

SOUTH AFRICA / JUDGMENT

S v Machape (2/2013) [2013] ZANWHC 89 (29 November 2013)

[2013] ZANWHC 89

COURT

North West High Court, Mafikeng

BEFORE

OK Chwaro, RD Hendricks

CASE / FILE NUMBER

2/2013

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HIGH COURT REF NO: 2/2013

In the matter between:-

THE STATE

versus

DUMISANE ERIC MACHAPE

REVIEW

JUDGMENT

CHWARO AJ:

Introduction

:-

[1] The accused was convicted of two counts of housebreaking with intent to steal and theft and sentenced to three (3) years direct imprisonment on each count. The sentences so imposed were not ordered to run concurrently.

[2] A subsequent query relating to the sentence was issued by my Brother Hendricks J on the 4 October 2013 where the learned Magistrate was asked the following:

- Whether the cumulative effect of a period of six (6) years imprisonment was not harsh having regard to the circumstances of the

case?

-Why did the learned Magistrate not order that the two sentences should run concurrently?

- [3] The learned Magistrate responded through correspondence dated 28 October 2013 and indicated that his sentencing discretion was informed by the fact that the two offences were not committed with a single intent and due to the prevalence of the offence in the district.

Background

facts :-

- [4] The accused faced two counts of housebreaking with intent to steal. It was established that on the 5 September 2010, the accused broke into the house of Ms Nong, the complainant, and stole a Fuji digital camera valued at R1,200-00 and an HP laptop valued at R7 000-00, both of which belonged to the complainant. The accused was convicted following evidence led by the complainant and the fingerprint expert, Warrant Office Diratsagae of the South African Police Service, the latter having testified that the fingerprints lifted at the scene of the crime matched with the fingerprints of the accused. At the end of the state case, the accused indicated that if he knew that his fingerprints were successfully matched with those uplifted at the scene of crime, he would have pleaded guilty to the charge in question. The accused was convicted accordingly.
- [5] In respect of the second count, Mr Albert Kekesi, the complainant, testified that on the 21 July 2012 at around 06h00 in the morning whilst busy preparing himself to attend a funeral, he noticed an unknown man crawling into his bedroom. He immediately called out for his wife who was still in bed at that time and it was then that the unknown man tried to conceal his face using a tracksuit top. That very man then grabbed an Asus laptop valued at R10 000-00 and ran out of the bedroom. An attempt at apprehending the suspect was unsuccessful. On his return to his yard after an unsuccessful chase for the suspect, the complainant found his Samsung television set, which was normally in the TV room, outside in the garden. Upon entering the house, he realised that the modem, the remote of the said television set and that of the DSTV decoder were also lost. He then called the police who attended to the scene of crime and uplifted fingerprints from the items so recovered and from the house. Warrant Officer Jacobs testified that he attended a housebreaking complaint at 1546 Magonare Close, Unit 6 Mmabatho . He found an identifiable palm which he uplifted from the television set and after comparison, it matched that of the accused. The accused was consequently convicted in respect of this charge.

The sentence :-

- [6] As indicated above, after considering the mitigating factors of the accused, which were that he was an unemployed 29 year old single man with one daughter who sold dagga in order to maintain his daughter and with one previous conviction of robbery which was committed in 2004, the learned Magistrate then sentenced him to three (3) years direct imprisonment on each count and ordered that the sentences should not run concurrently, with the effective term of imprisonment being six

(6) years.

[7] The relevant provisions of section 280 of the Criminal Procedure Act, No 51 of 1977 provide thus:

"280 Cumulative or concurrent sentences

- (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently."
- [8] It is apparent that the provisions of section 280(2) grants the court discretion to direct that any competent sentences of imprisonment imposed on a convicted person may run concurrently. It has been held that such a discretion must be exercised having due regard to the circumstances of a particular case, especially where the offences are inextricably linked in terms of locality, time, protagonists and where they were committed with one intent, including the cumulative effect of such sentences.

See: *S v Mokela* 2012 (1) SACR 431 (SCA)

[9] It is now settled law that the duty to impose an appropriate sentence is the prerogative of the trial court. It is only on limited instances that there may be an interference with the discretionary function of a trial court and where it is clear that the trial court exercised its discretion improperly or unreasonably.

See: *S v Malgas* 2001 (1) SACR 469 (SCA)

S v Shaik and Others [2007] ZACC 19; 2008 (1) SACR 1 (CC)

S v Le Roux and Others 2010 (2) SACR 11 (SCA)

[10] The court is also entitled to consider the cumulative effect of sentences imposed in respect of the offences committed and determine whether the sentence so imposed is not too harsh. In the matter of *S v Mpofu* 1985 (4) SA 322 (ZHC) at page 324G-J the court explained this aspect of sentencing as follows:

"In all multiple crime cases the courts pay regard to what Thomas describes as "the totality principle". (The court)

must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences." (Thomas Principles of Sentencing 2nd ed at 56.) In effect, the accused normally receives a "discount" for bulk offending,

particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole. In giving effect to this principle, individual sentences are passed on each count in some cases, whereas in others a globular penalty is imposed, but in either event, the overall severity of the sentence is modified to take account of the total and combined impact of all the offences together.”

See also: *S v Young* 1977 (1) SA 602 (A) at page 611D

[11] Having considered the totality of the circumstances of the present case, it is my view that the cumulative sentence of six

(6) years imprisonment is too severe and harsh. This is a case where the review court is entitled to interfere with the sentencing discretion of the trial court and order a different sentence.

[12] In the premises, the sentence of three years imprisonment on each count stands to be reviewed and substituted with a sentence which will provide that the term of imprisonment on both counts should run concurrently.

Order:-

[13] Consequently, the following order is made:

1.The sentence of three years imprisonment on each count is set aside and substituted with the following:

“Three

(3) years imprisonment on each count, which sentences are ordered to run concurrently in terms of the provisions of section 280(2) of the Criminal Procedure Act, 51 of 1977”.

2.The sentence is antedated to the 28 August 2013.

OK CHWARO

ACTING JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

JUDGE OF THE HIGH COURT

DATED: 29 NOVEMBER 2013

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