

SOUTH AFRICA / JUDGMENT

S v Kali and Others (R19/2023; R20/2023; R21/2023; R22/2023; R23/2023; R24/2023; R25/2023; R26/2023) [2023] ZAFSHC 268 (10 July 2023)

[2023] ZAFSHC 268

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, Cronjé

CASE / FILE NUMBER

R19/2023; R20/2023; R21/2023; R22/2023;
R23/2023; R24/2023; R25/2023; R26/2023

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IN THE HIGH COURT

OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Case

no: R19/2023

R20/2023

R21/2023

R22/2023

R23/2023

R24/2023

R25/2023

R26/2023

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO
MAGISTRATES:

YES/NO

In the matter between: THE STATE
And
NTSANE
KALI
TANKI
MOKWATSI
TEBELO
MANGOEJANE
MATSHELISO
MAHAKALA
NTEBOHENG
THULO
BOITUMELO
MAKOPOI
TSELE
PITSA
KHEBE
MATSOSO

CORAM: OPPERMAN, J et
CRONJé,
AJ
DELIVERED
ON: 10
JULY 2023

JUDGMENT

BY: CRONJé, AJ

I

INTRODUCTION

- [1] The magistrate for Ficksburg sent eight (8) cases for automatic review under section 302 of the Criminal Procedure Act, 1977 (CPA). The persons convicted were unrepresented, pleaded guilty and were sentenced for contravening section 49(1)(a), read with Section 1 of the Immigration Act, 13 of 2002.

II THE IMMIGRATION ACT, 2002

- [2] Only the salient provisions of the Act will for purposes of this judgement be referred to. The Preamble states, inter alia:

“ ... *the managed*;

- (g) immigration laws are efficiently and effectively enforced, deploying to this end significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration;

- (h) the South African economy may have access at all times to the full measure of needed contributions by foreigners;
 - (i) the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers;
 - ...
 - (l) immigration control is performed within the highest applicable standards of human rights protection;
 - (m) xenophobia is prevented and countered;
 - (n) a human rights based culture of enforcement is promoted; and
 - (p) civil society is educated on the rights of foreigners and refugees.”
- [3] The Act provides for maximum sentences of 2 years imprisonment or a fine of R5 000.00.

III PRINCIPLES IN SENTENCING

- [4] A perusal of the records show that the same prosecutor and same magistrate[1] dealt with the matters. The sentencing methodology of the magistrate in the cases shows a pattern and for this reason all the matters are dealt with in this judgment. The principles applicable to sentencing should be the starting point.
- [5] It has been stated that a court has to search for a sentence which will be appropriate, considering all the circumstances of the case. It does not mean that there is only one such sentence, and that the court should search for that one sentence. An appropriate sentence need not be the only appropriate sentence.[2] The Courts have to consider all three elements of the triad of Zinn[3] to determine accurately the weight of each element within the circumstances of the case, and impose a sentence that represents the best balance of these weights.[4]
- [6] In respect of incarceration as a sentencing option, the Constitutional Court in *S v Dodo*[5] noted:

“[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (...) the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the

offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity."

[7] In *Dwayi and another v S*[6] it was held:

"[5] Whilst it is true that the sentence imposed must serve all the objects of punishment including deterrence, it remains the duty of the trial court to achieve the balance between the interests of society, on one hand, and the interests of the individual accused, on the other. Furthermore, it is accepted that the act of balancing those conflicting interests cannot be measured with mathematical precision (S v Martin 1996 (2) SACR 378 (W)). However, it remains the duty of the trial court to strive to achieve that delicate balance."

[8] One should be cautious not to be lured into thinking that a heavy/long, or the maximum sentence, is the only appropriate sentence. In *S v Scott-Crossley*[7] it was held:

"[34] The natural indignation that the community must feel at the appellant's conduct warrants appropriate recognition in the sentence. Nevertheless that can hardly invite a sentence that is out of proportion to the nature and gravity of the offence. Against the public interest must be weighed the unblemished record of the appellant, who, at the time of the commission of the offence, was a useful member of society upon whom some 100 people and their families were economically dependant [sic]. To his credit, the appellant has expressed contrition and remorse."

