

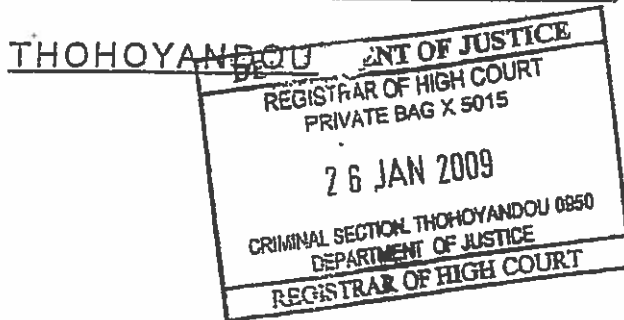
Annexure "B"
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A11/2008
IAFRICA/ci
IN THE HIGH COURT OF SOUTH AFRICA

JUDGMENT

(VENDA PROVINCIAL DIVISION)

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CASE NO: A11/2008

DATE: 2008-09-23

In the matter between

DELETE WHICHEVER IS
NOT APPLICABLE

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

The STATE

10 Versus

SIGNATURE
DATE 22/01/2009

LUCKY MAKHOKHA

Appellant 1

OUPA MAKHOKHA

Appellant 2

J U D G M E N T

15

SNYMAN (AJ): [1] The appellants appeal against the sentences of 15 years imprisonment imposed by the court a quo, after having pleaded guilty to the charge of contravening the provisions of Section 36 of the General Law Amendment Act 62/1955, (hereinafter referred to as the Act). Mr Madzhuta appears on behalf of the appellants and Mr Nekhambele appears on behalf of the state.

[2] The appellants applied for condonation for the late filing of their notice of appeal on the grounds set out in

25

the founding affidavit. Without even considering the

appellants' prospects of success in the appeal and in
the interest of justice and in the absence of any
prejudice to the state, such application should be

5 granted. The application for condonation is therefore
GRANTED.

[3] It is trite law that the discretion to impose sentence
belongs to the trial court. Therefore an appeal court
may not and shall not interfere with the imposed
10 sentence, unless it is convinced that the sentence
discretion has been exercised improperly or
unreasonably. (See inter alia S v Pieters 1987 (3) SA
717 (A) 728(B-C). If the trial court committed a
misdirection of the nature and extent as decided in S v
15 Pillay 1977 (4) SA 531 (A), it means that the court did
not exercise the discretion properly. In S v Pillay
supra at 535(E-G) the following is stated: "Now the
word misdirection in the present context simply means
an error committed by the court in determining or
20 applying the facts for assessing the appropriate
sentence. A mere misdirection is not, by itself,
sufficient to entitle the appeal court to interfere with
the sentence. It must be of such a nature, degree or
seriousness, that it shows, directly or inferentially, that
25 the court did not exercise its discretion at all or

exercised it improperly or unreasonably. Such
misdirection is usually and conveniently termed one
that vitiates the court's discretion on sentence."

[4] The grounds upon which the appellants rely are set
5 out in the heads of argument. I will firstly deal with the
argument in paragraph 2.8.1 in the heads of argument
to the effect that the appellants submit that the court a
quo committed an error in law by sentencing them when
the court a quo emphasised the offence of theft to
10 which the appellants were not convicted. In this
regard, the court a quo said the following and I quote:

15 "Although you have been convicted of the
mere possession of this motor vehicle, I
have to point out that this possession can
be treated similarly with the theft of a
motor vehicle itself. You are just twins
with the theft of a motor vehicle, in
particular because I have no explanation
where the motor vehicle comes from."

20 (See record page 11, lines 9 to 14) and:

25 "I am saying that in particular because I
have no explanation of where this motor
vehicle comes from. I am going to treat it
like any other theft of a motor vehicle,
especially because the two of you had the

propensity to commit theft of a motor vehicle."

(See record page 11, lines 19 to 23). It is common cause that the appellants were not convicted of theft.

5 They were convicted of contravening the provisions of Section 36 of the Act. Section 36 of the Act read as follows, and I quote:

10 "Any person who is found in possession of any goods other than stock or produce, as defined in Section 1 of the Stock Theft Act, in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an
15 offence and liable of conviction to the penalties, which may be imposed on a conviction of theft."

It is clear from this section that a convicted person is liable to the penalties which may be imposed on a
20 conviction of theft. This is exactly what the court a quo

did. For purposes of sentence, the court a quo treated the matter as that of theft. The court a quo did not specifically refer to the provisions of Section 36 of the Act, but that does not mean that it erred in any way
25 whatsoever. The appellants' argument in this regard

cannot, therefore, be upheld.

