

SOUTH AFRICA / JUDGMENT

S v Maties and S v Pieterse (130050, 130048) [2014] ZAECHGC 2 (23 October 2013) [2014] ZAECHGC 2

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, D Z Dukada

CASE / FILE NUMBER

130050, 130048

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THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Appeal
Case No: A391/2012
Trial
Case No: 3541/2012
In the matter

between:

WOOLWORTHS (PTY)
LTD.....APPELLANT
and
P CHRISTODOULOU &
SONS TEXTILES CC.....FIRST
RESPONDENT
PAULOS
CHRISTODOULOU.....SECOND
RESPONDENT
Coram:.....HLOPHE
JP & SAMELA & ROGERS JJ
Heard:31
JANUARY 2014
Delivered:.....10
FEBRUARY 2014

JUDGMENT

PLASKET, J:

[1] The appellants were convicted in the Regional Court, Kirkwood of seven counts of stock theft in terms of the Stock Theft Act 57 of 1959 in that they were found to have stolen, over a period of about two months, a total of 168 sheep from a number of farmers in the Kirkwood district.

[2] The first and second appellants were sentenced to nine years' imprisonment in respect of five of the counts and five years'

imprisonment in respect of the remaining two counts. Four sentences of nine years' imprisonment and one of five years'

imprisonment were ordered to run concurrently. This meant that they were sentenced to consecutive sentences of nine, nine and five years' imprisonment, an effective sentence of 23 years' imprisonment. The third appellant, who had a relevant previous conviction, was sentenced to nine year sentences in respect of four counts, which were ordered to run concurrently, a further nine years' imprisonment and two sentences of five years' imprisonment, all running consecutively. This means that he was sentenced to an effective 28 years' imprisonment.

[3] The appellants appeal against their sentences only. The matter is before this court with the leave of the trial court.

[4] The stock-theft of which the appellant were convicted was committed on a grand scale. In the court below, the magistrate pointed out correctly that a great deal of planning and preparation preceded the commission of the offences. Because of these features it is difficult to find comparable cases on sentence involving stock theft or, indeed, any other yardstick against which to determine what appropriate sentences may be.

[5] The Stock Theft Act offers limited assistance. Section 14 provides that a district court that has convicted a person of an offence under the Act may impose a sentence of 'a fine or imprisonment for a period not exceeding three years' and a regional court may imposed 'a fine or imprisonment for a period not exceeding 15 years'. In other words, the Act provides that neither the district nor regional courts may impose sentences for stock theft in excess of their normal sentencing jurisdiction.[1]

[6] It seems to me that in the absence of the guidance of previous comparable cases, it is necessary to revert to basics and consider

the personal circumstances of the appellants, the nature and seriousness of their offences and the interests of society –

the Zinn triad[2] – in order to assess the magistrate's sentences. Because of the limits on an appeal court's power to interfere with a trial court's sentencing discretion, the aim of the exercise is to determine whether the magistrate misdirected himself in any material respect and whether the sentences imposed by the magistrate are sufficiently different to those this court would have imposed to justify being classified as shockingly or startlingly or disturbingly inappropriate, these being the only bases upon which an appeal court may interfere with a trial court's sentencing jurisdiction.[3]

The appellants

- [7] The personal circumstances of the appellants are unremarkable in the sense that, for the most part, they are neither mitigatory nor aggravating. The first appellant was 38 years old when the charge sheet was drafted and so, slightly younger when the offences were committed. He was married and was the father of five children. At the time of the commission of the offences he was employed 'doing piece jobs at gardening services'. There is no evidence as to how much he earned. He has a standard 4 education and was convicted of theft in 2005. (He was treated as a first offender for purposes of his stock theft convictions by the magistrate.) He spent about 18 months in custody awaiting trial because, although he had been granted bail, he has not been able to pay it.
- [8] The second appellant was also 38 years old when the charge sheet was drafted. He was married and was the father of four children. He was employed at the time the offences were committed. Again, no evidence as to his salary is on record and no evidence about the nature of his job was placed before the court. He had no previous convictions. He had also been in custody awaiting trial for about 18 months.
- [9] According to the charge sheet, the third appellant was 29 years old. (His legal representative gave his age when he was sentenced as 31 years old.) He was not married and was the father of two young children. He has a standard 8 education. He was employed and earned R1 900 per month. He had spent about 18 months in custody as an awaiting trial prisoner. He has a previous conviction for the offence created by s 3(1) of the Stock Theft Act – acquiring stock in the absence of reasonable cause for believing that it was properly acquired – for which he had been sentenced to three years' imprisonment.