[35] Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones. Against that must be weighed the appellant's prospects of reformation and

rehabilitation, which appear to be good. It is true that it is in the interests of justice that crime should be punished. However,

punishment that is excessive serves neither the interests of justice nor those of society." [my emphasis]

[9] In *Mhlakaza and another v S*[8] the Supreme Court of Appeal also cautioned against the belief that the length of imprisonment is proportionate to deterrence:

"Deterrence has two aspects: deterring the prisoner and deterring others. The effectiveness of the latter is unclear (...) but, according to judicial precedent, it remains an important consideration (...). As far as deterring the accused is concerned, it should be borne in mind that there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length (S v Skenjana 1985 (3) SA 51 (A) 54I-55A). ... Whether long-term imprisonment has any rehabilitative effect, has also been doubted. ... Whether or not this scepticism is fully justified, the point is that the object of a lengthy sentence of imprisonment is the removal of a serious offender from society. Should he become rehabilitated in prison, he might qualify for a reduction in sentence, but it remains an unenviable, if not impossible, burden upon a court to have to divine what effect a long sentence have on the individual before it. Such predictions cannot be made with any degree of accuracy. To revert to the

argument under consideration. It seems to me that the learned Judge may well have overemphasised deterrence of others as a main sentencing object.” [my emphasis]

IV INTERFERENCE IN A COURT’S DISCRETION IN SENTENCING

[10] The powers of a reviewing judge whether under section 302(1) or section 304(4) of the CPA are akin to those of a court of appeal. In *S v Jacobs*[9] it was stated:

"Although s 302(1)(a) is couched in terms of a review of the sentence which was imposed, and although review powers are ordinarily confined to considering whether there was any irregularity in the proceedings, because s 303 requires certification that the proceedings are in accordance with justice the reviewing judge is required to evaluate whether the entire proceedings i.e. those pertaining both to the sentence as well as the merits of the conviction are not only formally in order and regular, but also whether they are fair, and in doing so it has long been accepted that the reviewing judge exercises a function akin to that ordinarily exercised by an appellate court. As such, the process of automatic review is aimed at ensuring both the validity as well as the fairness of the underlying conviction and sentence and the powers of the reviewing judge are extremely wide and include not only the power to alter or reduce the sentence imposed but also the power to quash the conviction or to set aside “or correct” the proceedings or to make any other order which may promote the ends of justice."

[11] In *Maila v The State*[10] the Supreme Court of Appeal confirmed that a court of appeal is not at liberty to interfere unless the court a quo committed a material misdirection:

“[43] It is trite that sentencing or punishment is pre-eminently a matter of discretion of the trial court. A court exercising appellate jurisdiction cannot, in the absence of a 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.

[44] Where, however, a 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.”

V OVERVIEW OF CASE LAW ON SENTENCING UNDER THE IMMIGRATION ACT

[13] In *Aboe v Minister of Home Affairs and Another*,[12] the Court sentenced the accused to 50 days’ imprisonment with an option to pay a fine of R1 500.00.

VI THE EIGHT CASES UNDER REVIEW

[14] All the accused in the matters before us were sentenced to direct imprisonment of between 12 months and two years.

