

SOUTH AFRICA / JUDGMENT

Taylor v S (CA&R: 14/2024) [2024] ZAECKMKHC 86 (12 August 2024)

[2024] ZAECKMKHC 86

COURT

Eastern Cape High Court, Makhanda

BEFORE

Bands, M.W. Nobatana

CASE / FILE NUMBER

CA&R: 14/2024

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THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No: CA&R: 14/2024

In the matter between:

CLEO TAYLOR

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

BANDS J:

- [1] This appeal is limited to sentence only. The appellant was convicted on 6 counts of fraud by the District Court, Gqeberha, having pleaded guilty to the charges in accordance with the provisions of section 112(2) of the Criminal Procedure Act 51 of 1977 (“the Act”). She was thereafter sentenced to an effective 6 years’ imprisonment; 1 year in respect of each count. No order was made in terms of section 280(2) of the Act. The applicant unsuccessfully sought leave from the trial court to appeal her sentence, whereafter she was ultimately granted leave to appeal, on petition to this court, on 5 February 2024.

- [2] In her written statement, the appellant sets out, inter alia, that the 6 offences were committed against 6 separate complainants over a period of 11 months, from 27 November 2021 to 25 October
2022. Her modus operandi for depriving the complainants of their property, without compensation, remained consistent. On each occasion, she approached her unsuspecting victims through various e-commerce marketplaces under the guise of desiring to purchase their pre-owned goods, advertised for sale. The appellant induced the complainants, by false pretences, to relinquish possession of their goods under the belief that she had paid for the items by way of electronic transfer. In each instance, the appellant who had no intention of paying for the goods, provided the complainants with falsified documentary proof of payment, evidencing the transactions. The value of the goods in question was R39,000.00 in aggregate; with the individual items selling for between R2,500.00 and R16,000.00 each.
- [3] The principal issue on appeal is whether the cumulative effect of the appellant's sentences is so harsh and disproportionate that it warrants the interference by this court. Central to this question is whether the counts ought to have been taken cumulatively or individually for the purposes of sentencing. On a reading of the trial court's judgment, both in the sentencing proceedings as well as in the application for leave to appeal, it does not appear that this aspect was considered by the Magistrate.
- [4] This notwithstanding, when the matter served before us, Ms Phikiso who appeared on behalf of the State initially argued that the trial court had correctly exercised its discretion in imposing the sentences that it did, given that: (i) the 6 counts of fraud were not inextricably linked; and (ii) the appellant has 2 previous convictions of relevance, dating back to 2010, for which she was given non-custodial sentences. However, when pressed further on the point, Ms Phikiso correctly conceded that the cumulative effect of the sentences was manifestly disproportionate. I accordingly turn to the appeal at hand.

Considerations of the sentencing court

- [5] In approaching the sentencing of the appellant, the sentencing court was alive to the fact that it was to impose sentences which struck an appropriate balance between the seriousness of the offences of which the appellant was convicted; her personal circumstances; and the legitimate expectations and legal interests of the community.[1] The trial court correctly pointed out that in the assessment of appropriate sentences, it was also required to give due consideration

to the four objectives of punishment, namely, its deterrent, preventative, reformatory and retributive aspects.[2]

[6] In mitigation of sentence, the trial court had due regard to the age of the appellant, being 32 at the relevant time. It further considered that she has a 15-year-old child with her husband (albeit that they are separated), with whom the minor resides. Prior to her arrest and incarceration, she was employed as a domestic worker,

earning between R3,000.00 and R5,000.00 per month. It was submitted from the bar that the offences were committed during a period when the appellant was struggling to find employment, and accordingly were motivated by need to fulfil her obligations. It is unclear as to what weight, if any, the trial court attached to this factor.

[7] The trial court remarked that the appellant had previously been convicted and sentenced on a count of theft in June 2010; a count of fraud in August 2010; and a count of assault in June 2014, and accordingly she was not a stranger to the law. Whilst the trial court acknowledged, correctly so, that the prior convictions of theft and fraud were older than 10 years, it concluded that they still served as an aggravating factor which fell to be considered in the context of this case. I agree with the trial court that the previous convictions of theft and fraud are relevant despite the lengthy passage of time. Not only were the offences of a similar nature (as taken into account by the trial court), but seemingly, whilst the appellant's previous convictions and non-custodial sentences may initially have served as a deterrent, that she again committed the offences with somewhat renewed vigour, the 6 offences being committed in a relatively short period of time, is an aggravating factor which falls to be considered. In such circumstances, the trial court cannot be faulted in the imposition of custodial sentences.

[8] Where the trial court erred, in my view, was its failure to consider the cumulative effect of the sentences imposed in circumstances where the total resultant sentence is disturbingly inappropriate and disproportionate to the offences of which the appellant was

convicted. This factor alone entitles this court to reconsider the imposed sentences on appeal.

Legal considerations and the effect thereof in the present case

[9] The approach to sentencing on appeal is well established.

