

SOUTH AFRICA / JUDGMENT

White v S (A441/2009) [2010]

ZAWCHC 504 (12 February 2010)

[2010] ZAWCHC 504

COURT

Western Cape High Court, Cape Town

BEFORE

Saldanha, Van Niekerk

CASE / FILE NUMBER

A441/2009

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A441/2009

DATE: 12 FEBRUARY 2010

In the matter between:

ANDREW WHITEAPPELLANT

and

THE STATERESPONDENT

JUDGMENT

SALDANHA, J: The appellant, Mr Andrew White, was convicted in the Laaiplek Magistrate's Court on 30 April 2009 for the contravention of the regulations under the Marine Living Resources Act Number 18 of 1998. He was sentenced on 10 June 2009 to two years imprisonment

in terms of section 58(4) of the Act. The charges arises out of an incident of 25 February 2009 when at Dwarskeersbospad, Laaiplek, the appellant was found in the possession of 16 290 West Coast rock lobster, (crayfish) tails. The appellant was legally represented at his trial and having tendered a plea of guilty to the charge, was convicted thereupon. He successfully applied for leave to appeal against the sentence. The magistrate thereafter furnished his written reasons for the sentence. It appears that the appellant had failed to timeously prosecute the appeal and he seeks condonation. The respondent does not oppose the application and having considered the reasons advanced by the appellant, I propose to grant condonation. The appellant did not lead

any evidence in mitigation of sentence and his legal representative addressed the Court *ex parte*. The appellant was 49 years old at the time at which the offence was committed he had been married for 30 years with six children. He had passed Standard 5 at school and worked as a hawker of snoek. He earned approximately R1 000,00 to R1 500,00 per week. His wife was unemployed and suffers from high blood pressure. The appellant is responsible for the payment of the purchase price of their house. The appellant has approximately ten previous convictions dating back from 1978 to 2003 for various dissimilar offences. In aggravation of sentence, the State conceded that there was no evidence that the appellant was involved in the actual catching of the crayfish. He was arrested as a result of information received by the police. The State submitted, however, that the offence was highly prevalent in the area and that the Court was urged to send a strong message out to the public. The matter was thereafter postponed for the magistrate to consider an appropriate sentence. On resumption the magistrate enquired from the

appellant's legal representative whether the crayfish had been lawfully caught. Mr Vallie, who appeared on behalf of the appellant at his trial, informed the Court that the crayfish had been unlawfully caught without a permit. The magistrate, in his reasons for the sentence states that the matter had been postponed for approximately a month in order for him to properly consider an appropriate sentence. He found that the facts and circumstances in the decision of *S v Packerevsammv* 2004(2) SACR 169, was similar to that of the appellant and that the decision was appropriate authority to be followed. In the matter of *Packerevsammv*, the appellant had been found in possession of over 6 000 abalone, also in contravention of the regulations under the Marine Living Resources Act 18 of 1998. The appellant, although a first offender, was sentenced to a term of imprisonment of 18 months. In confirming the sentence on appeal, Mthiyane, JA stated: "The sentence imposed on the appellant was severe, but is one which I do not regard as inappropriate in the circumstances of this case. It has been held that the severity of sentence is in itself not a sufficient ground to interfere. In the absence of any irregularity of misdirection, a Court will, on a question of severity, interfere only if it considers that there is a striking disparity between the sentence passed and that which the Court of Appeal would have imposed. In contending for a lesser sentence, counsel referred us to *S v Prinsloo & Another*, a judgment of Thring, J, sitting together with Potgieter, AJ, in which an accused in that case found in possession of 50 abalone, was sentenced to a fine of R5 000,00 or 1 200 hours

periodical imprisonment, wholly suspended for five years. We were urged to consider a similar approach. The *Prinsloo* case is clearly distinguishable on the facts from the present matter, where the appellant had in his possession over 6 000 abalone." Mthiyane, JA also found that the trial court had correctly emphasised the gravity of the offence as a threat to the marine resources of the country. The magistrate in *casu* likewise referred to the widespread plundering of marine resources on the West Coast and which involved the operation of syndicates. He noted that the crayfish industry provided much needed employment in the area and was one of the cornerstones of the fishing industry in the West Coast. In the event of the crayfish resources being depleted, many families would be affected thereby. He also noted that the appellant in his plea-explanation claimed that he had by chance been requested to transport the crayfish. This, the magistrate noted from his experience, was the standard explanation given in which the

