

SOUTH AFRICA / JUDGMENT

Myeza and Others v S (A211/2019) [2020] ZAGPPHC 653 (16 September 2020)

[2020] ZAGPPHC 653**COURT**

North Gauteng High Court, Pretoria

BEFORE

N. Janse Van Nieuwenhuizen, L.G.P. Ledwaba

CASE / FILE NUMBER

A211/2019

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Source record**IN THE****HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)****REPUBLIC****OF SOUTH AFRICA****(1)****REPORTABLE: NO****(2) OF****INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE:**

16 September 2020

Case

Number: A211/2019

In

the matter between:

KYNOS

MANQAMY MYEZA

BABO

LUCKY MKHIZE

SERGEANT

SIMPHEWE MAKHUBO

ALFRED

BONGANI SIBANYONI

First Appellant

Second Appellant

Third Appellant

Fourth

Appellant

And

THE
STATE
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The appellants were found guilty on a charge of theft of livestock, to wit cattle to the value of R 125 000, 00 and sentenced to 15 years' imprisonment each.

[2] This appeal is only against the sentence imposed by the court a quo.

GROUND OF APPEAL

[3] The appellants' appeal is premised on two grounds:

i. firstly, that the court erred in sentencing the appellants in terms of the Criminal Law Amendment Act, 105 of 1997 ("the Act"); and

ii. secondly, if the Act was applicable, that the sentence is shockingly inappropriate and harsh.

Statutory framework

[4] In convicting the appellants, the court a quo stated the following:

"As a result, I find all four accused guilty as charged of theft of stock to a value of R 125 000, 00 this finding as it was proof to the Court that it was theft that it involved a theft of more than R 100 000, 00 which was committed by a group of persons acting in the furtherance of a common purpose will attract the prescribed minimum sentence in Sec 51 sub 2 of Act 105 of 1997."

[5] The relevant provision of section 51(2) reads as follows:

"(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall-

(a) If it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person, in the case of-

(i) A first offender, to imprisonment for a period of not less than 15 years;"

[6] Part II of Schedule 2 refers, inter alia, to "any offence to exchange control, extortion, fraud, forgery, uttering, theft..."

(b) involving amounts of more than R 100 000, 00, if it is proved that the offence was committed by a person, group of person, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or ..."

[7] Ms Moloi, counsel for the appellants, submitted that the court a quo erred in convicting the appellants of stock theft read with the provisions of section 51(2) of the Criminal Law Amendment Act,

105 of 1997 (“the Act”).

[8] Ms Moloi contended that the appellants should have been sentenced in terms of the provisions of section 14 of the Stock Theft Act, 57 of 1959, which reads as follows:

“14. Jurisdiction of magistrates’ courts in respect of sentence. -Notwithstanding anything to the contrary in any law, any magistrates’ court may, in respect of an offence under this Act-

(a) where the court is not a court of a regional divisions impose a fine or imprisonment for a period not exceeding three years; or

(b) where the court is a court of regional division, impose a fine for a period not exceeding fifteen years.”

[9] On a reading of the submissions by both counsel in the court a quo, the judgment of the court and the reasons for granting leave to appeal the sentence, it, however, appears that the issue pertained to whether section 51(2) finds application in casu. Mr Venter, counsel for the appellants during the trial, correctly conceded that should the section find application, the appellants

must be sentenced in terms of the Act.

[10] The Act will apply if the “value” of the stock, being found to be R 125 000, 00 falls within the meaning of “amounts” as envisaged in the Schedule to the Act.

[11] In analysing the question whether “amounts” also include the “value” of the stolen item, the court had regard to *S v Naidoo* 2010 (1) SACR 499 GSJ. In *Naidoo* the appellant was convicted of the theft of a truck of which the value was in excess of R 500 000, 00. The magistrate’s

court sentenced the appellant in terms of section 51(2) of the Act to 15 years’ imprisonment. On appeal, the appellant raised a point in limine that the “value” of the truck for purposes of Part II of Schedule 2 of the Act, does not fall within the definition of theft. According to the appellant the Schedule only refers to “amounts” in relation to theft which would entail that only the theft of money falls within the Act for purposes of section 51(2).

