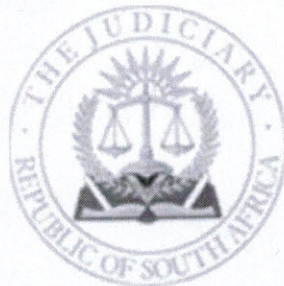


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: A101//2018

DATE OF HEARING: 20 MAY 2019

- 1) REPORTABLE: YES
- 2) OF INTEREST TO OTHER JUDGES: YES
- 3) REVISED.

.....
SIGNATURE

.....
DATE

In the matter of:

ELLIOT MOSEPELE

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

Bam AJ

Introduction

1. This is an appeal against sentence imposed by the Regional Court for Gauteng, held in Oberholzer. Appellant was charged with theft, read with section 51 (2) of the Criminal Law Amendment Act,¹ (CLAA) on 1 June 2016 in the district of Kutsong. He was not legally represented when he pleaded guilty to the charge. The state was able to prove several previous convictions which led to the referral to the regional court. Appellant was sentenced to 12 years imprisonment, of which five years were suspended for five years, based on the conditions imposed. The appellant was further declared unfit to possess a firearm. His application for leave to appeal against the sentence was unsuccessful, leading to the appellant petitioning the Judge President of this court. Such petition was granted on 6 March 2018.

Appellant's case on appeal

4. The appeal is brought on the grounds that the magistrate failed to take into account the personal circumstances of the appellant and in so doing, meted out a sentence which induces a sense of shock. This court is asked to exercise its powers and correct the result of the court a quo's misdirection.
5. The facts leading to the sentence can be briefly stated as follows: In April 2016 at or near Kutsong district, appellant was the last person to call at the salon in question. He asked for a haircut and was advised to wait as the owner/complainant was still busy with the penultimate patron. While waiting, appellant decided to help himself to

¹ Act 105 of 1997 as amended

the property of the complainant, *to wit*, two mobile phones and a R50 rand note which were on the table and left the salon. The state's case indicates that the complainant had seen him pilfering the property and called him out but appellant kept walking into the streets. There is also evidence indicating that the two know each other. A charge of theft was laid and upon hearing of the charge, appellant went to tender the return of the two mobile phones. Nothing was said about the R50. Appellant was nevertheless arrested a day after the theft. Before he was sentenced, a plethora of previous convictions were read, which the appellant confirmed. Of the previous convictions, some involve petty thieving, drugs and drug trafficking, and three convictions of robbery. These are the convictions as contained in the record:

- (i) On 24 October 2008 - theft - fine of R1200 or 90 days' imprisonment;
- (ii) 9 July 2009 - failure to give satisfactory account for possession of goods - fine of R1000 or 3 months imprisonment;
- (iii) 7 December 2007, conviction in terms of Drugs and the Drug Trafficking Act - fine of R2000;
- (iv) 12 August 2010 - robbery and attempt to escape from lawful custody - sentence not mentioned in the record;
- (v) 20 March 2014 - theft - R300 or 30 days' imprisonment and declared unfit to possess a firearm;
- (vi) 25 August 2014 - contravention of section 117 (e) of the Prison Act 111 of 1998 in that while subject to community service, appellant absconded and avoided being monitored - two years' imprisonment and further declared unfit to possess a firearm;
- (vii) 4 September 2014 - contravention of section 4 (b) of Act 140 of 1992 in that appellant was found in possession of a dependence producing substance and fined R2400 or 3 months' imprisonment;
- (viii) on 11 January 2016 a further conviction in terms of section 4 (b) of the last Act of 1992 followed and appellant was again fined R300 or 30 days' imprisonment.