S v Tebelo Mangoejane – R13/2023 - A72/2023

- [15] He was convicted and sentenced to two (2) years' imprisonment on 14 February 2023.
- [16] He is 22 years old, unmarried and has no children. He was employed in the construction industry at Vereniging since August 2022 and earned R1 000.00 per month. He returned to Lesotho in December 2022 and was arrested as he was again leaving Lesotho making his way back to Vereniging. He pleaded guilty to the charge.
- [17] On questioning him what type of sentence he wishes the Court to impose, he answered: "Any sentence that the Court can give me".
- [18] The State argued that "they" (presumably referring to illegal immigrants) show a shocking disregard for the laws of South Africa. The accused admitted to paying a bribe (the official that was bribed not being named) and that this should be an aggravating factor in sentencing. Reference was made to the fact that corruption is rife in South Africa and that the accused basically admitted contributing towards corrupt practices. The fact that the Accused also crossed the border twice unlawfully was a factor. The prosecutor argued for a sentence of one (1) year imprisonment.
- [19] In sentencing, the Court noted that he is a first offender with no previous convictions. The Court noted that the offence is serious and prevalent in the Court's jurisdiction. In applying the Zinn triad, the Court stated that it has to prevent the accused from committing the same offence again and make other offenders think before doing the same. A message should be sent to the public that the type of conduct will not be tolerated by the sentence that the Court must impose. She noted "through the sentence I must also rehabilitate you today and rehabilitation is only effective for people serving a long-term imprisonment." [my emphasis]
- [20] The Court continued that it looks at the seriousness of the offence, the interest of the community and his personal circumstances. The Court took into consideration that people worldwide are struggling to find employment and that persons without documentation are hired as they are seen as "cheap labour". The Court highlighted the fact that the accused paid a bribe when entering South Africa. She remarked that "if you were not arrested on this day, you would have continued with your criminal behaviour being illegally in this country."
- [21] The Court noted that he pleaded guilty and did not waste the Court's time. The Court then continued: "Now the sentence that I must impose on you, Sir, it must not be to break you. It must be to learn you a lesson for future. Now I look at the different sentencing options available to me today. I looked at a fine but I do not deem it suitable. As you will, be paying with the money that you earned illegally in this country. I was looking at a wholly suspended sentence as well but it will be a shockingly inappropriate sentence as it will now be sending the wrong message to the public." [my emphasis] The Magistrate sentenced the accused to two (2) years direct imprisonment.

[22] The approach of the Magistrate raises a number of concerns. She did not mention the incidence of the offence with reference to numbers. She did not consider that there are officials at the border post willing to be bribed and who facilitates the commission of the crime. There is nothing on the record that shows that he did not have remorse, that he would not apply for a passport or that a shorter or suspended sentence would not send a signal to him and the community that illegal activities will not be tolerated. A submission by the accused that the Court can decide what sentence to impose does not give a Court carte blanche to impose the maximum sentence. The warnings in *S v Scott-Crossley*[13] and *Mhlakaza and another v S*[14] in respect of the mistaken notion that long sentences rehabilitate must be heeded.

S v Khebe Matsoso – R26/2023 – A114/2023

[23] He was convicted on 13 February 2023 and was sentenced to 18 months imprisonment.

[24] He is a 20-year-old male person who was arrested at Ficksburg and remained in custody since 18 December

2022. He elected to represent himself and pleaded guilty.[15] He had no previous convictions. He is married and his wife is unemployed. They have no children except for the child with whom his wife was pregnant when he was arrested.[16]

[25] He earned an income of about R150.00 per week by cleaning other people's properties. He crossed the border to visit his grandmother to report that his mother passed away.[17] This was not challenged.[18]

[26] Upon asked what type of sentence the Court should impose he answered, "I do not know what kind of sentence that the Court would give me here." [19]

[27] The prosecutor referred to the offence being very serious, that it is prevalent in the area and that the sentence should serve as a personal deterrence for the accused as well as other offenders. The prosecutor stated:

"Your Worship, while grief is indeed a sad thing. Your Worship but that does not justify the accused person gratuitously breaking our laws, Your Worship. And his impulsiveness of age, Your Worship he should receive a sentence that would teach him for future that he should not become impulsive" [my emphasis]

[28] The prosecutor argued for 4 month's imprisonment.

[29] The Court took note that he is a first offender with no previous convictions, the seriousness and the prevalence of the offence, and that he should be deterred from committing the same offence and has to atone for his wrongdoing.

[30] She noted that he came to report to his grandmother that his mother passed on, but could have picked-up a telephone to phone his grandmother. She did not consider a fine as he was unemployed, which is, on the facts incorrect. In respect of a suspended sentence she merely notes: "With the influx of illegal immigrant case in Ficksburg, I also deem a suspended sentence not an applicable sentence."

S v Tsele Pitsa – R19/2023 - A01/2023

[31] The accused was convicted and sentenced to 18 months' imprisonment on 8 February 2023.

[32] He is a 41-year-old married male who looks after his two children, 11 and 5 years respectively. He is married but his wife and he are not living together. His wife is unemployed. He does odd jobs by plastering and bricklaying and earns approximately R150.00 per day if there is work, which is approximately 3 – 4 months per year.

