26/11/12

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: A426/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.
22/11/2012 M. M. Oosthuizen
DATE SIGNATURE

In the matter between:

Anthony Fabian de Bruin **Appellant**

and

The State **Respondent**

JUDGEMENT

OOSTHUIZEN AJ:

[1.] This is an appeal against the sentence imposed on 14 March 2011 upon the appellant, Anthony Fabian de Bruin, by the Magistrate Court for the District of Brakpan on a charge of theft after a plea of guilty. The appeal is with the leave of that court. The theft was one of two cell phones belonging to third parties and alleged to have a total value of R 6,000.00 (six thousand rand). For that conviction the sentence imposed

was, firstly, a sentence of three (3) years imprisonment and, secondly, an order in terms of section 103 of the Firearms Control Act 60 of 2000 declaring the appellant unfit to possess a firearm.

[2.] The factual background is briefly that the appellant entered the business premise of a third party in Brakpan on 10 February 2011. He claims that he did so in order to enquire about some assistance but it is unclear precisely what the purpose of his visit was. The appellant was, at the time, a street vendor selling fruit and he apparently entered to premises in order to sell fruit. Be that as it may, he saw two cell phones lying on a table, proceeded to take those cell phones and put them in his pocket where after he immediately absconded with them. Someone saw him and alerted the owners of the cell phones and they gave chase. The appellant was stopped in the street and confronted, whereupon he gave the cell phones back to the owners. They called the South African Police Service and had him arrested. In the written statement, handed in by the appellant's legal representative in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, the appellant freely admitted to an intention, at the time of the commission of the crime, to permanently deprive the owner or lawful holder of those cell phones of their property and to a knowledge of unlawfulness. In court he also answered frankly that he took the cell phones in order to sell them.

[3.] The appellant was arrested on 10 February 2011 and after a few postponements he pleaded guilty on 14 March 2011. His written statement, as contemplated in section 112(2) of the Criminal Procedure Act 51 of 1977, was to the satisfaction of both the prosecutor and the trial court, whereupon a conviction for the theft followed. The

appellant was thus in custody for a period of about one (1) month pending trial. Having been caught red-handed, the accused clearly had no other choice than to plead guilty.

[4.] What is not clear is whether or not the appellant admitted to the value of the two cell phones, which was stated to be R 6,000.00 in total; certainly no proof of the value thereof was given nor did the trial court investigate this aspect. Except for the reference to value in the charge sheet, the written statement of the appellant refers twice to that value. The first reference is clearly not an admission of any value but a recordal of the information that the legal representative obtained from the prosecution. The second reference when viewed in isolation is also ambiguous, although Adv Vorster for the respondent argued that, in context, the reference to value was an adoption by the appellant thereof. The appellant's statement reads that "*apparently someone saw me remove and conceal the cell phone as mentioned in the charge street to the value R 6,000.00.*" This argument is tenable but the statement, in our view, remains ambiguous. Was the appellant repeating what was stated in the charge sheet and conveyed to him, or was he admitting the value in question? The question is answered when the evidence is evaluated in its totality and the written statement of the appellant is taken into consideration in the context of his plea of guilty. There can be no doubt that he, by implication and through his conduct, admitted to the value. Adv Vorster for the respondent adopted this latter argument during the hearing and Adv Mashuga for the appellant conceded that the value of the cell phones was never in dispute. This, in our view, removes this theft from the category of petty thefts and goes to the seriousness of the crime that was committed.

[5.] Although in the end the ambiguity about value can be and was addressed, note should be taken of a decision such as *S v Gqobozo* 2005 (1) SACR 589 (C) (referred to with approval in *S v Machete* 2007 (1) SACR 398 (T)) in which the court held that a magistrate was not entitled to assume what the value of the stolen goods was but that it should be proved by the State or else admitted by the accused. In the legal fraternity it is well known that various complications can arise as a result of assumptions. Even where such value is admitted by implication and through conduct, the more cautious approach would be to deal with the issue of the value of stolen goods separately and expressly.

