

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.:A165/2014

In the appeal of:

BENJAMIN MOSOLOMI NSIKI

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, JP *et* MURRAY, AJ

HEARD ON:

3 NOVEMBER 2014

DELIVERED ON:

12 FEBRUARY 2015

MOLEMELA, JP

- [1] This is an appeal against a sentence of seven years' imprisonment imposed for stock theft by the Regional Court in Kroonstad ("the trial court"). The appellant was charged with theft of twelve cattle in contravention of sections 1, 11, 12, 14 and 15 of the Stock Theft Act 57 of 1959. He pleaded not guilty. The trial court convicted him and sentenced him to seven years' imprisonment. Aggrieved by this sentence, the appellant approached the trial court for leave to appeal, which was duly granted.

- [2] The facts that led to the appellant's prosecution and conviction are briefly summed up as follows. The appellant was a shepherd on the complainant's farm. He subsequently became interested in buying a motor vehicle and offered the owner of the vehicle twelve cattle as a payment in kind. The appellant duly delivered the twelve cattle, which belonged to his employer, to the vehicle owner but the latter was arrested when he tried to sell the cattle at an auction. Both the appellant and the vehicle owner were prosecuted. The vehicle owner was convicted of possession of stolen property and a wholly suspended sentence was imposed on him. The appellant was convicted of theft and was sentenced to seven years' imprisonment.
- [3] The sentence imposed is assailed on the basis that it is strikingly inappropriate, that the trial court paid lip-service to the appellant's personal circumstances and over-emphasized the seriousness and prevalence of the offence. In this court, it was argued on behalf of the appellant that the trial court misdirected itself and imposed a sentence that was disproportionate to the offence.
- [4] It is trite that a court of appeal will interfere with the sentence where the trial court failed to exercise its sentencing discretion properly or exercised it unreasonably or if there is a marked disparity between the sentence imposed and the sentence which the Court of Appeal would have imposed. In the case of **S v MALGAS**¹ the court stated as follows:

¹ 2001 (1) SACR 469 (SCA) at 478.

“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. Where material misdirection by the trial court vitiates its exercise of a discretion, an Appellate court is of course entitled to consider the question of sentence afresh. However, even in the absence of material misdirection, an Appellate court may yet be justified in interfering with the sentence imposed by the trial court...when the disparity between the sentence of the trial court and the sentence which the Appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling”, or “disturbingly inappropriate”.

- [5] It is also a trite principle of our law that sentencing must be individualised and thus each case must be decided on its own facts. In the case of **SMM v The State**², it was aptly stated as follows:

“For the reasons that follow I am of the view that the court below erred in this regard. I deem it necessary to provide a detailed exposition of this court’s recent judgments in such cases. I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors.”

It is, thus clear that it is an acceptable practice for courts to consider comparable cases as guidelines for purposes of

² 2013 (2) SACR 292 (SCA).

determining an appropriate sentence. See **S v De Klerk**³. I align myself to the approach set out in this case.

- [6] It is correct that the appellant was employed in a position of trust which he abused by committing the crime. The trial correctly found that the offence was of a serious nature and also that it was prevalent in its area of jurisdiction. All of these factors constitute aggravating circumstances. In the case of **Truyens v The State**⁴ (“Truyens case”) at para [24] the court correctly remarked as follows:

“Stock theft is a sensitive issue in many farming communities. This is because it is difficult for farmers to prevent the crime and equally difficult for perpetrators to be apprehended and prosecuted. Cattle farmers are therefore particularly vulnerable to this type of crime. The courts have reflected these concerns by progressively imposing tougher sentences – usually direct imprisonment – on offenders.”

- [7] In **S v Chipape**⁵ the trial court sentenced the accused to 18 months’ imprisonment for stock theft involving a bull that was later sold for R2 800. The accused had used the money to buy clothes and groceries. From this fact the review court accepted in the accused’s favour that he was not motivated by blatant greed. The review court indicated that correctional supervision would probably have been the appropriate sentence. However, since the accused had already served six months of his sentence, the review court

³ 2010 (2) SACR 40 (KZP) paras [18]–[26].