[33] He had no prior convictions. He was arrested and remained in custody since 11 January 2023. His passport was suspended by the Department of Home Affairs for a period of 5 years before, and at date of his arrest one year of the suspended period remained.

[34] Upon asked what type of sentence the Court should impose he answered, "I just request the Court to sentence me, but not to be to [sic] harsh".

[35] The prosecutor stated that the offence is serious and prevalent and that the accused entered the country gratuitously. Notwithstanding not cross-examining the accused on his reasons for entering, the prosecutor argued that the accused did not take the Court into his confidence. The prosecutor argued for six months imprisonment.

[36] The Court repeated the prevalence, seriousness, overflowing court rolls and deterrence as in all the other cases. The Court stated that the sentence must restore the public's faith in the criminal justice system and send a message that such conduct will not be tolerated.

[37] She stated that he came to South Africa without any documentation. This is incorrect as he had the suspended passport with him.

[38] The Court decided against a fine as the accused was not working and could he not pay it. A wholly suspended sentence would, according to the Court, send the wrong message that people can break the law and get a "slap on the wrist".

State v Boitumelo Makopoi: R17/2023 – A857/2022

[39] She was convicted and sentenced to twelve (12) months' imprisonment on 15 February 2023.

[40] She is 40 years old, has three children, twins of 6 of years old and one child of 4 years. She is not married and not employed. She earns approximately R140.00 to R250.00 per week by plaiting hair. She was arrested and kept in custody since 19 December 2022, She pleaded guilty to the charge. She entered South Africa on 26 October 2022 and had up to 26 November 2022 to return to Lesotho. On 26 November 2022 she was still looking after a person who was ill and she requested a person to bring her passport in order for her to

extend the days but was informed that she has to bring it herself and produce the passport. She was arrested as she overstayed the period for which she had authority.

[41] No previous convictions were proven. When questioned what sentence she wishes the Court to impose, she answered: "I just request the Court to warn me, Your Worship." She stated that she has elderly parents who are looking after her child and that her mother is over 70 years and father over 80 years old. She was concerned about the person whom she was looking after.

[42] The prosecutor argued that the offence is serious, prevalent in the area and that the sentence should not only serve as personal deterrence, but also to would-be offenders. The prosecutor argued for imprisonment of 3 months.

[43] The Court noted that she is a first-offender. The Court stated that the offence is serious, prevalent and that the legislature increased the sentencing jurisdiction to two (2) years direct imprisonment. The criminal courts in Ficksburg are flooded with illegal immigrant cases and that there were five (5) such cases on the roll that day. The Court noted:

"I must rehabilitate you through the sentence that I must impose on you. And rehabilitation is something that is best served for some person who is doing and getting a direct imprisonment sentence. Through the sentence that I will impose on you, you must atone for your wrongdoing. I must restore the public's faith in the criminal justice system, and I will be doing that through my sentence. Mam I will be [INAUDIBLE] suitable sentence I will be taking into account the seriousness of the offence, the interest of the community as well as your personal circumstances." [my emphasis]

[44] Later, notwithstanding taking into consideration all the mitigating factors, the Court stated that it considered a wholly suspended sentence but that it was not suitable.

State v Nteboheng Thulo – R16/2023 - A09/2023

[45] She was convicted and sentenced to eighteen (18) months' imprisonment on 15 February 2023.

[46] The accused was a 24-year-old female who was arrested near Ficksburg on 12 January 2023. She did not have a passport and came to South Africa to seek employment. She did not have previous convictions. In mitigation she stated that she is not married and has one child, 2 years old. She is not employed and is assisted by her mother. She came to South Africa to look for work as her mother is ill and cannot continue to assist the family financially. She stated: "And I am also worried as to how they are surviving because she can no longer work so I was coming to see if I could do anything to assist."

[47] Upon a question by the Court on what type of sentence should be imposed, she begged for forgiveness. The Court then stated that forgiveness is not a sentence and enquired whether she wants direct imprisonment, a suspended sentence, a fine or a warning. She asked for a suspended sentence.