[6.] After conviction the prosecutor proceeded to produce to the trial court for admission or denial by the appellant a record of previous convictions alleged against him, to which he admitted in terms of section 271(4) of the Criminal Procedure Act 51 of 1977. Those previous convictions were as follows:

- a conviction on 23 March 2004 (when the appellant would have been some 18 years old) for robbery, for which he was sentenced to three (3) years imprisonment of which half was suspended for five (5) years on condition that he is not found guilty of robbery committed during the period of suspension;
- a conviction on 28 June 2004 for theft (committed on 7 May 2004, within two (2) months after the previous conviction and during the period that ostensibly he should have been in prison), for which he was sentenced to R 1,000.00 or four (4) months imprisonment suspended for three (3) years on condition that he is not found guilty of theft or attempted theft committed during the period of suspension;

- a conviction on 18 October 2004 for theft (committed on 16 October 2004, within three-and-a-half (3½) months after the previous conviction, during the period that ostensibly he should have been in prison and during the aforesaid period of suspension) for which he was cautioned and discharged - apparently a petty theft which did not warrant that the suspended sentence of 28 June 2004 be put into operation;
- a conviction on 14 February 2005 (when the appellant would have been some 19 years old) for theft (committed on 13 February 2005, within three-and-a-half (3½) months after the previous conviction and during the aforesaid period of suspension) for which he was sentenced to R 1,000.00 or six (6) months imprisonment suspended for five (5) years on conditions not appearing from the record; in addition he was (in terms of section 103 of the Firearms Control Act 60 of 2000) declared unfit to posses a firearm;
- a conviction on 5 July 2005 for housebreaking with intent to steal and theft (committed on 3 April 2005, within one-and-a-half (1½) months after the previous conviction and during the aforesaid periods of suspension) for which he was sentenced to three (3) years direct imprisonment but in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 (in other words, imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board), something which the prosecutor and the trial court did not notice;
- a conviction on 16 April 2007 (when the appellant would have been some 21 years old) for theft (committed on 20 March 2007, more than twenty (20) months after the previous conviction but still during the aforesaid periods of suspension)

for which he was sentenced to R 2,000.00 or six (6) months imprisonment suspended for five (5) years on condition that he may not commit a similar offence during the period of suspension - *prima facie* his incarceration explains the twenty (20) months; and

- a conviction on 4 March 2010 (when the appellant would have been some 24 years old) for theft (committed on 16 January 2010, some thirty-three (33) months after the previous conviction but still during the last-mentioned period of suspension) for which he was sentenced to six (6) months imprisonment.

The second and third convictions were for crimes committed during the period that the appellant ostensibly should have been in prison but this discrepancy was not picked up by the prosecutor or the trial court and is not explained on the appeal record before us. During argument the matter was also not clarified. What was picked up, was the disturbing fact that the appellant started to us aliases.

[7.] From the list of previous convictions as admitted by the appellant, it appears that on more than one occasion he was given a sentence that was suspended either in whole or in part, and that the conditions of suspension were breached on various occasions. Despite this there is no indication on the record that any of those suspended sentences were ever put into operation. Neither Adv Vorster for the respondent nor Adv Mashuga for the appellant could assist us in this regard.

[8.] Returning now to the proceedings before the trial court, it appears from the record that the appellant was then advised by his legal representative not to proceed immediately; presumably the idea was to obtain a probation report or other evidence

in mitigation for the purposes of sentencing which the legal representative thought was advisable given the previous convictions. The appellant elected and in fact instructed his legal representative to proceed immediately with sentencing and a number of mitigating factors were then submitted from the bar. Those mitigating factors included the following: that the appellant was a single male of 24 years with a son aged 1 year, that he was unemployed and that his family was prepared to assist him with an amount of R 2,000.00 (two thousand rand) to pay a fine.

[9.] Adv Mashuga argued that the trial court should nevertheless have insisted on a pre-sentencing report because the lack of information before the trial court was such that he could not impose a proper sentence. In our view there was nothing irregular in this regard. The appellant had legal representation and he (the appellant), despite advice to the contrary, made a deliberate and clearly informed choice to proceed without one.

