

SOUTH AFRICA / JUDGMENT

S v Magadze (17/2018, A390/2017) [2018] ZALMPTHC 3 (20 February 2018) [2018] ZALMPTHC 3

COURT

Limpopo High Court, Thohoyandou

BEFORE

NF Kgomo, AML Phatudi

CASE / FILE NUMBER

17/2018, A390/2017

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA
LIMPOPO LOCAL DIVISION,
THOHOYANDOU
(1)
NOT
REPORTABLE
(2)
NOT OF
INTEREST TO OTHER JUDGES
(3)
REVISED
DATE:...20/2/2018
(on which review judgment is
handed

High Court Review Case	17/2018
No:	Vuwani
	Magistrate Court Case
	No.A390/2017
	In

the matter between: THE
 STATE
 and
 TAKALNI
 MAGADZE
 Accused
 REVIEW

JUDGMENT

NF KGOMO J

- [1] The accused was convicted in the Vuwani Magistrate's Court of two counts of malicious damage to property. He was sentenced to 36(thirty-six) months imprisonment on each count. The trial Magistrate, Mr Ntshane specifically ordered that both sentences should not run concurrently. Effectively the accused was to serve a combined sentence of 6(six) years imprisonment.
- [2] He was not legally represented. However, this court is satisfied that he was fully explained his right to legal representation and he made an informed choice of conducting his own defence.
- [3] The allegations by the accused were that he damaged his maternal home's windows with stones on 10 December 2017 and his aunt's or niece's car windscreen on 11 December 2017.
- [4] After his guilty plea's on both counts were converted into those of not guilty after questioning by the Court in terms of s112(1)(b) of the Criminal Procedure Act 51 of 1977, evidence aliundi was led: That evidence proved conclusively that he was guilty as charged on both counts. The evidence also proved that he damaged the said property deliberately or intentionally.
- [5] As a result, the convictions are in order.

SENTENCE

- [6] This court is not happy with the trial court's order that the two 36 months imprisonment period in respect of each of the above counts should not run concurrently.
- [7] The accused is a first offender as no previous convictions were proved against him. He was engaged in an economic activity of running a spaza shop. That meant that although he was not in active conventional employment, he was nevertheless doing something to sustain himself.
- [8]

It is so that the accused was proved to have been a problematic child to his people. However, that fact should not have moved the trial Magistrate to act with ostensible anger and vengeance in imposing the sentences herein. As Corbett JA held in *S v Rabie* 1975 (4) SA 855 (A).

"... A judicial officer should not approach punishment in a spirit of anger because, being a human being, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society, which his task and the objects of punishment demand of him. Nor should he strive for or after severely, or on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society, which contributes to criminality.. "

[9] A sentence passed should not induce a sense of shock. It is this Court's view and finding that a sentence of 6(six) years for what the accused did - motivated by his ostensible stupidity of course - is shockingly inappropriate .

[10] I agree with the sentiments by Thereon J when he stated the following in *S v Moswathupa* 2012(1) SACR 259 (SCA) among others:

"In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that punishment should fit the criminal as well as the crime be fair to society and be blended with a measure of mercy "

[11] It is this court's finding that the sentence imposed here was not blended with the requisite measure of mercy. The trial court did not act such that his sentence was -

"... to ensure that one element (of punishment) is not unduly accentuated at the expense of or to the detriment of or exclusion of the others..."

See *S v Moswathupa* (supra) at para [4]).

[12] The sentence herein over-emphasized the deterrent and retributive purposes of punishment. Not that it is generally a bad idea: Such over emphasis may be necessary in some circumstances. (See *S v Schwartz* 2004

(3) SACR 370 (SCA).

[13] In this case, the over-emphasis was not appropriate.

[14] I agree with Nicholas JA when the learned justice said the following in *S v Skenjana* 1985(2) SA 51 (A):

"... My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment, ... nor is it in the public interest that potentially valuable human potential or material should be seriously damaged by long incarceration..."

[15] The accused may be a rotting apple. However, he is not rotten beyond redeem. He is a good candidate for reformation while serving the custodial sentence which he deserves and which this court will propose.

[16] In the circumstances, the sentencing imposed stands to be interfered with. There are exceptional circumstances justifying why a query was not first raised.

ORDER

[17] In the peculiar circumstances, the following order is made:

17.1 The convictions on both counts are confirmed.

17.2 The sentence imposed is set aside and replaced with the following sentence:

"(a) The accused is sentenced to 24(twenty-four) months imprisonment on each count.

(b) The sentence in count 2 is ordered to run concurrently with the sentence in count 1.

(c) The accused's effective sentence is thus, 24 (twenty-four) months imprisonment.

(d) In terms of s103 Act 60 of 2000 (Firearms Control Act) the accused is declared unfit to possess a firearm.

NF KGOMO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree.

AML PHATUDI

It is so ordered.

NF KGOMO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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