- [48] The prosecutor argued that it was a serious offence, prevalent in the area of jurisdiction and that the sentence should not only serve as personal deterrence, but also a deterrence to would-be offenders. Illegal immigration is not a victimless crime and poses a security risk to South Africans. It was stated: "... the dissatisfaction of the community which is automatically xenophobic. [INAUDIBLE], Your Worship, they are in danger, the actions of the accused put those who are legally in the country, Your Worship in danger, as well as these things happen people are attacked indiscriminately Your Worship."
- [49] Reference is made to competition for resources and employment opportunities and that illegal immigrants render themselves open to exploitation. The sentence should vindicate the community's faith in the justice system. The prosecutor argued for 6 months' imprisonment.
- [50] The Court, in sentencing, repeated the sentiments of the State. It focused on deterrence and atonement. It referred to rehabilitation and took consideration of the difficulties South Africans have in securing employment. A suspended sentence would, according to the Court, not be suitable as it sends a wrong message to the public. A fine would not be appropriate as she is unemployed.

State v Matsheliso Mahakala: R22/2023 – A03/2023

- [51] She was convicted and sentenced to eighteen (18) months' imprisonment on 15 February 2023.
- [52] She is 21 years old, has no children and is not married. Both her parents are deceased and she looks after her two (2) siblings. She was arrested on 11 January 2023. She elected to represent herself. She entered South Africa to seek employment and did not have a passport. The State proved no previous convictions. She was not employed but did plaiting hair. She earned approximately R200.00 per week. Upon questioned what sentence she wishes the Court to impose, the accused asked for forgiveness or a fine of R500.00.
- [53] The prosecutor stated that it is a serious offence, prevalent in the area and the sentence should serve as deterrence. He stated: "Your Worship, should reflect the communities [sic] of horrors of this type offence, Your Worship" and argued for six (6) months' imprisonment.
- [54] The Court stated that the offence is serious and prevalent. The rolls are flooded and overcrowded with cases of this nature. The sentence must teach the accused a lesson that she should not commit the offence in future again. A message must be sent to the public that the offences will not be tolerated by Court. The Court took note that the community looks upon these cases where many offences are committed in South Africa where people cannot be traced as they are undocumented. People are struggling to find employment and illegal immigrants are seen as cheap labour. The Court stated that if she fines the accused, it will be sending a wrong message to the public.

S v Ntsane Kali – R19/2023 - A839/2022:

[55] The accused was convicted and sentenced to two (2) years' imprisonment on 1 February 2023.

[56] He is a 23-year-old male Lesotho national. His mother and father passed on and he looked after his three (3) siblings. He is married and have one (1) child who is 5 years old. His wife is presently unemployed. He was arrested and kept in custody since 18 December 2022. He pleaded guilty to the charge. He entered South Africa on 26 March 2022.

[57] He was arrested as he was on his way back to Warden where he worked for R1 500.00 per month. He requested the Court to sentence him to R800.00 fine.

[58] The State did not prove any previous convictions. It argued that it was a serious offence, prevalent in the area and having a look at the length of time that the accused was in South Africa without a passport or permission, it should be taken into consideration as an aggravating factor. The Court should impose an imprisonment of nine (9) months.

[59] The Court took note that he was a first offender and pleaded guilty. The offence is serious, prevalent and causes full Court rolls. The offence is so serious that the legislature increased the sentencing to two (2) years. The Court stated that the sentence should deter him from not committing the same offence in future and restore the public's faith in the criminal justice system. The sentence should also rehabilitate the accused. In referring

to rehabilitation the Court stated: "Now rehabilitation is seen as only being effective for people that serve a sentence in custody."

[60] The Court took into consideration the fact that citizens are also seeking employment and that immigrants are seen as cheap labour. Many offences are committed where people cannot be traced as they are undocumented. The Court took into consideration the period in custody and the long period that the accused has been in South Africa. A fine would be inappropriate as he would be using the money that he earned in South Africa to pay for it. A suspended sentence would send the wrong message to the public. The Court sentenced the accused to two (2) years imprisonment. The sentence does not reflect the consideration of the period spent awaiting trial.

State v Tanki Mkwatsi: R12/2023 – A05/2023

[61] He was convicted and the court sentenced him to eighteen (18) months' imprisonment on 13 February 2023.