The Offences

- [10] The appellants were convicted of seven counts of stock theft. They stole a total of 168 sheep over a period of approximately two months as follows: between 26 July and 15 August 2007, 26 sheep from the farm Steenbokvlakte; between 9 and 10 August 2007, eight sheep from the farm Cockscomb; between 21 and 26 August 2007, 31 sheep from the farm Skietnek; between 27 August and 1 September 2007, 27 sheep from the farm Hartmanshoop; between 6 and 7 September 2007, 27 sheep from the farm Skietnek; between 19 and 20 September 2007, 13 sheep from the farm Steenbokvlakte; and on 21 September 2007, 36 sheep from the farm Hartmanshoop.

- [11] It is clear from the evidence that the offences were well planned. Fences on the farms were cut, sheep were driven from their camps to close to the nearest access roads where they were slaughtered and skinned. The photographs that form part of the record show skins, heads and insides of sheep littering the veld. The carcasses were loaded onto vehicles which conveyed them away from the scene of the crime. From this it can be inferred that the appellants were part of a stock theft syndicate.
- [12] The photographs also show, at the slaughter sites, a number of foetuses. The sheep that were slaughtered were pregnant ewes. This means that the losses to the farmers concerned were far greater than the slaughter value of the ewes; the farmers also lost the progeny of their ewes.
- [13] Unlike many stock theft cases where an accused is motivated by hunger or need,[4] in this matter the organised nature of the offences, the sheer scale of the operation and the fact that the appellants were all employed leads to the inescapable inference that the motive for the offences was greed.
- [14] The scale of the operation and its brazen nature led to the farmers in the area having to take extraordinary measures to protect their stock. They were forced to employ guards and patrol the area at night. In addition to the losses caused directly by the thefts they had to mend their fences and replace locks and chains that had been destroyed or damaged by the thieves.
- [15] The losses the owners of the sheep suffered were not recovered. Although s 15 of the Stock Theft Act makes provision for the court that convicts a person of stock theft to order him or her to compensate the complainant there was no purpose in making such an order in this case given the means of the appellants and the quantum of the losses suffered by the farmers. The frustration and anxiety caused by conduct such as that of the appellants was summed up by one of the complainants, Mr Sydney Daniëls. When asked what it was like to farm sheep in the area, he said that it was no longer pleasant or easy. When asked why this was so he said, in effect, that if jackals and lynxes did not get their sheep, stock thieves did and that, as a result, more sheep farmers in the area were turning to game farming.

The interests of society

- [16] Stock theft has generally been regarded as a serious form of theft.[5] A number of factors contribute to its seriousness. Throughout the country, it is an offence that is prevalent although one should be careful not to over-emphasise this because, as Wessels J said in *S v Ndhlovu*,[6] 'one should not overlook the fact that all things being equal one is likely to find that stock theft is committed more frequently

in an area where farmers farm mainly with stock or poultry'.

[17] The prevalence of the offence has had the effect that as a general rule courts imprison first offenders, in the absence of special circumstances, for the theft of even one sheep, for periods of six months to a year.[7] There has been a tendency over the years of courts imposing increasingly harsher sentences. So, in *S v Oosthuisen & 'n ander*,^[8] Kotze J, after speaking of stock theft being an 'epidemiese plaag' in the Free State, said:

'Vergoedingsbevele, korrektiewe opsies, boetes, ligte vonnisse en dreigemente kan hierdie golf wat oor die hele Vrystaat spoel, nie meer keer nie en die tyd het aangebreek dat daar teen wil en dank verskerpte vonnisse opgelê moet word. Dít is noodsaaklik vir die handhawing van wet en orde en die beskerming van die geteisterde boeregemeenskap.'