⁴ 2012 (1) SACR 79 (SCA) para [24].

⁵ 2010 (1) SACR 245 (GNP).

imposed six months' imprisonment, antedated to the date of the original sentencing.

[8] In the Truyens case (*supra*) the Supreme Court of Appeal, having been referred to a case of S v Lephoro⁶ ("Lephoro case") where ten years' imprisonment (of which three years were suspended) was imposed on the accused persons for theft of forty eight cattle), accepted that the circumstances applicable to the case in question differed somewhat from other stock theft cases. It took into account that the Lephoro case concerned persons who were acting in concert and who had shown no remorse. It accepted that even though the appellant had stolen a large number of cattle over a period of time, his moral blameworthiness was somewhat reduced because his motive for stealing the cattle in question was to pay for his children's medical costs for the treatment of their rare illness and he had shown remorse for his actions. The court accordingly set aside the effective eight years' imprisonment sentence imposed by the high court on appeal for the theft of 48 cattle and re-instated the four years' imprisonment sentence that was originally imposed by the magistrate in the trial court in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977, in terms of which he would serve a minimum of eight months' imprisonment before being considered for placement under correctional supervision.

[9] A consideration of the above-mentioned authorities reveals that a harsh sentence was imposed on the appellant *in casu*. I accept that, unlike in the case of Truyens, the appellant was motivated by

⁶ Unreported case no CA 28/2006 (Bophuthatswana Provincial Division).

greed and not by need and did not show any remorse. This case is also distinguishable from the TRUYENS case in that the number of cattle stolen in the TRUYENS case is four times the number of cattle stolen in the present case. The appellant had two relevant previous convictions, namely robbery and theft, respectively, which both involve an element of dishonesty. However, the appellant was 41 years old and his last previous convictions occurred 15 years prior to his stock theft conviction. The trial court therefore correctly found that little weight was to be accorded to these previous convictions.

[10] A strong mitigating factor is the fact that the appellant was the sole breadwinner in a family in which his spouse and all his six children were unemployed. That does not mean that he should be treated lightly, though, and I hasten to point out that his economic situation should not necessarily call for his theft to be condoned. Stock-theft is a serious offence. The appellant stole twelve cattle with an approximate value of R72 000 from his employer. However, the twelve cattle that the appellant stole were all recovered the day after the theft and they were still in a good condition. The farm-owner thus suffered no financial loss. This is an important consideration that should count in his favour. The record reveals that the trial court paid little regard to this factor. This in my view constitutes a misdirection entitling this court to interfere with the sentence.

[11] It is trite that the period spent in custody while awaiting trial is a factor to be taken into account when an appropriate sentence is determined. I am of the view that imposing an effective seven

years' imprisonment sentence on the appellant when he had already spent 15 months in custody while awaiting trial put the sentence imposed in the realm of a "disturbingly inappropriate sentence" as contemplated in the **Malgas** case (*supra*). I am of the view, however, given his lack of remorse and the motive of greed, that on a proper consideration of the well-known triad of sentence and the period spent by the appellant in custody while awaiting his trial, the appropriate sentence for the accused is a more lenient but still relatively long custodial sentence.

[12] Wherefore the following order is made:

- (i) The appeal against sentence succeeds.
- (ii) The sentence imposed by the trial court is set aside and replaced with following: "The accused is sentenced to five years' imprisonment".
- (iii) The sentence referred to in clause (ii) above is antedated to 13 December 2013.

M. B. MOLEMELA, JP

I concur.

H MURRAY, AJ

On behalf of the appellant: Mr K. Pretorius
Instructed by:

Legal Aid
BLOEMFONTEIN

On behalf of the respondent: Adv. S. Chalale
Instructed by:
The Director: Public Prosecutions
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