[62] He is 30-year-old and was arrested and kept in custody since 11 January 2023. He pleaded guilty. He heard about employment opportunities in Bethlehem. He is married and has one child, 14 years old. His spouse is deceased and he was not employed. He previously sold food in Lesotho. He used to earn between R250.00 and R300.00 per day.

- [63] He asked for a lenient sentence. He testified that his spouse passed away on 3 September 2022 and was buried on 9 September 2022. The monies that he had was used for her funeral and they could no longer survive.
- [64] The State proved no previous convictions and argued that the offence is serious, prevalent and that the accused was actually engaged in lucrative business activities in Lesotho. There was no reason for him to commit the crime in coming to South Africa. It argued for five (5) months' imprisonment.
- [65] The Court took into consideration that he pleaded guilty and that the offence is serious and prevalent. The Courts are flooded with cases of this nature. The legislature increased the sentencing to show how serious the offence is. The sentence should deter him from committing the same offence in future and must gain the public's faith in the criminal justice system. The Court took his personal circumstances as well as that many South Africans are seeking employment but cannot secure same into consideration. Illegal foreigners is seen as cheap labour.
- [66] There was no reason for him to come to South Africa without documentation as he had a lucrative business. The Court took into consideration the period he was in custody. A suspended sentence would send the wrong message to the public as "a slap on the wrist".

VII THE RESPECTIVE TERMS OF IMPRISONMENT

- [67] The cases show that the Magistrate consistently elected to sentence the accused to terms between 12 months (one accused), 18 months (5 accused) and two years (2 accused).
- [68] In all the cases, the State asked for lesser sentences. It needs to be borne in mind that the prosecutor was, on probabilities, well aware of the prevalence of the crime, the society's demands for justice and the applicability of the Zinn triad. It can be accepted that this informed the prosecutor's argument on sentencing.
- [69] The accused were in all the cases first offenders and all pleaded guilty. In all the cases, the magistrate took meticulous note of their personal circumstances. She also, in virtually every case, noted the same aggravating factors.
- [70] Bearing the caution in *S v Dodo and Mhlakaza* and another v *S supra* in mind, it does not appear that individualisation of sentencing was applied. The State consistently argued for lesser sentences.
- [71] In *Keva v S*[20] the Court held:

"[43] In S v Rabie[21], the philosophies and principles applicable in an appeal against sentence were set out by Holmes JA, namely, that in every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and 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'. In *S v Anderson*[22], in dealing with the applicable legal principles to guide the court when requested to amend a sentence imposed by a trial court, Rumpff JA, affirmed as follows:

'These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice requires it'

[44] Moreover, as held in *Malgas*[23], a court of appeal is enjoined to consider all other circumstances bearing down on this question, to enable it to properly assess the trial court's finding and to determine the proportionality of the sentences imposed upon the offender.

[45] The constitutional court[24], has described an appeal court's discretion to interfere with a sentence only: when there has been an irregularity that results in a failure of justice: or when the court a quo misdirected itself to such an extent that its decision on sentencing is vitiated: or when the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[72] Terblanche supra states:

"In S v Scheepers[25] *Viljoen JA expressed the personal opinion that imprisonment is justified only if the offender needs to be removed from society in order to protect society and if the purposes of punishment cannot be achieved through any other punishment. In addition, the court declared that if the same objects of punishment can be achieved through an alternative sentence, that alternative sentence should be preferred.*[26]

[73] In my view, the sentences imposed do not show sufficient reasoning by the magistrate. There is no proportionality between the periods spent in South Africa and the term of imprisonment. The record is silent on the statistics of the offence. This culminates in a sense of shock and an appreciation that the sentences are grossly excessive and that there was an improper exercise of discretion by the court.

[74] In my view the interests of justice require interference in the sentences.

VIII CONCLUSION AND ORDERS

[75] Bearing the respective accused person's circumstances, the nature of their offences, the time spent in awaiting trial, and the demands of society in mind, the following sentences would do justice to the accused. All sentences be antedated from date of imposition. The sentences of four months are not suspended as they would have been served by the time of this judgment. Those exceeding 4 months are not suspended due to the circumstances of the offences.

S v Tebelo Mangoejane

[76] He is 22-years-old, unmarried and has no children. He was employed in the construction industry since August 2022 and earned R1 000.00 per month. He paid a bribe to enter South Africa.