[18] In *Truyens v The State*^[9] Cachalia JA said the following of stock theft:^[10]

'Stock theft is a sensitive issue in many farming communities. This is because it is difficult for farmers to prevent the crime and equally difficult for perpetrators to be apprehended and prosecuted. Cattle farmers are therefore particularly vulnerable to this type of crime. The courts have reflected these concerns by progressively imposing tougher sentences – usually direct imprisonment – on offenders.'

[19] The economic impact of stock theft on rural communities is also a factor that increases the inherent seriousness of the offence. It is not only the owners of stock who suffer but their workers as well, whose continued employment is placed at risk as farmers either go out of business, reduce or close down their stock farming operations or change to less labour intensive farming that does not carry the same risks of stock theft, such as game farming. In most cases, the fact that the Act makes provision for compensation orders is cold comfort for complainants because, as in this case, there is often no point in making such an order because the stock thief does not have the means to pay compensation.

[20] Allied to this, stock theft tends, understandably, to generate strong emotions in those from whom stock is stolen. In *S v Oosthuisen & 'n ander*^[11] Kotze J stated:

'Daar moet gewaak word daarteen dat die misdadigers se belange nie oorbeklemtoon en die benadeeldes en gemeenskap se belange nie

onderbeklemtoon word nie. Die veeboere wat van hulle vee afhanklik is om verbandrentes en werkerslone en minstens dat hulle en hulle kinders se lewensbenodighede te betaal, kan nie vanweë 'n oordrewe humanistiese benadering maar net aan hulle lot oorgelaat word nie, want dan ontstaan die gevaar dat hulle self gaan straf en skiet.'

[21] The danger of people resorting to self-help and vigilante-ism is ever-present if sentences do not properly and fairly reflect societal censure for stock theft and do not adequately protect the interests of society (within the balancing of interests required by Zinn).^[12] This point was made graphically by Munnik CJ in *S v Solani*^[13] when he spoke of people taking the law into their own hands when people believed that a stock thief was not adequately punished by burning down the kraal of the stock thief, 'if possible with him and his family roasted alive in the flames'.

[22] That does not mean that courts have to impose sentences that satisfy the public (however one would gauge that satisfaction). Harms JA stated in *S v Mhlakaza & another*:^[14]

‘The object of sentencing is not to satisfy public opinion but to serve the public interest. . . A sentencing policy that caters

predominantly or exclusively for public opinion is inherently flawed. It remains the court’s duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.’

Sentencing in stock theft cases

[23] I accept as a starting point that this case is, in terms of its combination of scale, method and motive, a more serious instance of stock theft than any that I have been able to find in the law reports or in unreported judgments. That means that while previous decisions on sentence may have some relevance to show trends and judicial attitudes, the unique facts of this case, seen within the general principles applicable to sentencing, will ultimately be decisive. I shall, however, now turn to a brief survey of the cases. In so doing, I shall restrict myself to more recent decisions and only those dealing with the theft of small stock such as sheep and goats.

[24] In *S v Khumalo & andere*^[15] the first appellant had been convicted of six counts of stock theft involving the theft of 61 goats committed over a period of about four months. The second and third appellants had been convicted of five counts. The first appellant had been sentenced to three years’ imprisonment per counts, of which one year per count had been conditionally suspended – an effective sentence of 12 years’ imprisonment. The other appellants had been sentenced to two years’ imprisonment per count, of which one year had been conditionally suspended – an effective sentence of five years’ imprisonment. The first appellant had played a leading role and had two previous convictions for stock theft. On review, Van Rensburg AJ held that the magistrate had misdirected himself in not applying himself properly to the cumulative effect of the sentences. Having set aside the sentences, he replaced them with the following sentences: in the case of the first appellant, a sentence of two years’ imprisonment per count of which nine months per count was conditionally suspended – an effective sentence of seven and a half years’ imprisonment; and, in the case of the second and third appellants, 15 months’ imprisonment per count of which five months per count was conditionally suspended – effective sentences of four years and two months imprisonment.

