Annexure "B"

IN THE HIGH COURT OF SOUTH AFRICA

(VENDA PROVINCIAL DIVISION)

00000022

THOHOYANDOU

CASE NO: A11/2008

DATE: 2008-09-23

In the matter between

The STATE

Versus

LUCKY MAKHOKHA Appellant 1

OUPA MAKHOKHA Appellant 2

J U D G M E N T

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

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 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 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 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 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 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 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 which the appellants were not convicted. In this regard, the court a quo said the following and I quote:

> "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."

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

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

> "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 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 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 whatsoever. The appellants' argument in this regard

cannot, therefore, be upheld.

[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 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, 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 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. 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 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 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 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 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.

[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 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:

> "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 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 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

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Annexure "C"

the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

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APPEAL CASE NO.

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

DEPARTMENT OF JUSTICE
REGISTRAR OF HIGH COURT
PRIVATE BAG X 5015
26 JAN 2009
CRIMINAL SECTION. THOHOYANDOU 0950
DEPARTMENT OF JUSTICE
REGISTRAR OF HIGH COURT

In the matter of

MAKHOKHA LUCKY — 1st Applicant
OUPA MAKHOKHA — 2nd Applicant
vs
THE STATE — Respondent

Having read the record of the appeal record;

IT IS ORDERED;

THAT the appeal is dismissed.

BY ORDER OF THE COURT

REGISTRAR