[77] The sentence is amended to 1 year's imprisonment.

S v Khebe Matsoso

[78] He is a 20-year-old male person who was in custody since 18 December 2022. He is married and his wife is unemployed. They had no children except for the child which she was pregnant at date of his arrest. He crossed the border to visit his grandmother to report that his mother passed away.

[79] The sentence is amended to 4 months' imprisonment.

S v Tsele Pitsa

[80] He is a 41-year-old and looked after his two children, 11 and 5 years respectively. He is married but his wife and he are not living together. His wife is unemployed. His passport was suspended by the Department of Home Affairs for a period of 5 years and at date of his arrest.

[81] It is not his first brush with immigration and the sentence is amended to 8 months' imprisonment.

State v Boitumelo Makopoi

[82] She is 40-year-old, has three children (twins 6 years old and one 4 years old). She was arrested and kept in custody since 19 December 2022. She requested a person to bring her passport in order for her to extend her visit.

[83] She tried to comply with the immigration laws and her sentence is amended to 2 months' imprisonment.

State v Nteboheng Thulo

[84] She is 23-year-old, not married and has one child, 2 years old. She is not employed and is assisted by her mother. She came to South Africa to seek employment.

[85] The sentence is amended to 4 months' imprisonment.

State v Matsheliso Mahakala

[86] She is 21-year-old, have no children and is not married. Both her parents are deceased but has two (2) siblings. She looks after her siblings.

[87] The sentence is amended to 4 months' imprisonment.

S v Ntsane Kali

[88] He is a 23-year-old male. His mother and father passed on and he looked after his three

[3] siblings. He is married and have one (1) child who is 5 years old. His wife is unemployed.

[89] The sentence is amended to 4 months' imprisonment.

State v Tanki Mokwatsi

[90] The accused is a 30-year-old. He is married and has one child, 14 years old. His spouse passed away on 3 September 2022 and buried on 9 September 2022. The monies that he had he used for her funeral and therefore could no longer survive.

[91] The sentence is amended to 4 months' imprisonment.

P R CRONJÉ, AJ

I agree

M OPPERMAN, J

[1] She was appointed on 1 February 2020 to the rank of Magistrate.

[2] Terblanche, S S, Guide to Sentencing in South Africa, 2016, Third Edition, LexisNexis, para 3.1.

[3] S v Zinn 1969 (2) SA 537 (A).

[4] Terblanche supra.

[5] (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (5 April 2001).

[6] [2001] JOL 7691 (Tk).

[7] (677/06)

[2007] ZASCA 127; 2008 (1) SA 404 (SCA); 2008 (1) SACR 223 (SCA) (28 September 2007).

[8] [1997] 2 All SA 185 (A).

[9] 2017

(2) SACR 546 (WCC) at paragraph [8].

[10] (429/2022)

[2023] ZASCA 3 (23 January 2023). See also: Lesoetsa v S (A69/2022) [2023] ZAFSHC 37 (16 February 2023).

[11] (CA&R 04/2021) [2021] ZAECGHC 5 (12 January 2021).

[12] (CCT 115/21) [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC) (30 December 2021).

[13] Supra.

[14] Supra.

[15] Transcript,

p. 1.

[16] Transcript,

p. 5.

[17] Transcript,

p. 3.

[18] Transcript,

p. 6.

[19] Transcript,

p. 6.

[20] (A103/2021)

[2021] ZAWCHC 217 (29 October 2021).

[21] S v Rabie 1975(4) 855 (AD) at 862 G. See also S v PB[21]: “...it remains an established principle of our criminal law that sentencing discretion lies pre-eminently with the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing”.

[22] 1964

(3) SA 494 (AD) at 495 D-H.

[23] S v Malgas 2001

(1) SACR 469 (SCA).

[24] S v Boggards 2013

(1) SACR (CC) at [4].

[25] 1977 (2) SA 155 (A) at 159A-D.

[26] This first principle was rejected in S v Holder 1979 (2) SA 70 (A) at 77H-78A, but the latter approach was endorsed, as long as no factor would be over- or underemphasised in the process (at 74H).

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