[12] In deciding the issue, Robinson AJ had regard to the Schedule as a whole and applying the ordinary rules of interpretation, held as follows in paragraph [16]:

*“In my view, the use of the word ‘value’ with regard to the Drug Trafficking Act, and the use of the word ‘amounts’ with regard to theft, clearly indicates that the legislator had intended to differentiate between two instances. This is further underscored by the use of the eiusdem generis rule of interpretation. In other words, the meaning to be given to the word ‘amounts’ was to be equated to a situation of financial crime. Compare the application of this rule by the Supreme Court of Appeal in *S v Shaik and Others* [2006] ZASCA 105; 2007 (1) SACR 247 (SCA) (2007 (1) SA 240; [2007] 2 All SA 90 at 268; and*

LAWSA vol 25 part 1 (first reissue) para 347.”

[13] Although bound by the decision the court a quo held that the Naidoo decision was overruled by the decision of the Supreme Court of Appeal in *S v Brown* 2015 (1) SACR 211 SCA.

[14] The applicable portion of the Brown decision reads as follows:

“Applicability of minimum sentence provisions

The court below erred primarily by holding that section 51(2)(a) of Act 105 of 1997 was inapplicable. Veldhuizen J, in arriving at that conclusion, had regard to the TETA and MATCO transactions. In respect of the first, he considered that Brown had only admitted to making representations contained in the monthly statements to TETA which had the potential to cause prejudice. In respect of the MATCO transaction, he took into consideration that the minority shareholders were paid and that, through the handing over of control of MATCO, funds became available to pay the balance of the purchase price to the majority shareholder. Veldhuizen J said the following:

“Those, in essence, are the facts which constitute the two crimes of which you have been convicted. These two crimes, as you admitted, involved potential prejudice and not actual prejudice and certainly do not ‘involve amounts of more than R500 000,00’. After you made the admissions which I mentioned, and changed your plea, the State simply closed its case. The State, with regard to both counts, accepted that your conduct entailed potential prejudice and not actual prejudice.

After we convicted you, the State led evidence which, if it be accepted, constitute crimes which are far more serious.

I cannot sentence you for crimes of which you have not been convicted, that would be wrong. I can only sentence you for that of which you have been convicted. It is, accordingly, my judgment that section 51 of Act 105 of 1997 does not apply.”

Fraud is defined by Snyman as follows:

“Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.

“The unlawful and intentional making of a misrepresentation does not have to cause actual loss for it to constitute fraud. That fact eluded the court below. In respect of each of the transactions in question Brown committed fraud involving tens of millions of rands, way beyond the R500 000 threshold, which is the jurisdictional fact that triggers the minimum sentence provisions. Those assets were at risk and the potential prejudice has to be viewed from that perspective. Thus, in concluding that the minimum sentence legislation did not apply, the court below erred. I may add that even if the court below was correct in its conclusion that the minimum sentence did not find application, it ought to have considered whether, given the objective gravity of the offences, a custodial sentence was nonetheless called for. That it did not do. I shall now turn to consider whether there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of 15 years’ imprisonment.”

- [15] The Brown decision is, however, distinguishable from the facts in Naidoo and the facts in casu. In Brown the fraud still pertained to an amount in excess of R 500 000, 00. The issue in Brown was whether actual loss should occur or whether potential loss of an amount in excess of R 500 000, 00 will suffice for purposes of the Act.
- [16] The issue whether “amounts” include the value of the stolen article was not considered and consequently the court a quo erred in finding the Brown decision overruled the Naidoo decision.
- [17] I respectfully agree with the reasoning in the Naidoo decision. The decision reflects the correct interpretation of the language used by the Legislator in Part II of Schedule 2 to the Act.
- [18] In the result, the court a quo misdirected itself in finding that the Act was applicable to the facts in casu and the sentence imposed by the court a quo may be reconsidered.

SENTENCE

- [19] In considering an appropriate sentence, the factors colloquially known as the Zinn triad apply, to wit the personal circumstances of the appellants, the seriousness of the crime and the interests of society.

Personal circumstances

- [20] In respect of the appellants’ personal circumstances, the following was placed on record:

[21.1] The first appellant is an unmarried 56 year old father of seven children who was employed in construction earning R 1 500, 00 per month. The first appellant has three previous convictions of stock theft committed in 1986, 1987 and in 2003.

[21.2] The second appellant is a 36 year old unmarried father of a two year old child. The second appellant was self-employed in the informal trade and earned approximately R 500, 00 per month. He is a first offender.

