IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **AR388/2023**

In the matter between:

EDMUND LUCKY NGCOBO **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Radebe J and Mossop J
Heard: 18 October 2024
Delivered: 18 October 2024

ORDER

On appeal from: Pietermaritzburg Regional Court (sitting as the court of first instance):

1. The appeal against sentence is dismissed.
2. The appellant's bail is revoked, and he is ordered to report to the Inchanga Police Station within 48 hours of the handing down of this judgment to commence serving his sentence.
3. For the assistance of the Inchanga South African Police Services (SAPS), the relevant CAS Number is 96/01/2015 and the investigating officer was Warrant Officer de Wet.

4. If the appellant does not report to the Inchanga Police Station as directed, the SAPS are directed to forthwith arrest him for that purpose.

5. To the extent that paragraph 2 of this order conflicts with the order of the regional magistrate when admitting the appellant to bail on 25 July 2022, this order supersedes the order of the regional magistrate.

JUDGMENT

MOSSOP J (RADEBE J concurring):

[1] The appellant was one of two men charged with the rather unusual offence of stealing a steamroller. To be more precise and technically correct, it was a Bomag compaction roller, but I shall continue to refer to it as 'the steamroller'. This was not a steamroller that is driven: it is, instead, a steamroller with long extension handles that is controlled by an operator on the ground who holds onto the handles and directs its operation. It had a value of approximately R100 000.

[2] The appellant stood trial in the Pietermaritzburg Regional Court, sitting at Camperdown, together with one of his co-accused. A third accused was at large at the time when the appellant's trial commenced, and the absent accused's trial was consequently separated from the appellant and his co-accused's trial. Both the appellant and his co-accused pleaded not guilty. They were, however, found guilty and the appellant was sentenced on 1 March 2022 to four years' imprisonment. He was forthwith committed to prison to commence serving that sentence.[1] Approximately five months later, on 25 July 2022, he sought leave from the trial court to appeal against his sentence only, which application was granted. He simultaneously sought, and was granted, bail pending his appeal. His appeal against the sentence imposed upon him is therefore now before us.

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[1] The appellant's co-accused was sentenced to six years' imprisonment. The differentiation in the sentence imposed upon him and the appellant appears to be based upon his admitted criminal history.

[3] While we are not called upon to consider the appellant's conviction, we must consider the facts as a whole to gain a sense of whether the sentence imposed upon the appellant was just and appropriate.

[4] One may legitimately ask: how does someone steal a steamroller? They are big, heavy, traditionally slow moving and noisy pieces of machinery. And this one was painted bright yellow. It consequently stood out. The theft was, however, carried out quite simply and efficiently.

[5] A group of men, of whom the appellant was one, went to SM Building Contractors in Pietermaritzburg (SMBC), which is an establishment that, inter alia, hires out heavy duty construction machinery, such as steamrollers. Mr Justin Minnis (Mr Minnis) initially attended to the group of men. To hire the steamroller, a deposit of R650 had to be paid and one of the persons hiring the steamroller had to leave behind his identity document as security while the steamroller was under hire. One of the group paid the deposit with real money. Unlike the money, the identity document handed over was not real. It was a fake, created that very day for this specific transaction. The formalities having been satisfied, Mr Minnis then arranged for the steamroller to be delivered that day to a building site in Cato Ridge. The arrangement was that Mr Minnis would have the steamroller collected from that building site the next morning. When Mr Minnis's representative returned the next morning to the building site, the steamroller was no longer there. That, in a nutshell, is how one steals a steamroller. The steamroller was recovered in Hammarsdale about two weeks later and it was found to still be in a functional state.

[6] In my view, there was sufficient evidence adduced at his trial to warrant the conviction of the appellant. That evidence largely came from the testimony of another member of the group of men who carried out the theft, who testified in terms of the provisions of s 204 of the Criminal Procedure Act 51 of 1977 (the Act). The appellant apparently acknowledges that he is, indeed, guilty, for he did not seek leave to challenge his conviction.

[7] The focus of the appellant's case before us is accordingly the sentence that was imposed upon him. The test to be applied where the issue is the sentence imposed on an appellant was clarified in *S v Malgas*[2] to be:

'Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance … However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

[8] It was argued by Ms Barnard, who appears for the appellant, that the sentence of four years' imprisonment imposed by the regional magistrate was harsh and evoked a sense of shock. It was also argued that the regional magistrate misdirected himself in the following respects:

(a) A sentence of correctional supervision in terms of the provisions of s 276(1)*(h)* of the Act was recommended by a correctional services officer, and was supported by the State, but was not imposed by the court;

(b) He failed to attach sufficient weight to the fact that the appellant was 50 years old, and a first offender, who ran a scrap yard and utilised the earnings therefrom to support his family;

(c) He over-emphasised the principle of general deterrence and the interests of society;

(d) He failed to consider the views of the probation officer and did not explain why he was not inclined to follow the recommendations of that witness or the correctional services officer; and

(e) He concluded that a term of direct imprisonment was the appropriate sentence to be imposed without considering other sentencing options, including suspending any sentence that he determined to be appropriate.

