
SOUTH AFRICA / JUDGMENT

S v Velaphi (CA&R 99/08) [2008] ZAECHC 135 (20 August 2008)

[2008] ZAECHC 135

COURT

High Courts - Eastern Cape

BEFORE

Jones, Grogan

CASE / FILE NUMBER

CA&R 99/08

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ECJ:

PARTIES :

ANDILE VELAPHI

And

THE STATE

DATE HEARD: 06/08/08

JUDGE(S): JONES J, GROGAN AJ

LEGAL REPRESENTATIVES –

Appearances:

Not reportable

In the High Court of South Africa

(Eastern Cape Division)

Delivered:

(Grahamstown High Court) CA&R 99/08

In the matter between

ANDILE VELAPHI

Appellant

and

- [1] The appellant was charged before the additional magistrate of East London with theft. He pleaded guilty and was convicted in terms of his plea. His statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 revealed that on walking past the complainant's premises in an East London suburb he noticed a gas cylinder, a skottel braai, a bakkie roll bar, and some metal poles unattended in the garden. He decided to steal them. He jumped over the wall to get them, and took them into the street outside. But he was seen by a domestic worker who raised the alarm. He was caught red-handed and arrested on the scene.
- [2] After the conviction the prosecutor proved a large number of previous convictions, mainly for house-breaking with intent to steal and theft. The magistrate considered that the appellant's bad record called for a sentence which exceeded her jurisdiction. She accordingly stopped the trial in terms of section 114(1)(b), and committed the appellant to the regional court for sentence.
- [3] The appellant was brought before the regional magistrate of East London on 15 January 2008. His attorney led no evidence and contented himself instead with an address from the bar in mitigation of sentence. In doing so he referred to the appellant's personal circumstances, his previous convictions, the gravity of the offence and the desirability of the imposition of a sentence designed at the appellant's rehabilitation. He submitted that despite the previous convictions consideration should be given to a rehabilitative sentence of correctional supervision rather than imprisonment. The prosecutor made the counter submission that imprisonment was the only appropriate sentence. The regional magistrate then sentenced the appellant to 5 years' imprisonment.
- [4] The appellant now appeals against the severity of that sentence, with the leave of the court a quo.
- [5] The magistrate's reasons make it clear that he deliberately imposed a severe sentence. He was motivated primarily by the bad criminal record, the lack of any sign in the past of any real prospect of rehabilitation, and the need to protect society. In analysing the previous convictions, he emphasized the large number of occasions upon which the appellant has repeated the same kind of offence in the past, and pointed to the added aggravating feature that he frequently committed his next offence as soon as he was released, sometimes while he was still on parole. His judgment continues:
- ‘The impression the court gains is that if the accused is not in prison then he steals, and the only way to stop him from stealing is to keep him behind bars where he cannot steal because he simply will not stop stealing out of his own accord. . . . Society also needs some measure of protection. . . . Accused must know, if he keeps on stealing he will keep on going back to prison. This choice is very simple and the choice is his.’

- [6] That the sentence is deliberately severe is not a valid ground for a court of appeal to reduce it. Serious cases frequently call for deliberately severe sentences. The principle for interference by a court of appeal is clearly re-stated by Scott JA in *S v Kgosi* 1999 (2) SACR 238 (SCA) at 241:

It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Compare *S v Pieters* 1987 (3) SA 717 (A) at 727G - I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.

- [7] In this case, the argument on behalf of the appellant was that the magistrate did not exercise his discretion properly, and that a court of appeal is accordingly free to interfere. Counsel submitted that the magistrate overemphasised the effect of the previous convictions and the need to protect society, and that this misdirection induced him to impose a sentence that was out of proportion to the gravity of the offence. This argument requires, first, an evaluation of the previous convictions. The appellant, who is now 45 years old, first fell foul of the law on 8 May 1976 when he was given a sentence of a juvenile correction of 6 cuts with a light cane for theft. On 22 February 1984, he was sent to prison for 9 months for attempted robbery. Between August 1985 and February 2006 he was convicted of five separate charges of housebreaking with intent to steal and theft and one charge of attempted housebreaking. For these crimes he was given

During that 11 year period he was, in addition, convicted of theft in December 1986, for which he was given 20 months' imprisonment; and attempted theft in August 2000 for which he was given 3 months' imprisonment. He was eventually released on 2 February

2007. He committed the present offence in November 2007, during the period of suspension of the sentence imposed in February 2006.

The first point that I want to emphasise is that notwithstanding recidivism, and a recurrence in regard to the commission of the same offence, in weighing up a sentence the court must never lose sight of the actual offence for which sentence is being imposed.

The same point is made in *S v Baartman* 1997 (1) SACR 305 where this principle is stated as part of the wider rule that, to be just, punishment must fit the crime. The judgment says at 305b-h

... the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise it inevitably overemphasises the interests of society at the expense of the interests of justice and the interest of the offender. If it does this, it cannot be a just sentence.

It all comes down to the basic principle that the punishment should fit the crime.

The focus in the Baartman judgment is on sentences for petty theft, but the principle applies to sentencing generally.

On 15 September 1983 she was convicted of the theft of a cheque to the value of R0.50 - for which she was cautioned and discharged - and of fraud involving R27600, no doubt perpetrated with the stolen cheque - for which she received a sentence of three years' imprisonment, suspended for five years on condition that she was not convicted of theft or fraud, committed during the period of suspension, in respect of which she received a sentence of imprisonment without the option of a fine. Nine months later, within the period of suspension, she was again convicted on three counts of fraud involving cheques. The amounts involved, according to the SAP 69, were R1091.95, R981.08 and R3102 (sic). The passing of sentence was postponed for five years on condition that she refunded the amount of R981,08 in instalments of R150 per month. Less than a year later she was again convicted, this time on 63 counts of theft involving a total cash amount of R58 168.97. In terms of s 285 of the Criminal Procedure Act 51 of 1977, a sentence of 1500 hours of periodical imprisonment was imposed.

The current offences were also committed during the period of suspension.

The Lister case is, of course, distinguishable from the present matter. But it is useful as a guide to measure the seriousness of the present offence in relation to a sentence of 5 years' imprisonment. There is no doubt that in my mind that the Lister case has more aggravating features, is more serious, and warranted a more severe sentence than the present case.

[11] In the result I am satisfied that the magistrate misdirected himself in imposing a sentence which was out of proportion to the seriousness of the offence to the extent that there was a striking disparity between his sentence and an appropriate sentence. It is necessary, therefore, to set the sentence aside on appeal.

7 August 2008

Judge of the High Court (Acting)

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