6. As to the personal circumstances, the appellant's attorney placed on record that he was 24 years. *[If one considers his age when he received his first conviction in 2008, appellant must have been 14]*. He is not married and has two children aged 4 years and 11 months. He was unemployed at the time of his arrest.
7. The appellant's attorney placed on record that the appellant had a serious drug dependency problem. He pleaded with the court to exercise its powers to provide him help. I have extracted the relevant passages from the record²:

'Your worship also noticed .. that all kinds of sentences meted out to him...Your worship.....I confronted the accused as to what is going on in his life. He honestly told me that he has got a very serious drug problem.....Your worship in Afrikaans, "hy is verslaaf van dwelms" and this addiction turns him intoWhenever he sees something that he can sell quickly... it shows he is a kind of person who steals these minor items just to finance his drug addiction.' I then confronted the accused person as what, what must [be] done to you?he said to me....seeing that he is a serious drug addict, he needs help, if the court has some powers to commit him in any rehabilitation centrefor whatever period., he is prepped to do it because he says yes,in prison he cannot stop this addition if he is still in prison...'

8. In response, the magistrate rejected the defence's plea for help. The passages below demonstrate the magistrate vacillating between accepting that the appellant indeed has a problem with drug dependency and, rejecting same as if a simple solution existed for people with drug dependency³:

'There must be truth to what your attorney said regarding your drug problem, because many of your previous convictions are drug related as well. Like poverty, drug users cannot use that as an excuse to commit crime. Not only is the offence

² Page 14, paragraph 15 of the record

³ Page 17, line 21 of the record

serious... it is also prevalent.....The community has an interest, ...complainant worked hard for his items and it is actually worse because you now again stole from someone that you even know.Unfortunately, now the final bell is ringing, your past has now caught up with you, because today, the court sit here with your full record and all indications are that you do not want to stop your life of crime. People are always very quick to say oh, I have got a problem I need help when they are in a corner and facing imprisonment, but they do not reach out and ask for help when they are outside.⁴ (quoted verbatim).

9. Appellant was further warned that in the event he were to be convicted one more time, he would be declared a habitual criminal. I shall not concern myself with the statements made by the court in connection herewith save to say that the necessary safeguards have already been put into place for courts to heed before a person is declared a habitual criminal. See in this regard, *S v Van Eck* 2003 (2) SACR 563 (SCA) para 10; *S v Masisi* 1996 (1) SACR 147 (O) para 152 d; and *Smith v S* (A02/2013) [2013] ZAFSHC 120.

10. Is this court at large then to interfere with the sentence imposed by the sentencing court? In *Cornick & Kinnear v The State*⁵ it was noted:

'In the absence of any misdirection on the part of the trial court an appeal court should not interfere with the sentence imposed.....'

11. In *The Director of Public Prosecutions, Gauteng v Oscar Leonard Carl Pistorius*⁶:

'.....The Constitutional Court reaffirmed this approach in S v Boggards [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41 when it said '[o]rdinarily sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity

⁴ Page 19 paragraph 10

⁵[2007] SCA 14 (RSA) para 46

⁶(950/2016) [2017] ZASCA 158 (24 November 2017) para 17

that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it'. See also S v Malgas 2001 (1) SACR 469 (SCA) para 12 and S v Hewitt [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8.'

12. In reading the record and considering the sentence imposed by the court a quo, one accepts that there had not been a probation officer's report to assist the court with pertinent information relating to the full nature of the appellant's drug decency problems. However, when interrogated closely, and although the SAP69 on its own can never reveal the circumstances that led the appellant to commit the crimes in question, it is apparent that from the age of 14 and before appellant turned 16, he already had received three convictions, two of which relate to theft and or possession of stolen property and the third, to drugs. Thereafter, a pattern began of a petty thief who was in and out of gaol. The punishment meted out by the courts suggests that the offences did not carry much gravity, notwithstanding the legal descriptions.

13. Appellant's attorney made the submission to the court that notwithstanding the periods he had spent in goal, appellant had not been rehabilitated. It is regrettable that the court did not consider to invoke the provisions of section 36 of the Prevention of and Treatment for Substance Abuse Act (No. 70 of 2008), (the Act). I refer in particular to section 36 of the Act, which provides:

'Committal of person to treatment centre after conviction:

1. A court convicting a person of any offence may in addition or in lieu of any sentence in respect of such offence order that such person be committed to a treatment centre if the court is satisfied that such person is a person contemplated in section 33(1) and such order, for the purposes of this Act, must be regarded as having been made in terms of section 35.
2. An order in terms of subsection (1) may not be made in addition to any sentence of imprisonment, whether direct or as an alternative of a fine, unless the operation of the whole sentence is suspended.