[25] In *S v Oosthuizen*^[16] the appellant had been convicted of three counts of stock theft, involving one, four and 11 sheep, committed over one and a half

months. All of the sheep were ewes in lamb, the appellant was a first offender, the offences were carefully planned and were committed out of greed. Kriegler AJA described the offences as ‘inherently serious’ and the sentences imposed as ‘robust,

particularly in their cumulative effect'.^[17] An effective sentence of four years' imprisonment was confirmed on appeal.

[26] In *S v Oosthuisen & 'n ander*^[18] the appellants, having been convicted of the theft of six sheep, were sentenced to 18 and 12 months' imprisonment respectively. The first appellant was a 34 year old farmer who, as a result of an accident, had two artificial legs. He had two previous convictions

for stock theft. The second appellant, a 41 year old railway worker, was a first offender. The sentences were confirmed on appeal.

[27] In *S v Tyers*^[19] the appellant had been convicted in separate trials of the theft of 15 and 18 sheep. He had been sentenced to 15 months' imprisonment

in respect of each conviction. When he appealed against these sentences, the court gave him notice that it was considering an increase in sentence. Buys J held that the trial magistrate had given insufficient weight to a number of aggravating factors, namely the number of sheep stolen, the organised nature of the offences, the fact that the appellant had not committed them out of economic need or hunger and that he had been motivated by greed. The sentences were increased to two years' imprisonment in respect of each conviction – a total of four years' imprisonment.

[28] In *S v Molenbeek & andere*^[20] the appellant, two of whom were policemen, had between them stolen a total of six, five and eight sheep. One was only convicted of one count, three were convicted of two counts and one was convicted of all three counts. All were employed, were young – either 20 or 21 years old – and they were all treated as first offenders. They were all sentenced to 18 months' imprisonment on each count, of which ten months per count was suspended. In other words, the effective terms of imprisonment imposed were eight months (in respect of one appellant), 16 months (in respect of three appellants) and 24 months (in respect of one appellant). These sentences were confirmed on appeal.

[29] In *Vunati v S*^[21] the appellant had been convicted of stealing 21 sheep. Petse AJ, in confirming a sentence of five years' imprisonment, took into account the seriousness of the offence of stock theft and the large number of sheep stolen by the appellant 'in what on all accounts appears to be an organised theft motivated by nothing other than greed'.

[30] From the survey of the cases, it is clear that the sentences imposed in this case are substantially more severe than any sentence that I have been able to find in the law reports and in the unreported cases that I have found. I turn now to consider the sentences imposed by the magistrate and their cumulative effect.

The cumulative effect of the sentences

- [31] Section 280(1) of the Criminal Procedure Act 51 of 1977 provides that when an accused is convicted of two or more offences, the trial court ‘may sentence him to such several punishments for such offences. . . as the court is competent to impose’. Section 280(2) provides that sentences of imprisonment shall run consecutively ‘unless the court directs that such sentences of imprisonment shall run concurrently’.
- [32] Once appropriate sentences have been imposed in relation to each offence of which an accused has been convicted, it is necessary for a trial court to consider the cumulative effect of the sentences and, if necessary, to ameliorate the harshness of the aggregate sentence. In such a case, ‘the sentences on several counts may be arbitrarily reduced to produce a reasonable result when taken together’.[22] The court must, in the words of Trollip JA in *S v Young*,[23] ask itself: ‘Despite the gravity of the individual offences, is the cumulative effect of these sentences too harsh?’
- [33] The effective sentences of 23 and 28 years’ imprisonment that were imposed by the magistrate in this case are undoubtedly extremely long sentences. One only has to consider Holmes JA’s well known dictum in *S v V*[24] for this to be apparent:
- ‘As to that, if there be any who doubt whether a massive sentence of imprisonment for 20 years will not be a sufficient expiation for the gravely evil misdeeds of this youth, let them cast their minds back in their own lives over that period, and consider how much has happened to them in those two decades, and how long ago it has seemed, although enlivened by domestic happiness and the free pursuit of their avocations. No such ameliorations attend the slow tread of years when you are locked up.’
- [34] The Supreme Court of Appeal, in particular, has made it clear in a number of cases that sentences of this magnitude should be reserved for the most heinous of offences, and that there is a point beyond which a long term of imprisonment is no longer able to serve any rehabilitative or deterrent purpose.[25]

