

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIEK VAN SUID-AFRIKA



27/2/15

CASE NUMBER: A342/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. 26.2.2015
DATE	SIGNATURE

In the matter between:

PATRICK TUMELO MOTSEKI

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The appellant was convicted on a charge of theft in the court *a quo* and sentenced to 3 years imprisonment.

- [2] The appellant was granted leave by the court *a quo* to appeal against both conviction and sentence.

FACTS

- [3] The appellant was, at the time of the incident, employed at Free State Trucking and Spares. As part of his duties, he was the driver of a company bakkie, which bakkie displayed the name and particulars of his employer.
- [8] It is common cause that the appellant was in possession of the bakkie on 8 July 2012.
- [9] The evidence presented by the State, establishes that on the 8th of July 2012, a person driving the said bakkie, sold 211 kilogram of scrap metal to a scrap yard in Unitas Park, Vereeniging for an amount of R 400, 00(Four hundred rand). Mr Kenneth Palatsi, an employee at the scrap yard, produced an inventory of the scrap metal that was purchased on 8 July 2012, which indicated that one “Domelo” was the seller of the said 211 kilogram scrap metal. The transaction occurred at 8:50 in the morning and Mr Palatsi was able to identify the appellant in court, as the person who sold the scrap metal to him.
- [10] The scap metal was identified as that belonging to Free State Trucking and Spares and valued at approximately R 15 000, 00(Fifteen Thousand Rand).
- [11] The appellant denied any knowledge or involvement in the theft.

AD CONVICTION

- [12] The appellant contends that the court *a quo*, although correctly identifying the issue in dispute as that of identity, erred in finding that the State proved the identity of the appellant beyond reasonable doubt.
- [13] The evidence of Mr Palatsi coupled with the fact that, on the appellant's own version, he was in possession of the bakkie at the time of the theft, establishes the appellant's guilt beyond reasonable doubt.

- [4] If the bakkie was, for instance, stolen before the theft occurred or the appellant lend it to someone else during the time that the theft occurred, there might have been room for an argument that Mr Palatsi made a mistake in identifying the appellant as the perpetrator. The facts set out *supra*, however, leave no doubt that the appellant was indeed the perpetrator of the theft.
- [5] Mr Gama, counsel for the appellant, quite correctly, conceded as much during argument.
- [6] In the premises, the appeal against conviction falls to be dismissed.

AD SENTENCE

- [7] The court *a quo* correctly identified the three factors to be taken into account when considering an appropriate sentence, to wit, the personal circumstances of the accused, the interests of the community and the seriousness of the offence.
- [8] Mr Gama submitted that, having regard to the abovementioned factors, the sentence imposed by the court *a quo*, is, on the facts in this matter, inappropriate.
- [9] In considering an appropriate sentence, the court *a quo* had regard to the following personal circumstances of the appellant:

“Your personal circumstances are as follows: You are a 40 year old male person. Your school qualification is Grade 11. You are still married, your wife is employed earning R3500. You have been dismissed from your employment after your arrest. You have two children, they are receiving a social grant since the time of your dismissal at work. You are not a first offender before. In 2004 you were convicted of assault, however, it is not relevant to this matter. You have no money to pay a fine to this court, your [indistinct] requested to consider a suspended sentence.”

- [10] In considering the seriousness of the offence and the interests of society, the court *a quo* made the following remarks:

“Unfortunately, you were the only one that we could identify in this matter, and therefore we have to make an example of you. We are in a country that has

big, big economical problems facing us. We have strikes on our hands, property being damaged, townships being damaged because of money, the cost of the economy and you were one of the lucky ones that had employment. You were the lucky one that had the vehicle to use. But you decided, as the prosecutor says, to bite the hand that was feeding you.

The State versus Prinsloo [1998] states clearly what the High Courts think about theft from an employer. We have to sentence people that steal from their employers, that the others that are working there will think twice, it is not worth it to steal. I am going to lose my freedom, I am going to lose my job, I am going to be marked as a criminal, I better think twice before I take something that I am supposed to look after and protect.

Because if we slight this and say this, no, this is fine, caution and discharge, suspended sentence, give him a fine, the shop owners, the employers can close their businesses at the end of the day and say it is not worth it. We are sitting here daily listening to cases of theft from employers.”

- [11] The words “....we have to make an example of you...” is a clear indication that the court *a quo* attached undue weight to the deterrence element. The value of the stolen goods, having regard to the price the appellant received for it, is relatively small. I am mindful that the crime was committed in an employer-employee relationship, but do not agree with the court *a quo* that direct imprisonment was, in the circumstances, proportionate to the crime committed.
- [12] In *S v Mbingo* 1984 (1) SA 552 AD at 555H, Grosskopf AJA, said the following in respect of the over-emphasising of the deterrence factor:

“On the other hand, all these factors should be seen in their true perspective. The prevalence of a certain type of offence and the consequent need to impose sentences which act as deterrents cannot justify a sentence which is disproportionate to the seriousness of the particular case with which the court is dealing.”
- [13] Mr Fourie, counsel for the respondent, supported the above principal and conceded that the sentence is disproportionate to the crime.
- [14] In the premises, the sentence falls to be set aside and this court must exercise its discretion in imposing a proportionate sentence in the particular circumstances of this matter.
- [15] It appears from the record, that the appellant has already served 5(five) months of the sentence imposed by the court *a quo*.
- [16] Having regard to all the facts *supra*, I am of the view that a sentence that is partly suspended should be imposed.

ORDER

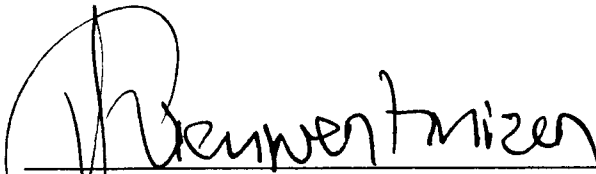
In the premises, I propose the following order:

1. The appeal against conviction is dismissed.
2. The appeal against the sentence of three years imprisonment succeeds.
3. The sentence of three years imprisonment is set aside and substituted with the following:

“The accused is sentenced to three years imprisonment of which thirty one months is suspended for three years on condition that the accused is not found guilty of theft or any other offence that involves dishonesty during the period of suspension.”

4. The sentence is ante-dated to 7 June 2013.

It is so ordered.



N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree,



M G PHATUDI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

ADVOCATE FOR THE APPELLANT

ADVOCATE N GAMA

ADVOCATE FOR THE STATE

ADVOCATE FOURIE

DATE OF HEARING: 12 FEBRUARY 2015