[10] The imposition of sentence is pre-eminently within the discretion of the trial court, the interference thereof on appeal, being justified only if one or more of the recognised grounds have been shown to exist.[3] Such grounds being that the imposed sentence is: (i) disturbingly inappropriate; (ii) so totally out of proportion to the magnitude of the offence; (iii) sufficiently disparate; (iv) vitiated by misdirection, showing that the trial court exercised its discretion

unreasonably; and (v) is otherwise such that no reasonable court would have imposed it. In the presence of one or more of these

grounds, it follows as a matter of course that the discretion of the sentencing court was not properly exercised. Put simply, an appellate court, when considering a sentence imposed, in the exercise of a sentencing court's ordinary sentencing discretion, will interfere with such sentence only if there is a clear misdirection on the part of the court or if the sentence is disturbingly inappropriate or induces a sense of shock.

[11] With reference to the aspect of proportionality, the Constitutional Court in *S v Dodo*[4] stated at paragraph [37] as follows:

“The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly

where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognised in *S v Makwanyane*. Section 12(1)(a) guarantees, amongst others, the right “not to be deprived of freedom ... without just cause”. The “cause” justifying penal incarceration and thus the deprivation of the offender's freedom, is the offence committed. ‘Offence’, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

[12] In this respect, and whilst I accept that there is a need to have regard to the cumulative effect of sentences for closely connected

offences,[5] such duty also arises when a sentencing court is faced with a possible unacceptable cumulative term of imprisonment, regardless of whether the offences are connected in time and place.

[13] As succinctly stated by Shongwe JA in the unanimous judgment of the Supreme Court of Appeal, *S v Kruger*:[6]

“In the present case the trial and high courts considered the previous convictions as an aggravating factor. I too agree. The trial as well as the high court reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed at different places and on different times. While this may be a consideration, it cannot justify a failure to factor in the cumulative effect of the ultimate number of years imposed. I believe that a sentencing court ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. I also acknowledge that it is a daunting exercise indeed.”

[14] To suggest otherwise, would be irrational. It would serve to place an artificial limitation on the court's discretion under section 280 of the Act, not contemplated by the legislature, and would be tantamount to absolving the sentencing court from considering the

cumulative effect of multiple sentences when they relate to offences committed at different times and places. This would, in some

instances, result in the imposition of manifestly excessive sentences, without due regard to proportionality.

[15] The courts have consistently held that fraud is a serious offence. On each occasion, the offences were premeditated by the appellant, and the complainants were necessarily targeted. Having said that, the value of the goods involved, taken individually as well as

cumulatively, is not substantial (comparatively speaking) if regard is had to the plethora of reported cases involving offences of a similar nature. As stated previously, the appellant is not a first-time offender, the relevance of which I have dealt with. Given the appellant's age and the passage of time since her previous convictions, the prospect of her rehabilitation cannot be ruled out.

[16] Regard being had to the triad of factors, to which I have referred, and the objectives of punishment, I am satisfied that the circumstances of this case call for the imposition of custodial sentences. The so-called inappropriateness of direct imprisonment for "white-collar

crimes" has long since been disavowed.[7]

[17] I do not intend interfering with the trial court's imposition of 1 year imprisonment in respect of each offence. In order to mitigate the cumulative effect of the respective sentences, I do however intend making an order that such sentences be served concurrently, in such a manner that the effective term of imprisonment shall be 18 months. In the result, the appeal must succeed.

[18] In the premises, the following order is issued:

1. The appeal against sentence is upheld.
2. The sentences imposed by the trial court are set aside and replaced with the following:

"1. Counts 1 to 6: The accused is sentenced to 1 year imprisonment in respect of each count.

2. In order to mitigate the cumulative effect of the individual sentences, all the sentences imposed shall be served in such a manner

that the effective term of imprisonment shall be 18 months."

3. The substituted sentence is antedated, in terms of section 282 of the Criminal Procedure Act 51 of 1977, to 6 February 2023.

4. The appellant, having served the full term of the sentence imposed in accordance with paragraph 2 of this order (read together with

paragraph 3) is to be released from incarceration forthwith.

I BANDS

JUDGE OF THE HIGH COURT

M.W. NOBATANA AJ:

I agree.

PP

M.W. NOBATANA

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Appellant: Adv. Geldenhuys Instructed by: Legal Aid South Africa For the Respondent: Adv. Phikiso Instructed by: Office of the Director of Public Prosecutions, Eastern Cape Heard: 31 July 2024

Judgment:

12 August 2024

[1] S v Zinn 1969

(2) SA537 (A).

[2] As set out in Director of Public Prosecutions, KwaZulu-Natal v P 2006

(3) SA 515 (SCA).

[3] S v Mtungwa en ‘n ander 1990

(2) SACR 1 (A); State v Romer (412/10) [2011] ZASCA 46 (30 March 2011).

[4] 2001 (3) SA 382 (CC).

[5] S v Soni 2021

(2) SACR 241 (SCA).

[6] 2012

(1) SACR 369 (SCA) at para [9].

[7] S v Sadler [2000] ZASCA 105; [2000] 2 All SA 121 (A).

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