

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA& R 26/18
Heard on: 06/08/2018
Delivered on: 17/08/2018

In the matter between:

PIET NTONGA

APPELLANT

And

THE STATE

RESPONDENT

Coram: Tlaletsi JP et Mamosebo J

Summary: Appeal against sentence – appellant convicted of stock theft - sentenced to 6 years direct imprisonment – not declaring the appellant an habitual criminal- cumulative effect of sentence. Whether interference with the sentence is warranted.

On appeal- sentence confirmed.

JUDGMENT: APPEAL ON SENTENCE

MAMOSEBO J

[1] This appeal by Mr Piet Ntonga, is limited to two grounds: the cumulative effect of the sentences imposed and whether the failure by the regional

court magistrate to order concurrent running of the new sentence with the sentence that the accused is already serving is a misdirection that warrants interference.

- [2] The appellant's application for leave to appeal against his conviction and sentence was unsuccessful in the regional court. He filed a petition to this Court for leave to appeal and was only granted leave to appeal against his sentence.
- [3] The appellant was convicted of stock theft of 8 sheep to the value of R13 600.00 by the Magistrate in the district of Kakamas and the case was transferred to the regional court in terms of s 116(1)(b) of the Criminal Procedure Act¹ (CPA) for sentencing. He was sentenced to 6 years imprisonment. Counsel for the appellant, Adv Steynberg, correctly conceded the appropriateness of the 6-year sentence, however, sought to convince us that the failure by the regional court magistrate, Mr Viewe, to order the sentence to run concurrently with the 10 year sentence which was imposed a few months prior, resulted in the sentence being shockingly harsh and inappropriate based on its cumulative effect. Mr Steynberg further submitted that the failure by the magistrate to declare the appellant an habitual criminal also added to the harsh and inappropriate sentence. The appellant is 50 years old and his appeal should be upheld, urged counsel.
- [4] On the contrary, counsel for the Respondent, Adv Van Heerden, argued that it is only if this Court were to find material misdirection, which she submitted was absent, where interference would be warranted. Counsel submitted further that the trial court had applied its mind correctly and

¹ Act 51 of 1977 as amended

judiciously, having considered the appellant's personal circumstances, his catalogue of previous convictions which included a suspended sentence which was still in operation when the appellant committed this offence. Counsel submitted that the trial court was correct in not ordering the sentences to run concurrently. In as far as the declaration of the appellant as a habitual criminal is concerned, counsel argued that although it was not a requirement to warn the accused before the declaration, counsel conceded that it is in the interests of justice to do so. In this instance, the magistrate chose to warn the appellant. Counsel maintained that there was no misdirection by the trial court and asked the Court to dismiss the appeal.

- [5] The principles when considering appeals against sentence and the cumulative effect thereof are trite. Sentencing lies pre-eminently within the discretion of the sentencing court. Absent any misdirection or where the sentence is not vitiated by any irregularity or is not disturbingly inappropriate, the appeal courts must be careful not to interfere with such discretion.² This is the test that we follow to determine if there is any misdirection or the sentence is disturbingly inappropriate. It is only once those are found, that we will be entitled to interfere with the sentence. I now turn to deal with the two aspects raised before us.

Cumulative as opposed to concurrent sentence

- [6] To recap, Mr Steynberg argued on behalf of the appellant that the trial court misdirected itself by failing to order that the sentence imposed must run concurrently with the sentence already being served.

² See *S v Rabie* 1975 (4) SA 855 (A) at 857 D – F; *Zimila v S* (1179/16) [2017] ZASCA 55 (18 May 2017); *Marota v The State* (300/15) [2015] ZASCA 130 (28 September 2015)

[7] Section 280 of the CPA stipulates:

- “(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishment for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
- (2) Such punishments, when consisting of imprisonment, shall commence the one after the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”

[8] The trial court was mindful that the appellant had commenced serving an imprisonment term of 10 years for rape. It was alive to the age of the appellant and that he is a livestock farmer who did not steal out of hunger or need but out of greed. Only four of the eight stolen sheep were recovered. The appellant had seven previous convictions of which one was also of stock theft. He is a father of three children and also cares for his own father.