Conclusion

- [35] The magistrate adopted what may be termed a rough and ready approach to the sentences to be imposed in respect of each count. He imposed nine years’ imprisonment in respect of those counts where more than 20 sheep were stolen and five years’ imprisonment in respect of those counts where less than 20 sheep were stolen. I am sure he could have applied other methods of coming to much the same result, so I find that there is no misdirection in his general approach.
- [36] As for the length of each sentence, I am aware of the fact that sentences of nine years’ imprisonment are harsher than any of the sentences that I have come across in the cases that I have surveyed. (A sentence of five years’ imprisonment was confirmed by me (with Dambuza J concurring) in *S v Nywebeni*[26] where the appellant and others had slaughtered, butchered and stolen two dairy cows, and a sentence of five years’ imprisonment for the theft of 21 sheep was confirmed by Petse AJ in *Vunati*.[27]) But the facts of this case are

markedly different – and far more serious – than any of those that I have referred to in this judgment. On that basis, I am of the view that, robust as the sentences imposed by the magistrate in respect of each count undoubtedly are, he did not misdirect himself in that respect, and his robust approach is justified by the extreme seriousness of the appellants' course of conduct. Moreover, it is appropriate in my view for the court to send out an unequivocal message: people who plunder the property of others and thereby endanger fragile rural economies must expect a severe response from the courts when they are caught.

- [37] I am, however, of the view that the magistrate misdirected himself by paying insufficient regard to the cumulative effect of the sentences with the result that the sentences of 23 and 28 years' imprisonment were too harsh to the point where it can be said that they are startlingly inappropriate. These are the sort of sentences that are imposed to deter serious crimes involving violence – and then only rarely. They are far out of kilter with the effective sentences that have been imposed for multiple counts of stock theft involving large numbers of small stock. They must be interfered with even though the effective sentences I intend to impose are also a great deal more severe than those imposed in any of the cases that I have discussed in this judgment.
- [38] I am of the view that, serious as this case of stock theft certainly is, sentences of 14 and 16 years' imprisonment respectively are adequate to meet all of the goals of punishment – retribution, deterrence and rehabilitation – and be proportionate to the crimes, the personal circumstances of the appellants and the legitimate interests of society.
- [39] In the cases of the first and second appellants, the sentences of nine years' imprisonment in respect of each of counts 1, 4, 5, 6 and 8 will be ordered to run concurrently with each other and the five year sentences in respect of counts 3 and 7 will likewise be ordered to run concurrently with each other. In the case of the third appellant, his previous conviction justifies a more severe sentence. The nine year sentences in respect of counts 1, 4, 5, 6 and 8 will run concurrently with each other and three years of the five year sentence in respect of count 7 will run concurrently with the five year sentence in respect of count 3.
- [40] In the result, the following order is made.
- (a) The appellants' appeals against their sentences succeed to the extent set out below.
 - (b) The sentences imposed on the appellants by the court below are set aside and replaced with the following sentences which are back-dated to 9 April 2009.
 - (i) The first, second and third appellants are sentenced to nine years' imprisonment in respect of each of counts 1, 4, 5, 6 and 8 and to five years' imprisonment in respect of each of counts 3 and 7.