[10.] Argument on sentence by the legal representative of the appellant followed, concluded with some questions by the trial court. The prosecutor was not given an opportunity to make the views of the State on the mitigating factors, sentence in general or imprisonment in particular known.

[11.] In the judgement on sentencing the trial court commenced with the seriousness of the offence and made two points at the outset. The first point was that the value of the two phones was R 6,000.00 in total. We have already dealt with this aspect and repeat that the more cautious approach would have been to make sure that the value

was admitted and what value was admitted. The second point was that theft in the district of Brakpan was so prevalent that each and every day a person is convicted by the trial court for this type of offence. Whilst we have no issue with the trial court taking judicial notice of the prevalence of crime, we are concerned with the manner in which this was done. The prosecutor did not address the trial court on sentence and neither did the trial court mention this consideration during its interaction with the legal representative of the appellant. Adv Mashuga for the appellant did not address us on this point. Adv Vorster for the respondent argued that, although it was factually so that in this particular case the appellant was not given an opportunity to address this factor, he has been in and out of courts so many times that he should have known about it. We cannot accept that argument. It assumes knowledge and experience on the part of the appellants and takes us into the realm of speculation. In the result the appellant did not have an opportunity to address this factor, which was taken into consideration by the trial court. In our view that was irregular.

[12.] The basic approach in every appeal against sentence was stated in *S v Giannoulis* 1975 (4) SA 867 (A) to be that the court hearing the appeal (a) should be guided by the principle that sentence is pre-eminently a matter for the discretion of the trial court; and (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. See also *R v Mapumulo and Others* 1920 AD 56 at 57; *R v Freedman* 1921 AD 603 at 604; *S v Narker and Another* 1975 (1) SA 583 (AD) at 585C; *S v Rabie* 1975 (4) SA 855 (AD) 857D-F. Many other

judgements of the High Court and the Supreme Court of Appeal endorse these venerable principles and they were also endorsed by the Constitutional Court: see *S v Shaik* 2008 (2) SA 208 (CC) para 72 and *S v Shaik* 2008 (5) SA 354 (CC) para 66.

[13.] We emphasise that the presence of a mere irregularity (or misdirection) in the sentencing procedure is not a licence to interfere on appeal. The irregularity is such that the sentence must be "*vitiated*" by irregularity, in other words it must spoil or impair the quality or efficiency of the sentencing procedure or destroy or impair the legal validity thereof. One way of testing this is to think away the irregularity and ask whether the outcome would have been different. Another way is to ask what prejudice the appellant actually suffered. In our view and even if the prevalence of theft in Brakpan is left out of consideration, the outcome would still be the same so that, in this instance, this particular irregularity does not make a difference and thus did not vitiate the sentence procedure. We can also not conceive of any prejudice for the appellant and none was suggested in argument to us. Also on this basis there was no vitiating irregularity in this regard.

[14.] One of the grounds of appeal is that the trial court overemphasised the previous convictions. We do not agree. The long list of previous convictions, and similar ones to boot, is obviously a cause for concern. What is also a concern is that a later conviction was in some instances for a crime that was committed within a matter of months after the previous conviction or sentence. The inclination of the appellant to start using aliases exacerbates the seriousness of his record of previous convictions.

[15.] As was pointed out in *S v Stenge* 2008 (2) SACR 27 (C), force of habit is not the only reasonable inference that can be drawn from a long list of previous convictions because the socio-economic conditions of the offender and other relevant factors may well be the motivating cause for the commission of these offences. We must also not lose sight of the actual crime for which the appellant was convicted; furthermore the sort of social problem represented by recidivism and a recurrence in regard to the commission of the same offence by an offender living under the same socio-economic conditions as the appellant cannot be cured by simply imposing heavier and heavier sentences: see *S v May* 1999 (1) SACR, 565 (C), referred to in *S v Matlotlo* 2004 (2) SACR 549 (T). These are laudable observations. The problem is that the appellant elected not to obtain a pre-sentencing report and thus not only does the motivating cause for the commission of these offences remain unexplained but we are kept in the dark as to what the socio-economic conditions of the appellant really are.