(a) Where a court has referred a person to a treatment centre under subsection (1) and such person is later found not to be fit for treatment in such treatment centre, he or she may be dealt with in accordance with section 276A(4) of the Criminal Procedure Act.

(b) For the purposes of paragraph (a), the expression “probation officer or the Commissioner” in section 276A(4) of the Criminal Procedure Act must be construed as the manager of the treatment centre or a person authorised by him or her for the purposes of this Act.’

14. Section 33 (1) of the Act reads:

‘Admission of involuntary service user to treatment centre

1. An involuntary service user, except those referred to in sections 36 and 40, may not be provided with treatment, rehabilitation and skills development at a treatment centre unless a sworn statement is submitted to a public prosecutor by a social worker, community leader or person closely associated with such a person, alleging that the involuntary service user is within the area of jurisdiction of the magistrate’s court to which such prosecutor is attached and is a person who is dependent on substances and—

- (a) is a danger to himself or herself or to the immediate environment or causes a major public health risk;
- (b) in any other manner does harm to his or her own welfare or the welfare of his or her family and others; or
- (c) commits a criminal act to sustain his or her dependence on substances.’

15. The definition section of the Act describes an involuntary service user as:

“involuntary service user” means a person who has been admitted to a treatment centre upon being—

- (a) convicted of an offence and has in addition to or in lieu of any sentence in respect of such offence been committed to a treatment centre or community based treatment service by a court;’

16. Based on the extensive record of appellant's previous convictions, his personal circumstances and the offence in question, this court agrees that the sentencing court's discretion was not properly exercised. In *Damgazela v The State*⁷ it was noted that:

*'Appellate interference in respect of sentence on the striking disparity criterion is only competent in instances where the appellate court has formed a definite view as to the sentence it would have imposed and where the degree of disparity between that sentence and the one imposed by the sentencing court is so striking that interference on appeal is warranted.'*⁸

17. The difficulty facing this court however is the absence of the necessary investigation report regarding the extent of the appellant's drug problem, the nature and methods of intervention that are considered appropriate to address the problem, and finally, the probation officer's recommendation as to which center/s may be appropriate in the circumstances of the appellant for the purposes of detoxification and rehabilitation. Nonetheless, having considered the circumstances of the appellant, the offence and its surrounding circumstances, we agree that the appeal must succeed.

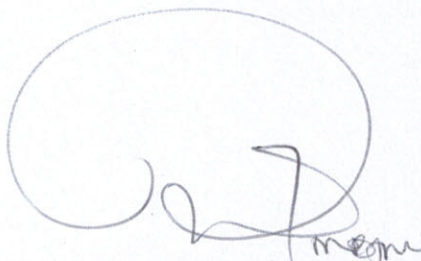
The following order is made:

- (i) The appeal succeeds.
- (ii) The sentence imposed by the court below is set aside and replaced with the following:

'The appellant is sentenced to **5 years imprisonment**. The sentence is further antedated to 21 September 2016.'

⁷ (633/09) [2010] ZASCA 69 (26 May 2010). para 16

⁸ *S v Pieters* 1987 (3) SA 717(A) at 734F-I; *S v Matlala* 2003 (1) SACR 80 (SCA) at para 10.



NN BAM
ACTING JUDGE OF THE HIGH COURT,
PRETORIA

I AGREE, AND IT IS SO ORDERED,



TAN MAKHUELE
JUDGE OF THE HIGH COURT,
PRETORIA

DATE OF HEARING:

20 May 2019

DATE OF JUDGMENT:

18 July 2019
~~17 June 2019~~

APPEARANCES

APPELLANT'S COUNSEL:

MR S MOENG
Pretoria Justice Centre
206 Church Street, Pretoria

RESPONDENT'S COUNSEL:

Adv R MOLOKOANE
(Office of the DPP, Pretoria)