unlawful transport of sea products was involved. He was of the view that although the appellant was not directly involved in the unlawful fishing of the crayfish, he nonetheless played an important role in the chain of distribution. He surmised that the appellant must have been known to the distribution "smokkel" network, in order for them to have trusted him with such a large amount of crayfish tails. Having considered the appellant's circumstances, the nature of the offence and the interest of the public, he was of the view that a fine or correctional supervision would not have the necessary deterrent effect and given also the need to protect the marine resources. He, therefore, imposed the maximum sentence of two years imprisonment under the legislation. A Court of Appeal will not likely interfere with a sentence imposed by a lower court, unless there is evidence of a misdirection or any irregularity in the assessment of the facts or in the application of law, and the sentence imposed is shockingly inappropriate. The trial court is pre-eminently vested with the discretion of an appropriate sentence. Counsel for the appellant submitted that the magistrate had over-emphasised the interest of the community and had not paid sufficient attention to the personal circumstances of the appellant, and had failed to consider an alternative sentence. That submission is clearly not supported by the written reasons furnished by the magistrate. The appellant was convicted of a serious offence. Counsel for the respondent appropriately referred, in her heads, to the decision of *S v Packereysammy* (above) and to the unreported decision of the late Josman, J in this division in the matter of *A Hamilton v S*, case 568/01, (C), in which the appellant was convicted and sentenced for the unlawful possession of 174 abalone to a term of imprisonment of nine months. Josman, J found that given the seriousness of the offence, and in circumstances where the appellant had a previous conviction, that

correctional supervision was not an appropriate sentences. In the circumstances of this matter in which the appellant was found in the possession of 16 290 crayfish tails, with an economic value in excess of R300 000 and given the role that the appellant played in the distribution of the crayfish, I am not able to find that the magistrate had committed any irregularity in metering out the sentence that he imposed. In the circumstances I

intend to confirm the sentence of two years imprisonment imposed by the magistrate. It is ordered that: 1. The appeal against sentence is dismissed. 2. The sentence imposed by the magistrate is confirmed. SALDANHA, J VAN NIEKERK, J: I agree. VAN NIEKERK, J

SALDANHA, J:

The appellant, Mr Andrew White, was convicted in the Laaiplek Magistrate's Court on 30 April 2009 for the contravention of the regulations under the Marine Living Resources Act Number 18 of 1998. He was sentenced on 10 June 2009 to two years imprisonment

in terms of section 58(4) of the Act. The charges arises out of an incident of 25 February 2009 when at Dwarskeersbospad, Laaiplek, the appellant was found in the possession of 16 290 West Coast rock lobster, (crayfish) tails.

The appellant was legally represented at his trial and having tendered a plea of guilty to the charge, was convicted thereupon. He successfully applied for leave to appeal against the sentence. The magistrate thereafter furnished his written reasons for the sentence.

It appears that the appellant had failed to timeously prosecute the appeal and he seeks condonation. The respondent does not oppose the application and having considered the reasons advanced by the appellant, I propose to grant condonation.

The appellant did not lead any evidence in mitigation of sentence and his legal representative addressed the Court *ex parte*. The appellant was 49 years old at the time at which the offence was committed he had been married for 30 years with six children. He had passed Standard 5 at school and worked as a hawker of snoek. He earned approximately R1 000,00 to R1 500,00 per week. His wife was unemployed and suffers from high blood pressure. The appellant is responsible for the payment of the purchase price of their house. The appellant has approximately ten previous convictions dating back from 1978 to 2003 for various dissimilar offences. In aggravation of sentence, the State conceded that there was no evidence that the appellant was involved in the actual catching of the crayfish. He was arrested as a result of information received by the police. The State submitted, however, that the offence was highly prevalent in the area and that the Court was urged to send a strong message out to the public. The matter was thereafter postponed for the magistrate to consider an appropriate sentence. On resumption the magistrate enquired from the

appellant's legal representative whether the crayfish had been lawfully caught. Mr Vallie, who appeared on behalf of the appellant at his trial, informed the Court that the crayfish had been unlawfully caught without a permit.