[21.3] The third appellant is a 44 year old unmarried father of seven children. He is also engaged in the informal trade and earns approximately R 500,00 per month. The third appellant has one previous conviction for stock theft in 2018.

[22.4] The fourth appellant is a 38 year old unmarried father of four children who earns R 500, 00 per month in the informal trade. He is a first offender.

[22.5] All four appellants spent two years in custody awaiting trial.

Nature and Seriousness of the crime

- [21] The cattle that was stolen was valued at R 125 000, 00. It was conceded by the defence during argument that stock theft is indeed a serious offence that directly impacts on the livelihoods of farmers and their employees. Due to the amount involved it is clear that the offence was committed for self-enrichment and not as a mode of survival.

Interests of society

- [22] The owner of the cattle, Mr Da Costa, testified that he had lost 183 cattle in the 18 months preceding this crime to theft. The value of the stolen cattle is in the region of R 4 million. The court a quo took into account that stock theft is rife in the Heidelberg and Nigel area with farmers suffering huge losses due to the despicable

acts of unscrupulous thieves who have no respect for law and order. In the premises, society demands that the courts impose sentences

reflecting the gravity and prevalence of the offence as well as a deterrent to the would-be thieves.

Evaluation

- [23] In imposing an appropriate sentence it is instructive to have regard to sentences imposed in similar matters. The sentences in the matters *infra* were confirmed on appeal.
- [24] In *Mosotho and Another v S* [2017] ZAGPPHC (18 September 2017), the appellants were found guilty of the theft of 14 cattle valued at R 1 00 000,00 and sentenced to five years' imprisonment.
- [25] In *S v Dhlamini* 2019 JDR 0764 (FB) the appellant, a first offender, was found guilty of the theft of eight cattle and sentenced to five years' imprisonment of which two years were suspended on certain conditions.
- [26] In *S V Mbudire* 2018 JDR 1167 (FB) the appellant was found guilty of the theft of ten cattle valued at R 60 000, 00 and sentenced to five years' imprisonment of which three years were suspended.
- [27] In *S v Nnete* 2019 JDR 2096 (FB) the appellant was found guilty of the theft of five cattle and sentenced to six years' imprisonment.
- [28] In *S v Pondai* 2019 JDR 0203 (FB) the appellant was found guilty of stock theft and sentenced to six years' imprisonment of which two years were suspended.
- [29] Having regard to the personal circumstances of the appellants and more specifically their criminal records, different sentences will be appropriate.
- [30] The first appellant is sentenced to eight years' imprisonment. The second and fourth appellants are sentenced to five years' imprisonment of which two years are suspended for five years on condition that the second and third appellants are not convicted of an offence in terms of the Stock Theft Act, 57 of 1959, during the period of suspension.

[31] The third appellant is convicted to six years' imprisonment of which two years are suspended for five years on condition that the third appellant is not convicted of an offence in terms of the Stock Theft Act, 57 of 1959, during the period of suspension.

ORDER

[32] In the premises, I propose the following order:

1. The appeal against conviction is upheld.

2. The sentence in the court a quo is set aside and replaced with the following sentence:

2.1 Accused 1 is sentenced to eight years' imprisonment.

2.2 Accused 2 is sentenced to five years' imprisonment of which two years is suspended for five years on condition that accused 2 is not convicted of an offence in terms of the Stock Theft Act, 57 of 1959 during the period of suspension.

2.3 Accused 3 is sentenced to six years' imprisonment of which two years is suspended for five years on condition that accused 3 is not convicted of an offence in terms of the Stock Theft Act, 57 of 1959, during the period of suspension.

2.4 Accused 4 is sentenced to five years' imprisonment of which two years is suspended for five years on condition that accused 4 is not convicted of an offence in terms of the Stock Theft Act, 57 of 1959 during the period of suspension."

3. The sentences are antedated to 2 November 2018.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree

L.G.P. LEDWABA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE "HEARD" PER COVID19 DIRECTIVES: 3 August 2020

DATE DELIVERED PER COVID19 DIRECTIVES: I will "fill in"

APPEARANCES

Appearance for the Appellants: Advocate M.B. Moloi

Instructed by:

Legal Aid South Africa

Counsel for the Respondent:

Advocate More

Instructed by:

Director of Public Prosecutions

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