaging it in the process.
- [4] The main grounds of appeal are that the court a quo over-emphasised the seriousness of the offence and failed to take into account the appellant's personal circumstances. Further that the magistrate failed to take into account the period of six years the appellant spent awaiting trial in prison.
- [5] 1975
- (4) SA 855 AD at 875D-F, the following was stated: "1. In every appeal against sentence the Court hearing the appeal should be guided by the principle that a punishment is 'pre-eminently a matter for the discretion of the trial court' and;
- (a) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".
- [6] In sentencing the appellant, the magistrate adequately addressed the personal circumstances of the appellant and also took into account the good work that the appellant does in prison. She further considered the fact that the appellant has a long list of previous

convictions for fraud and malicious injury to property. What exacerbates things is the fact that the offence of malicious injury to property was committed in a court room. This shows a flagrant disregard and total lack of respect for the law on the part of the appellant. The record reveals that the matter was postponed on no less than thirteen occasions because the appellant wanted to obtain legal representation. That at some stage he requested that the case be postponed for a period of a year because he was not in a hurry to finish it. The argument on behalf of the appellant that the period of six years he spent awaiting trial was not taken into account for purposes of sentence can therefore not be accepted. Much of the delaying in this matter was as a direct result of the Appellants lackadaisical attitude in seeing that this matter is finalised.

- [7] Counsel for the Appellant argued that the undue delay in this matter that stretches over a period of seven years before the trial was finalised is a gross irregularity that resulted in Appellant not having a fair trial. The submission, if I understood it correctly, was that because of this delay which caused the Appellant not to have a fair trial, the court should use its inherent jurisdiction to set aside the conviction and sentence. Mr Mohamed could not refer this court to any authority for his proposition that a delay on the facts of this case can result in a conviction to be set aside. There is no doubt that the length of time that it took to finalise this matter, is a cause of concern. The delay was not only caused by the Appellant, who for a variety of reasons requested regular postponements, but also as a result of court rolls that were over booked with cases on a particular day and the magistrate who rather took a lenient approach in granting postponements without properly conducting an investigation if these postponements were warranted. Despite the seven years it took for this case to be finalised, the conviction of the Appellant cannot be criticised. In any event, the appeal lies only with sentence and not with the conviction. As far as sentence is concerned, the magistrate considered all the relevant sentencing principles and gave due weight to the Appellant's personal circumstances, the seriousness of the offence and the interests of the society. The only difficulty that I have is that the magistrate did not give proper consideration to the period spent by the Appellant in custody awaiting trial. In my view, a portion of the sentence imposed should have been suspended for a period on the normal conditions.
- [8] In view of the fact that the Appellant has already served a large portion of the eight year imprisonment (which is six years in this case), I propose the following order:- In respect of the fraud charge (count1), the Appellant is sentenced to a term of six years' imprisonment which is antedated to 17/01/2005. in respect of malicious injury to property charge (count 5), the Appellant is sentenced to two years' imprisonment which is wholly suspended for a period of three years on condition that he is not again convicted of malicious injury to property, committed during the period of suspension. It follows that the appeal against sentence must succeed. N SABA Acting Judge of the High Court I agree and it is so ordered.
- A. LE GRANGE Judge of the High Court

REPORTABLE

Republic of South Africa

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vs

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N SABA

Acting Judge of the High Court

I agree and it is so ordered.

A. LE GRANGE

Judge of the High Court

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