The magistrate, in his reasons for the sentence states that the matter had been postponed for approximately a month in order for him to properly consider an appropriate sentence. He found that the facts and circumstances in the decision of *S v Packerevsammv* 2004(2) SACR 169, was similar to that of the appellant and that the decision was appropriate authority to be followed. In the matter of *Packerevsammv*, the appellant had been found in possession of over 6 000 abalone, also in contravention of the regulations under the Marine Living Resources Act 18 of 1998. The appellant, although a first offender, was sentenced to a term of imprisonment of 18 months. In confirming the sentence on appeal, Mthiyane, JA stated:

"The sentence imposed on the appellant was severe, but is one which I do not regard as inappropriate in the circumstances of this case. It has been held that the severity of sentence is in itself not a sufficient ground to interfere. In the absence of any irregularity of misdirection, a Court will, on a question of severity, interfere only if it considers that there is a striking disparity between the sentence passed and that which the Court of Appeal would have imposed. In contending for a lesser sentence, counsel referred us to *S v Prinsloo & Another*, a judgment of Thring, J, sitting together with Potgieter, AJ, in which an accused in that case found in possession of 50 abalone, was sentenced to a fine of R5 000,00 or 1 200 hours

periodical imprisonment, wholly suspended for five years. We were urged to consider a similar approach. The Prinsloo case is clearly distinguishable on the facts from the present matter, where the appellant had in his possession over 6 000 abalone."

Mthiyane, JA also found that the trial court had correctly emphasised the gravity of the offence as a threat to the marine resources of the country.

The magistrate in casu likewise referred to the widespread plundering of marine resources on the West Coast and which involved the operation of syndicates. He noted that the crayfish industry provided much needed employment in the area and was one of the cornerstones of the fishing industry in the West Coast. In the event of the crayfish resources being depleted, many families would be affected thereby. He also noted that the appellant in his plea-explanation claimed that he had by chance been requested to transport the crayfish. This, the magistrate noted from his experience, was the standard explanation given in which the unlawful transport of sea products was involved. He was of the view that although the appellant was not directly involved in the unlawful fishing of the crayfish, he nonetheless played an important role in the chain of distribution. He surmised that the appellant must have been known to the distribution "smokkel" network, in order for them to have trusted him with such a large amount of crayfish tails. Having considered the appellant's

circumstances, the nature of the offence and the interest of the public, he was of the view that a fine or correctional supervision would not have the necessary deterrent effect and given also the need to protect the marine resources. He, therefore, imposed the maximum sentence of two years imprisonment under the legislation.

A Court of Appeal will not likely interfere with a sentence imposed by a lower court, unless there is evidence of a misdirection or any irregularity in the assessment of the facts or in the application of law, and the sentence imposed is shockingly inappropriate. The trial court is pre-eminently vested with the discretion of an appropriate sentence.

Counsel for the appellant submitted that the magistrate had over-emphasised the interest of the community and had not paid sufficient attention to the personal circumstances of the appellant, and had failed to consider an alternative sentence. That submission is clearly not supported by the written reasons furnished by the magistrate.

The appellant was convicted of a serious offence. Counsel for the respondent appropriately referred, in her heads, to the decision of *S v Packereysammy* (above) and to the unreported decision of the late Josman, J in this division in the matter of *A Hamilton v S*, case 568/01, (C), in which the appellant was convicted and sentenced for the unlawful possession of 174 abalone to a term of imprisonment of nine months. Josman, J found that given the seriousness of the offence, and in circumstances where the appellant had a previous conviction, that

correctional supervision was not an appropriate sentences.

In the circumstances of this matter in which the appellant was found in the possession of 16 290 crayfish tails, with an economic value in excess of R300 000 and given the role that the appellant played in the distribution of the crayfish, I am not able to find that the magistrate had committed any irregularity in metering out the sentence that he imposed. In the circumstances I

intend to confirm the sentence of two years imprisonment imposed by the magistrate. It is ordered that:

1. The appeal against sentence is dismissed.
2. The sentence imposed by the magistrate is confirmed.

SALDANHA, J

VAN NIEKERK, J: I agree.

VAN NIEKERK, J

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