(ii) In the cases of the first and second appellants, the sentences of nine years' imprisonment in respect of counts 1, 4, 5, 6 and 8 shall run concurrently with each other and the sentences of five years' imprisonment in respect of counts 3 and 7 shall run concurrently with each other, so that they are each sentenced to an effective term of 14 years' imprisonment.

(iii) In the case of the third appellant, the sentences of nine years' imprisonment in respect of counts 1, 4, 5, 6 and 8 shall run concurrently with each other and three years of the sentence of five years' imprisonment in respect of count 7 will run concurrently with the sentence of five years' imprisonment in respect of count 3, so that he is sentenced to an effective term of 16 years' imprisonment.

C Plasket

Judge of the High Court

I agree.

D Z Dukada

APPEARANCES:

Appellants: N P Mtini, Grahamstown Justice Centre

Respondent: D G Robinson, office of the Director of Public Prosecutions, Grahamstown

[1] Magistrates' Courts Act 32 of 1944, s 92(1).

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

[3] S v Malgas 2001 (1) SACR 469 (SCA) para 12; S v Kgosi 1999 (2) SACR 238 (SCA) para 10.

[4] S v Louw 1990 (2) SACR 323 (E); S v Phillip 1990 (2) SACR 442 (C); S v Pienaar 1991 (1) SACR 341 (C); S v Holiday 2004 (2) SACR 576 (E). See more generally, S v Ndhlovu 1961 (2) SA 637 (N).

[5] See S v Tyers 1997 (1) SACR 261 (NC) at 263c-d; Vunati v S

[2003] JOL 11171 (E) para 17. But see R v Hemley & 'n ander 1960 (1) SA 397 (GW) at 398B-D and 399E-G in which the point is made that the seriousness of any case of stock theft or of theft will depend on its own facts. The theft of £50 in cash from a farmer would be more serious than the theft of a barren ewe valued at £2.

[6] Note 4 at 638C.

[7] See S v Molenbeek & andere 1997 (2) SACR 346 (O) at 350c-e; S v Tyers (note 5) at 264g.

[8] S v Oosthuisen & 'n ander 1996

(1) SACR 475 (C) at 476f-h.

[9] *Truyens v The State* (454/2010)

[2011] ZASCA 110 (1 June 2011)

[10] Para 24.

[11] Note 8 at 476i-477a.

[12] See generally, *R v Karg* 1961 (1) SA 231 (A) at 236B-C.

[13] *S v Solani* 1978 (1) SA 432 (Tk) at 433H.

[14] *S v Mhlakaza & another* 1997

(1) SACR 515 (SCA) at e-g.

[15] *S v Khumalo & andere* 1983

(2) SA 540 (N).

[16] *S v Oosthuisen* 1993 (1) SACR 10 (A).

[17] At 11e-g.

[18] Note 8.

[19] Note 5.

[20] Note 7.

[21] Note 5.

[22] *R v Abdullah* 1956 (2) SA 295 (A) at 300A.

[23] *S v Young* 1977 (1) SA 602 (A) at 611C-D. See too *S v Johaar* 2010 (1) SACR 23 (SCA) para 14; *S v Moswathupa* 2012 (1) SACR 259 (SCA) para 8; *S v Muller & another* 2012 (2) SACR 545 (SCA) para 9.

[24] *S v V* 1972

(3) SA 611 (A) at 614H. In Holmes JA's obituary in October 1990 *Consultus* 109 it was said of this dictum that 'one senses here the influence of his personal experience of incarceration while a

prisoner-of-war'.

[25] *S v Skenjana* 1985 (3) SA 51 (A) at 54I-55E; *S v Moswathupa* (note 23) para 10; *S v Muller & another* (note 23) para 10.

[26] *S v Nywebeni* ECD 2 November 2004 (case no.CA & R 186/04) unreported.

[27] Note 5.

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