REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A206/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

10/11/2017.
DATE

SIGNATURE

In the matter between:

DUBE PRECIOUS APPELLANT

And

THE STATE RESPONDENT

J U D G M E N T

NAIR AJ

[1] This is an appeal against the sentence imposed by the Regional Magistrate, Kempton Park. The appellant was legally represented and pleaded guilty to a charge of theft of cash in the amount of R545 000. She was sentenced to 10 years imprisonment.

[2] A brief exposition of the facts leading to the conviction and sentence is as follows: The appellant was employed by the complainant as a cleaner. She had access to his house and was also entrusted with keys to the safe. She stole an amount of R545 000.

[3] On her arrival at work the next day, she searched the safe looking for the cash and eventually found the money in the vehicle. She appropriated same. She was arrested two weeks later. The details of what amount was recovered were never canvassed at any stage up to the handing down of sentence.

[4] The court *a quo* considered the following personal circumstances of the accused: The appellant is 34 years old and has three dependants two of whom are 13 and the youngest is 5. She hails from Zimbabwe and is also taking care of her late sister's child. Her parents are deceased. She has three siblings who are now residing in South Africa.

[5] She intended using the money to purchase a house in Zimbabwe for her siblings because their home was demolished.

[6] The appellant completed grade 11 (form 4) in Zimbabwe. She is a first offender. She has been in custody since arrest on 27 September 2016. During mitigation her counsel indicated that she has R20 000 available for a fine. The appellant is responsible for caring for her own child aged 13 and two of her late boyfriend's children who are aged 13 and 5. It was further argued that the appellant's siblings now reside in South Africa because both her parents are deceased.

[7] The learned magistrate took into account the seriousness of the offence and the interests of the community.

[8] The sentence imposed is sought to be assailed on the ground that it is harsh and induces a sense of shock.

[9] A striking feature in this matter and one which motivated the court *a quo* to grant leave to appeal against sentence emerged during the application for leave to appeal. The appellant's counsel mentioned that an amount of approximately R200 000 was recovered. This was not taken into account by the trial court as a mitigating circumstance because the appellant had already been sentenced. The learned magistrate was of the view that this fact ought to have been considered but that he was *functus officio*.

[10] The following was advanced by the appellant's legal representative

> "Some facts which constituted weighty reasons which could have been placed before the learned magistrate before sentencing was not placed before him. These facts only were made known after sentencing. Your worship, I know the court has given a sentence, the accused is stating that there is an amount of money that was recovered, which was R120 000. and there is a vehicle that was recovered as well, property, I think amounting to R300.000. That is the R200 000. that was not recovered. I did not get those instructions when I was consulting with her. She is raising it now that there is an amount of money that was recovered."

[11] The learned magistrate placed emphasis on the fact that the stolen money was not recovered. In sentencing the appellant he states:

> "The court does not lose sight of the fact that the complainant did not receive the money back or recovered this almost half a million rands that you actually took and actually spent with your boyfriend and other people ..... the complainant in this particular matter has suffered a loss of more than half a million because of the trust that she placed in you ....

> And that is why it was blown out in two weeks' time and the whole amount was gone."

[12] The learned magistrate took into account that the appellant pleaded guilty. He also appears to have considered that the appellant has dependants and took into account that the appellant had the idea to build a home for her siblings in Zimbabwe because their house had been demolished. The learned magistrate states as follows with regard to the appellant's dependants:

> "I will take into account that you do have children, and further that you actually - ja, you do have children but somebody is actually taking care of those children."

[13] It is trite that sentencing is a matter pre-eminently in the discretion of the trial court. The court of appeal may interfere with the sentence discretion of the trial court, if it is not judicially exercised. The test is whether the sentence imposed by the trial court is shockingly inappropriate or vitiated by misdirection and irregularities See *S v Rabie* 1975 (2) SA 537 (A) and *S v Anderson* 1964 (3) SA 494 (A).

[14] The appellant was charged and also convicted under the minimum sentencing regime. The trial court was enjoined to impose a minimum of 15 years imprisonment.

[15] Section 51 (2) of the Criminal Law Amendment Act 105 of 1997, *(the CLAA)* prescribes that the appellant has to advance substantial and compelling reasons before the court will deviate from the prescribed minimum sentence.

[16] The learned magistrate indeed deviated from the prescribed minimum sentence of 15 years although he did not specifically record the circumstances which he found to be substantial and compelling, which he ought to have done.

[17] The Act does not describe factors which may be regarded as "substantial and compelling". However, it is now trite that traditional factors ordinarily taken into account when considering an appropriate sentence are still relevant (see *S v Malgas* 2001 (1) SACR 469 (SCA).