[9] As may be expected, the State disputes all these criticisms of the regional magistrate. It asserts that the imposition of sentence is a matter that falls entirely

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[2] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12 ('*Malgas*').

within the discretion of the regional magistrate presiding at the trial. It further submits that the regional magistrate considered all the relevant issues at play when crafting the appropriate sentence for the appellant. In so doing, the regional magistrate did not misdirect himself and this court is therefore not at liberty to intervene in the proceedings. In conclusion, the State submits that the appeal must consequently fail.

[10] There is no gainsaying the fact that this was a considered and well-planned crime. Prior to the steamroller being stolen, evidence was led at the appellant's trial that an attempt was made to obtain a steamroller from another hiring outlet that ultimately came to nothing when the machine to be supplied was found to be defective. Rather than call a halt to the intended criminal enterprise, the appellant and his cohorts simply shifted their attention to SMBC. They anticipated that an identity document would be demanded and retained to obtain possession of the steamroller. Thus, a fake identity document was manufactured and handed over. There was no intention to recover it from SMBC. The theft was thus not a spur of the moment decision but was a deliberate attempt to permanently deprive SMBC of the steamroller, which was to be sold once it was under the group's control. After delivery of the steamroller to the building site was achieved, further transport was needed to move it from there to Hammarsdale. All this required planning.

[11] As regards the grounds raised by the appellant in support of his appeal:

(a) It is so that a correctional services officer indicated that correctional supervision in terms of s 276(1)*(h)* of the Act was a possibility. The State also acknowledged that. But the court was not obliged to fall in line and simply rubber stamp that sentencing alternative. The imposing of sentence requires an objective analysis of a range of options available to the court. The court was entitled to apply an independent mind to all the facts of the matter and the sentencing options at its disposal before deciding on the appropriate option. The court declined to follow the recommendation. In my view, it was entitled to do so;

(b) The regional magistrate acknowledged the accused's age and the business that he conducted. He did not ignore it, as has been submitted. But he concluded that these considerations did not mean that the appellant would not be liable to a

period of imprisonment given the seriousness of the offence. I am not able to find an error in this line of reasoning;

(c) The regional magistrate did mention the need to deter other like-minded offenders. But, in my view, he did not over-emphasise this aspect;

(d) The views of the probation officer were mentioned and considered but were not followed. The regional magistrate provided brief reasons for not following those recommendations. Those reasons included:

'… the circumstances of the crime, its prevalence and the interests of society…';

(e) Finally, the criticism that other sentencing options were not considered by the regional magistrate is misplaced. He specifically mentioned that:

'The Court is satisfied that wholly suspended imprisonment or any form of correctional supervision will amount to overemphasising your individual personal circumstances.'

[12] An appeal such as this is not intended to constitute a rehearing of the original trial. For any relief to be granted by an appeal court, there must be evidence of a demonstrable and material misdirection by the trial court or, where a discretion exists, that such discretion has not been exercised properly or judicially. In the absence of such proof, an appeal court has no right to interfere. The power of the appeal court is consequently very limited.[3] Thus:

'[i]n the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'[4]

As was confirmed in *Malgas*:[5]

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.'

[13] The judgment of the regional magistrate on sentence is concise but thorough, notwithstanding its brevity. It addresses all the essential aspects that must occupy the mind of a judicial officer when sentence is considered and imposed. The State is,

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[3] *S v Monyane and others* 2008 (1) SACR 543 (SCA) para 15.
[4] *S v Hadebe and others* 1998 (1) SACR 422 (SCA) at 426B-C.
[5] *Malgas* para 12.

furthermore, correct in its submission that the issue of sentence is a matter that falls peculiarly within the discretion of the judicial official.[6]

[14] In casu, the sentence that the trial court imposed may not have been a sentence that I personally may have imposed, but that does not mean, for the reasons already explained, that this court is entitled to summarily intervene and change it. I am not able to conclude that the regional magistrate misdirected himself. The sentence, whilst robust, does not induce a sense of shock, given the known circumstances of the offence. Had the appellant been convicted, for example, of the theft of a motor vehicle with the equivalent value of the steamroller, the sentence imposed may have been considered lenient, even for a first offender.

[15] In the circumstances, I would propose that the following order be granted:

1. The appeal against sentence is dismissed.
2. The appellant's bail is revoked, and he is ordered to report to the Inchanga Police Station within 48 hours of the handing down of this judgment to commence serving his sentence.
3. For the assistance of the Inchanga South African Police Services (SAPS), the relevant CAS Number is 96/01/2015 and the investigating officer was Warrant Officer de Wet.
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5. To the extent that paragraph 2 of this order conflicts with the order of the regional magistrate when admitting the appellant to bail on 25 July 2022, this order supersedes the order of the regional magistrate.

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MOSSOP J

I agree and it is so ordered:

[6] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

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RADEBE J

APPEARANCES

Counsel for the appellant:	Ms D. Barnard
Instructed by:	
Counsel for the respondent:	Mr T. L. Mlondo
Instructed by:	Director of Public Prosecutions Pietermaritzburg