[9] The trial court considered the following factors as aggravating: the seriousness of the offence and its impact in the Northern Cape; the effect of stock theft on employment; the increase in price of the livestock and the cost of meat to consumers.

[10] I have considered whether the trial court could have erred in not ordering the sentences to run concurrently. I do not think so. The cumulative effect of the sentences does not induce a sense of shock. In fact, the argument presented by Mr Steynberg on this aspect is linked to the fact that had the appellant been declared a habitual criminal he would have served 15 years instead of the 16 years that he is currently facing. The argument seems to lose sight of the fact that the two offences are completely

unrelated and have occurred at different times and places. The effect of the sentences if they run consecutively is that the appellant serves an effective term of 16 years' imprisonment.

- [11] It is common cause between the parties that an imprisonment term of 6 years is appropriate for the current offence. Consideration was given on the aspect of ameliorating the effect of the sentence. Nothing substantial was argued that swayed me to find misdirection by the trial court that warranted tampering with the sentence. The instructive remarks by Marais JA in *S v Malgas*³ need mentioning:

“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.”

Declaring an accused person a habitual criminal

- [12] Section 286 of the CPA stipulates

“(1) Subject to the provisions of subsection (2), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.”

- [13] Du Toit et al⁴, dealing with situations or circumstances when the declaration of a person as a habitual criminal is competent say the following at Clause 8:

³ 2001 (1) SACR 469 (SCA) at para 12; 2001 (2) SA 1222; [2001] 3 All SA 220; [2001] ZASCA 30

⁴ Commentary on the Criminal Procedure Act, volume 2 [Service 58, 2017] 28-24A

“Even though the court is satisfied or convinced...., no obligation to declare the accused an habitual criminal arises; there is still a discretion (Du Toit 291; *S v Makoula*⁵; *R v Swarts*⁶. See generally Terblanche *A Guide to sentencing in South Africa* 3 ed (2016) at 271 – 5. ”

[14] It remains within the discretion of the judicial officer whether to declare a person a habitual criminal or not. The Supreme Court of Appeal (SCA) has made plain in *S v Van Eck*⁷ that:

“A Court will not ordinarily make a declaration in the absence of a prior warning to the accused of the provisions of s 286.”

[15] Taking cue from the SCA’s remarks in the *Van Eck* case Snellenburg AJ concurred in by Moloi J made the following pronouncements in *S v Smith*⁸:

“[10] Although s 286 contains no requirement that an accused person must be warned that he is at risk of being declared a habitual criminal prior to such a declaration being made (see S v Van Eck⁹; S v Masisi¹⁰), and the fact that a warning has been given or not does not fetter the discretion of the court to impose such a sentence (see S v Magqabi 2004 (2) SACR 551 (E), it is notwithstanding a well-settled practice not to declare a person a habitual criminal without prior warning, save in exceptional circumstances.”

[16] It therefore follows that there could not have been a misdirection by the trial court when it warned the appellant instead of declaring him a habitual criminal. I therefore find that the argument by the appellant’s counsel in this regard is without merit and must fail.

⁵ 1978 (4) SA 763 (SWA) at 766G

⁶ 1953 (4) SA 461 (A) at 463B – C.

⁷ 2003(2) SACR 563 (SCA) at 567f

⁸ 2014 (2) SACR 190 (FB) at para 10

⁹ 2003 (2) SACR 563 (SCA)

¹⁰ 1996 (1) SACR 147 (O)

[17] The regional magistrate did not impose a disproportionate sentence. The trial court also exercised its discretion judiciously by warning the appellant instead of declaring him a habitual criminal. This is settled practice for which nothing in the record dictated otherwise. I could also find no material misdirection in not ordering that the sentence imposed should run concurrently with the sentence the appellant is already serving. The cumulative effect of the sentences is not so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’. Based on the aforementioned reasons, the appeal stands to be dismissed.

[18] In the result, the following order is made:

The appeal against sentence is dismissed.

MAMOSEBO MC

JUDGE

NORTHERN CAPE DIVISION

I concur

TLALETSI LP

JUDGE PRESIDENT

NORTHERN CAPE DIVISION

For the appellant:	Adv H Steynberg
Instructed by:	Kimberley Justice Centre
For the respondent:	Adv AH Van Heerden
Instructed by:	Director of Public Prosecutions