

SOUTH AFRICA / JUDGMENT

Nkamela v S (CA&R203/2017) [2017] ZAECGHC 112 (17 October 2017)

[2017] ZAECGHC 112

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, N Msizi

CASE / FILE NUMBER

CA&R203/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA & R 203/2017

In the matter between:

ZOLA NKAMELA Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

Bloem J.

[1] The appellant was charged with theft in the district court at Humansdorp, it having been alleged that on 29 October 2016 he

unlawfully and intentionally stole three pairs of shoes totalling R479.85 from Shoe City in St Francis Bay. He pleaded guilty to the charge. He stated that on the day in question he hid the shoes in his lumber jacket and left the store. He was found with the shoes shortly thereafter. In my view the appellant was correctly convicted of theft.

[2] The case was then transferred to the regional court for sentence to be imposed. The appellant was legally represented in the regional court. The magistrate was informed on 5 December 2016 when the appellant was sentenced, that he was a 35 year old single father of two minor children aged six years and ten months respectively and, although he had no fixed employment, he performed piece jobs from time to time. The appellant has a list of previous convictions. Between 2004 and 2016 he was convicted on nine occasions of theft

and on one occasion of housebreaking with intent to steal and theft. For the latter offence he was sentenced to two years' imprisonment in 2006. In respect of theft the sentences ranged between a fine of R100.00 or ten days' imprisonment and R3 000.00 or six months' imprisonment.

- [3] In its quest to impose what it considers to be a just and appropriate sentence, a court must have regard to the accused's personal circumstances, the nature of the offence committed by the accused and the interests of society. Ordinarily a court of appeal will not interfere with the sentence imposed by the trial court because sentencing is predominantly the domain of the trial court. The approach to be followed by an appeal court when considering an appeal against the sentence imposed by the trial court has been stated as follows by Marais JA in *S v Malgas*:^[1]

"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

- [4] In this case the magistrate stated that she had regard to the interests of society when she stated that members of society do not look kindly upon persons who steal the property of others. I agree with that statement. Although the magistrate said that she would consider the appellant's personal circumstances, the only aspect of his personal circumstances that she took into account was his list of previous convictions. Regarding the offence, the magistrate mentioned the fact that the stolen shoes were recovered. She also took into account that the appellant pleaded guilty.
- [5] Theft from shops is prevalent within the area of jurisdiction of this court. Shopkeepers suffer serious loss as a result of theft. In the circumstances of this case imprisonment seems to be the only appropriate sentence. However the period of imprisonment should not be out of proportion to the gravity of the offence. In *S v Baartman*^[2] Jones J said that the public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence. In my view this is such a case. The magistrate imposed a sentence of

four years' imprisonment on a 35 year old who had on nine previous occasions been convicted of theft and who had stolen three pairs of shoes valued at R479.85, which shoes had been recovered immediately after they were stolen.

- [6] The sentence imposed by the magistrate overemphasised the interests of society, insofar as she referred to those interests. The overemphasis of the interests of society caused the magistrate to ignore the relatively low value of the stolen items, that they were recovered and that the complainant did not suffer any pecuniary loss. The overemphasis also happened at the expense of a balanced view of the interests of the appellant.
- [7] In my view, the magistrate misdirected herself when she did not properly consider the value of the stolen shoes and the interests of both the appellant and society. Furthermore, the sentence imposed by her is so markedly different from the sentence that this court deems appropriate that the sentence imposed by her can be described as shocking. As a guide reference is made to *S v Mzazi*[3] wherein the accused was convicted of theft of a tray of mutton valued at R19.05 from a butchery. The 60-year-old pensioner had previously been convicted of crimes on no less than 24 occasions, 17 of those involving theft or acts of dishonesty. The sentence of three years' imprisonment imposed by the magistrate was set aside on automatic review and replaced by a sentence of eight months' imprisonment of which four months were suspended on the usual condition. The court was of the view "that the magistrate has misdirected herself in deliberately ignoring the petty nature of the crime involved in the instant matter and seemingly going out of her way to punish the accused for his bad criminal record." [4] Reference is also made to *S v Beja*[5] wherein the 31-year-old accused was convicted of theft of ten metres of electrical cord valued at R84.99 and sentenced to 18 months'

imprisonment. At the time of the commission of the offence she was the mother of two minor children and had a list of previous convictions involving theft. The sentence imposed by the magistrate was set aside on review. The court found firstly, that the magistrate misdirected himself by overemphasising the prevalence of the offence of theft and the impact of the list of previous convictions of the accused and secondly, that the magistrate disregarded the extent of the act of theft and the value of what was stolen. The above sentence was set aside and substituted with a period of six months' imprisonment.

- [8] In this case, despite the fact that the appellant had nine previous convictions of theft, if regard is had to the value of the stolen shoes, that they were recovered immediately after they had been stolen and that society's interest would be protected by imposing a term of imprisonment, an appropriate sentence would be imprisonment for a period of two years. There is a marked

disparity between a sentence of four years' imprisonment and one of two years' imprisonment.

- [9] In the result, it is ordered that:

9.1. The appeal against sentence is upheld.

9.2. The sentence of four years' imprisonment is set aside and replaced with the following:

"The accused is sentenced to two years' imprisonment."

9.3. The sentence is antedated to 5 December 2016.

G H BLOEM

Judge of the High Court

Msizi AJ,

I agree

N MSIZI

Acting Judge of the High Court

For the appellant: Ms N M Mazibukwana of Legal Aid South Africa, Grahamstown.

For the state: Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing: 11 October 2017

Date of delivery of the judgment: 17 October 2017

[1] S v Malgas 2001 (2) SA 1222 (SCA) at 1232A-E; also reported in [2001] 3 All SA 220 (SCA); 2001 SACR 468 (SCA).

[2] S v Baartman 1997 (1) SACR 304 (E) at 305d.

[3] S v Mzazi 2006 (1) SACR 100 (E).

[4] S v Mzazi at 103b-c.

[5] S v Beja 2003

(1) SACR 1680 (E).

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