

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

Appeal Number: A369/2007

In the appeal of:

ANDRIES MAKHASANE

Appellant

v

THE STATE

Respondent

CORAM:

NAIDOO, J and WILLIAMS, AJ

JUDGMENT BY:

WILLIAMS, AJ

HEARD ON:

1 JUNE 2015

DELIVERED ON:

11 JUNE 2015

[1] The appellant was charged in the regional court at Bloemfontein on one count of contravening sections 11, 13(3) and 15 of the Stock

Theft Act, 57 of 1959, in that on or about the 10th to the 13th of January 2003 at or near Edenburg he wrongfully and intentionally stole eight Merino sheep valued at R2 400, 00, being the property of HF Theron.

- [2] The appellant was legally represented and pleaded not guilty to the charge.
- [3] On 5 October 2005 the appellant was convicted as charged. He was sentenced to 24 months' imprisonment.
- [4] The appellant applied for leave to appeal in the court *a quo* against apparently both the conviction and the sentence which leave was granted. The word "apparently" is used for reason that the heads of argument of the appellant only referred to an appeal against the sentence.
- [5] The chronology of the appeal can be summarized as follows:

5.1 After sentence was handed down the appellant obtained the services of a fresh attorney, A Coetzee of the firm Goodrick & Franklin. Last mentioned filed an application for leave to

appeal on 23 November 2005. On the said date the tapes which had recorded the proceedings were not available in order for the record to be transcribed. The court refused to grant bail pending the appeal.

5.2 It transpired that one of the tapes could not be found, as a result of which the magistrate was obliged to reconstruct the record to the best of his ability. The court on 23 January 2006 thereupon granted bail to the appellant pending appeal, whilst the record was being reconstructed. According to the record, a bail receipt in the amount of R1 000, 00 was issued by the head of the Grootvlei prison on the said date. The appellant presumably then was released on bail.

5.3 On the date of the further postponement, namely 7 April 2006, the appellant did not appear and a warrant for his arrest was issued. His bail was provisionally estreated. At the next hearing on 24 April 2006, the appellant was still absent and his bail was finally estreated to the State.

5.4 Thereafter, on 19 June 2006, the appellant appeared in person before court. Mr Coetzee had by then long since

withdrawn as his representative. It appears from the record that on 3 July 2006, the appellant applied for legal aid and was granted bail of R100, 00 pending appeal. According to the record a bail receipt in this amount was issued by the Magistrate's court of Edenburg on 19 August 2006. The appellant was presumably once again released on the said date.

5.5 Thereafter, on 20 September 2006, it appears that the reconstruction of the record had been finalized. For some inexplicable reason, the appeal was only set-down for hearing at some stage during October 2014, some eight years later.

[6] From information conveyed to me by Mr Makhene for the appellant, as well as by Mr Hoffman for the prosecution, the appellant was not satisfied with the reconstruction and discussions had to be held with the presiding magistrate in order to clear certain issues up. Understandably, after all this time, the magistrate could not add anything and the matter was finally enrolled for hearing on 1 June 2015 before this court.

- [7] Mr Makhene could not provide any argument on the merits as his client was of the opinion that a certain critical issue pertaining to his evidence in chief had not been recorded. It was thereupon pointed out by Mr Hoffman that this particular issue had never been put to the first state witness and in consequence nothing could turn upon the evidence even if it had been recorded. Both Mr Makhene and Mr Hoffman agreed that the sentence of 24 months' imprisonment was not inappropriate and could not be interfered with. Mr Hoffman further argued that the conviction could not be set aside.
- [8] The dilemma that now faces the court is the present position of the appellant. Some almost ten years has passed since he was convicted. All in all it appears as if he was incarcerated for a total period of four months, after being sentenced, before bail was granted pending appeal.
- [9] In view of the fact that it was not the applicant's fault that the matter was delayed for so long, it would be highly prejudicial to the appellant at this stage to order him back to prison to complete his sentence, should the conviction and sentence be confirmed. As stated above, the appeal was never set-down for some unknown

reason. There is no explanation from either state or the appellant regarding the inordinate delay in setting this matter down for hearing. It is regrettable that neither party appears to have acted in the interest of Justice as well as that of the appellant in ensuring an expeditious end to this matter.

- [10] It is true that the evidence of the accused has not been transcribed as it formed part of the missing record. The magistrate, in his reconstruction of the record, indicated that the accused confirmed what was said in his plea explanation and what was put to the State witnesses as his version. The plea explanation and cross-examination of the State witness's forms part of the transcribed record. It is my view that the transcribed records together with the reconstructed portion are sufficient for this court to hear the matter and make a finding. I agree with Mr Hoffman's submission that if there was anything further in the appellant's evidence that was not part of his plea explanation or in the propositions put to the State witness, nothing much would turn on it, as the State would no doubt argue that it was in any event a fabrication, added on by the applicant in his evidence under oath. With regard to the conviction, I am satisfied that the trial court's evaluation of the evidence was

correct and that the court did not misdirect itself, in any way, in convicting the appellant as it did.

- [11] With regard to sentence it is true that an appeal court may only interfere with sentence if the trial court has misdirected itself in the application of the law or the facts in arriving at the sentence it did, or if the sentence is shockingly inappropriate. [See *S v Rabie* 1975(4) SA 855 (A) and *S v Giannoulis* 1975 (4) 867 (A).

In the present matter I can find no misdirection on the part of the trial court, and as pointed out, neither Counsel before me was able to assail the sentence in anyway. Having said that, I am of the view that while this court will not interfere in the sentence imposed, it is still the duty of this court to ensure that Justice and fairness prevails in the matter. As pointed out the appellant has spent 4 months in custody, post sentencing. It has been almost ten years since he was sentenced, and the delay in this matter is through no fault on his part. In such a situation, which I consider to be out of the ordinary, an unusual remedy is called for. I feel that justice and equity can be served by suspending the remaining portion of sentence under certain conditions.

[12] In the circumstances, I propose that the following order be made:

1. The conviction and sentence are confirmed.
2. The remaining portion of 20 months of imprisonment is suspended for a period of three years, on condition that appellant is not convicted of stock theft committed during the period of suspension.
3. The suspended sentence will take effect on the date of this judgment being handed down.

A. WILLIAMS, AJ

I concur, and it is so ordered.

S NAIDOO, J

On behalf of the appellant: **Adv. Makhene**
Instructed by: Legal Aid

BLOEMFONTEIN

On behalf of the respondent: **Adv. Rudolf**
Instructed by: DPP
BLOEMFONTEIN