[18] The relevant section reads:

> "If any court referred to in subsection (1) and (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentenced prescribed in those sub sections , it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence."

[17] This matter is yet another example of the difficulty facing the appeal court when there is noncompliance with section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997. The section is peremptory and should be strictly applied. "The learned authors *Du Toit* et al at 28-18Q state as follows with regard to an observation of this practice in our Courts :

> "In *S v Mcoseli* 2012 (2) SACR 82 (ECG) the regional court magistrate's judgment on sentence was, according to the court of appeal so superficial and shoddy that it had to be inferred that the applicable minimum sentence legislation was never considered."

[18] The learned magistrate referred to the fact that the appellant was a first offender who pleaded guilty and has children. These factors appear disjunctively in the judgement on sentence. The learned magistrate neither specifically refers to nor strictly complies with the section.

[19] Sentencing in this fashion makes the task of determining exactly what was considered to be substantial and compelling very difficult indeed. It is a practice that should be desisted with forthwith.

[23] Section 19 of the Superior Courts Act 10 of 2013 reads as follows:

> "The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-
>
> (a) Dispose of an appeal without the hearing of oral argument;
>
> (b) Receive further evidence;
>
> (c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
>
> (d) Confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

[24] In *S v De Jager* 1965 (2) SA 612 (A) at 613 the following guidelines have been set out in this regard:

> '*(a)* There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial. *(b)* There should be a *prima facie* likelihood of the truth of the evidence. *(c)* The evidence should be materially relevant to the outcome of the trial.'

[25] The evidence of the recovered amount in cash or otherwise is a material consideration in determining substantial and compelling circumstances; If not on its own then certainly in conjunction with other factors that the trial court has considered. The learned magistrate made it abundantly clear that the loss of the entire amount weighed heavily against the appellant. This much is clear from the passages quoted before.

[26] The exact amount recovered and circumstances under which they were recovered remain unclear. Certainly where a substantial portion of the stolen goods is recovered it cannot be said that this is not as relevant a factor as when none of the stolen goods are recovered.

[27] With regard to the weight attached to the fact that the appellant is a primary caregiver, I refer to *S v Pillay* 2011 (2) SACR 409 (SCA) where Seriti J held that whilst it was on record that the appellant had six children, there was insufficient information upon which a court could impose an appropriate sentence that would also accommodate the continued well-being of the children. It appears that the learned magistrate drew the conclusion that the children will be cared for without exploring how or by whom.

[28] The well-being of the dependants is a very important consideration particularly because of their ages. This aspect should be explored by means of evidence which should inform what are in the best interests of the children.

In *Bogaards v S* 2013 (1) SACR 1 (CC) Khampepe J writing for the court stated the following at para [80]:

> "I am minded to remit the case to the trial court for sentencing as it is ordinarily the court best placed to determine an appropriate sentence."

CONCLUSION

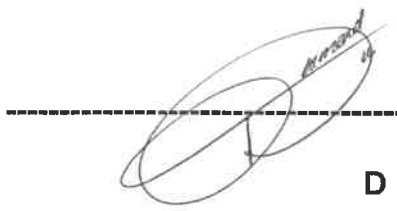
[29] I am of the view that the sentence ought to be set aside and the matter remitted to the trial court in order that the state and defence can place evidential material before it that will enable the trial court to judicially exercise its discretion mindful of the provisions of section 274(1) of Act 51 of 1977. It may well be that once the court has considered all the facts, including making a finding on whether there are substantial and compelling circumstances, that it will conclude that an appropriate term of imprisonment is 10 years.

ORDER

[30] In the circumstances I make the following order:

30.1 The sentence imposed on 24 April is set aside, subject to the further orders made herein.

30.2 The matter is remitted to the trial court for the receipt of further evidence and argument on the exact amount of the recovered goods/cash, the welfare of the children in the appellants care and any other evidence the court *a quo* considers fit in order to inform itself as to the proper sentence to be passed and to then impose a sentence afresh.



D NAIR

ACTING JUDGE OF THE HIGH COURT

I agree

I OPPERMAN

JUDGE OF THE HIGH COURT

APPEARANCE:

COUNSEL FOR THE APPELLANT: ADV LEOTO

INSTRUCTED BY: JOHANESSBURG JUSTICE CENTRE

COUNSEL FOR RESPONDENT: ADV KT NGUBANE

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS

DATE OF HEARING: 6 NOVEMBER 2017

DATE OF JUDGEMENT: 10 NOVEMBER 2017