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[5] It was also argued on behalf of the first appellant that his previous convictions of robbery and theft should not be taken into account as far as sentence is
5 concerned, because the first appellant is still in the process of petitioning the Supreme Court of Appeal for leave to appeal. This aspect was never brought to the attention of the court a quo and it follows that the court a quo could not have erred in this regard. Furthermore,
10 it is trite law that a court of appeal cannot consider any other factors and/or circumstances that were not before the trial court. The first appellant's argument cannot therefore be upheld.

[6] It was also argued on behalf of the second
15 appellant that his previous convictions of murder and robbery should not be taken into account as far as sentence is concerned because these convictions are still pending on appeal. This aspect was never brought to the attention of the court a quo.
20 What was stated to the court a quo is that the sentences, not the convictions, are currently under appeal. (See record page 6, line 11). It follows therefore that the court a quo could not have erred in this regard and, as already mentioned, a court of
25 appeal cannot consider any other factors and/or

circumstances that were not before the trial court. The

second appellant's argument cannot therefore be upheld.

[7] The court a quo did consider the youthfulness of
5 the appellants (See record page 8, lines 21 to 22) and
their personal circumstances (See record page 9, lines
18 to 25, page 10, lines 1 to 9) and in my view, the
court a quo did not err in this regard.

[8] From the record of the proceedings, it is clear that
10 the court a quo did not "prefer" the public or society's
opinion in sentencing the appellants. The court a quo
referred to the interest of society and in so doing, he
did not err. There is not even a suggestion that the
court a quo preferred the opinion of society or the
15 public. This argument cannot, therefore, be upheld.

[9] No evidence was placed before the court a quo that
the motor vehicle and the Toyota engine were
recovered and/or confiscated by the state and it follows
that the court a quo could not have erred in this regard.

20 [10] The mere fact of a plea of guilty does not
necessarily show remorse and it may simply show that
an accused is realistic. In S v Martin 1996 (2) SACR
378 (W) 383(g-i) the following was stated:

"Counsel claims that by pleading guilty the
25 accused showed remorse. His two sisters-

in-law could incriminate him. The plea
does not necessarily imply anything more
than the accused is realistic. The
statement in terms of Section 112(2) does
not state that the accused regrets his
action. For the purposes of sentence,
there is a chasm between regret and
remorse. The former has no necessary
implication of anything more than simply
being sorry that he has committed the
deed, perhaps with no deeper roots than
the current adverse consequences to
yourself. Remorse connotes repentance,
an inner sorrow inspired by another's plight
or by a feeling of guilt. For example,
because of the breaking the commands of
the higher authority. There is often no
factual basis for a finding that there is true
remorse if the accused does not step out to
say what is going on in his inner self."

On the facts in casu and in the absence of any
evidence, I find it difficult to make a finding that the
applicants were remorseful. On the contrary, it seems
they had no option but to plead guilty because they
were found in possession of the suspected stolen

goods. The appellants' argument in this regard cannot be upheld.

[11] The last ground of appeal is that the court a quo erred in ordering or directing the appellants' sentences shall start running after they have completed serving their imprisonment sentences in their respective previous convictions. No reasons were submitted for this submission. Section 280(2) of the Criminal Procedure Act, 51/1977 reads as follows and I quote:

10 "Such punishment, when consisting of imprisonment, shall commence, the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs
15 that such sentences of imprisonment shall run concurrently."

This is exactly what the court a quo did and in my view the court a quo did not err in this regard.

[12] In the premises, I am not convinced that the court
20 a quo exercised its sentence discretion improperly or unreasonably and therefore, this court may not interfere with the imposed sentence. In the result, the appellants' appeal is DISMISSED.

HETISANI (J) CONCURRED



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Annexure "C"

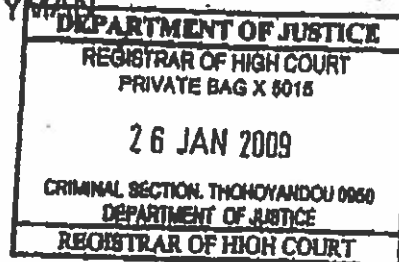
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APPEAL CASE NO.

IN THE HIGH COURT OF SOUTH AFRICA
VENDA PROVINCIAL DIVISION
SITTING AT THOHOYANDOU THIS 23RD DAY OF SEPTEMBER 2008
BEFORE THE HONOURABLE MR JUSTICE G N K HETISANI
BEFORE ACTING JUSTICE M M SNYMAN
In the matter of

MAKHOKHA LUCKY
OUPA MAKHOKHA
VS

THE STATE



1st Applicant
2nd Applicant

Respondent

Having read the record of the appeal record;

IT IS ORDERED;

THAT the appeal is dismissed.

BY ORDER OF THE COURT

REGISTRAR

Access to Justice for All