[16.] The basic proposition for the appellant boils down to a submission that the sentence of three (3) years imprisonment, imposed on the appellant, was informed solely if not overwhelmingly by his list of previous convictions and, inversely, without any consideration of the personal circumstances and interests of the appellant. During argument Adv Mashuga conceded that the trial court could have referred this matter to the regional court for punishment. If that had happened, the changes that the appellant would have been on the receiving end of a stiffer sentence would have been good. The trial court however, expressly stating that this was from considerations of leniency, decided not to do such a referral but to deal with the matter itself. The personal circumstances and interests of the appellant were thus taken into consideration, as was

submitted by Adv Vorster.

[17.] The appellant committed an opportunistic crime without any premeditation or planning, which in a sense is the more difficult crime to prevent in our society. Furthermore he committed a crime of dishonesty and this theft was one of valuable property. He is not a first offender but he is still a young man.

[18.] The trial court dismissed submissions on poverty as a contributing cause for, or explaining, the criminal conduct of the appellant on the basis of the neatly dressed appearance of the appellant in court and the fact, of which the trial court also took judicial notice without alerting the appellant thereto, that the appellant would have had money to pay for transport in order to travel the approximately 50 km from his residence in Lenasia to Brakpan where he was selling fruit. There is no denial that the appellant had some level of income but that does not mean that he is not living in poverty or that he is able to do anything but barely survive. We repeat, however, what we have said in paragraph 15 above.

[19.] The trial court stated that the plea of guilty as well as the ready admission of the incriminating facts were signs of remorse: the reality was that the appellant was caught practically red-handed after he committed an opportunistic crime and simply had no other choice.

[20.] Considering the matter within the parameters of the well-known Triad of Zinn (derived from *S v Zinn* 1969 (2) SA 537 (A), applied in numerous cases thereafter and

also endorsed by the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)), calling upon a sentencing court to consider the crime, the offender and the interests of society, we are of the view that the proper sentence is indeed one of three (3) years imprisonment.

[21.] In the final analysis the test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. We find no irregularity or misdirection or inappropriateness of such a degree although we must add that the judgement of the trial court is, in certain minor respects, not free from criticism.

[22.] There was no direct appeal against the second leg of the sentence, namely the order in terms of section 103 of the Firearms Control Act 60 of 2000 declaring the accused unfit to possess a firearm. This section caters for two scenarios. On the one scenario the default position is that where a person is convicted of one of a circumscribed list of crimes or offences, he or she becomes unfit to possess a firearm unless a court determines otherwise - the focus is on grounds to determine whether, despite a conviction of one of those crimes or offences, the convicted person is nevertheless fit to possess a firearm. On the other scenario a court is charged with the duty to enquire and determine whether a person, convicted of a crime or offence referred to in Schedule 2 to that Act and which is not a crime or offence as contemplated in the said circumscribed list, is unfit to possess a firearm - here the focus is on grounds to determine whether, in view of a conviction of a crime or offence contained in a different list, the convicted person is unfit to possess a firearm.

[23.] Under the first scenario, section 103(1)(g) of the Firearms Control Act 60 of 2000 provides as follows:

> "*(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of ...*
> *(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine; ...*"

Common law theft is such a crime of dishonesty for which, in the present instance, the sentence for a period of three (3) years imprisonment is such a sentence without the option of a fine. There was also no such "*otherwise*" determination by the court as is contemplated by this subsection. Nor was it argued before us that there should have been such a determination and on the facts appearing from the record there is also no legal basis for it. It follows that the second leg of the sentence is above reproach and cannot be interfered with on appeal.

[24.] In the result I propose that the following order be made: the appeal is dismissed.

OOSTHUIZEN AJ
19 November 2012

[25.] I concur in the judgement of my brother Oosthuizen AJ. The appeal is dismissed.

RAULINGA J
19 November 2012