



06/02/13

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case number: A978/2011

Date: 6-2-2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
6/2/2013	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

THEMBA MACU
LEHLOHONOLO PETRUS MOKOENA
LUCKY MOKOENA
BONGANI JIMMY MACU

First Appellant
Second Appellant
Third Appellant
Fourth Appellant

and

THE STATE

Respondent

JUDGMENT

PRETORIUS J.

- [1] The appellants were convicted of theft of 102 boxes of cigarettes to the value of R714,000.00 from the British American Tobacco Company. The provisions of section 51(2) of Act 105 of 1997 applies. All the appellants were legally represented in the court *a quo*.

- [2] The first appellant withdrew his appeal as he had already been released on parole. The first, second and fourth appellants were sentenced to 7 years imprisonment by the presiding magistrate in Heidelberg on 14 May 2010. The third appellant was sentenced to 10 years imprisonment. The reason for the distinction was that the third appellant was employed by British American Tobacco Company at the time and he had planned the crime.

- [3] The appellant was refused leave to appeal by the magistrate, but was granted leave to appeal against sentence only, when petitioning the High Court.

- [4] It is common cause that the appellant entered the factory of the British American Tobacco Company during the night of 12 November 2007 at Heidelberg and loaded 102 boxes of cigarettes to the value of R714 000 on a bakkie and a Dyna truck driven by the appellant. The police intercepted the truck and arrested the appellants.

- [5] The personal circumstances of the 2nd appellant was that he was 26 years old. He was a taxi-driver earning R2800.00 per month of which

he paid R1500.00 maintenance for his three children aged 6 years, years and 7 months.

[6] The personal circumstances of the 3rd appellant was that he was 34 years old; had 3 children aged 6, 5 years and a baby of 3 months. He earned R3,500.00 per month.

[7] The personal circumstances of the 4th appellant was that he was 26 years old. His income was R7000.00 – R8000.00 per month. All the appellants are first offenders.

[8] As the value of the goods exceeded R500,000.00 the minimum sentence of 15 years imprisonment in terms of section 51 and 52 of 105 of 1997, applies. However, the magistrate found substantial and compelling circumstances, in that the appellants were first offenders and all the goods had been recovered.

[9] In **S v Rabie 1975 (4) SA 855 (A)** Holmes JA held at 857 D – E:

"In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is

"pre-eminently a matter for the discretion of the trial Court";

and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised."

[10] Counsel for the appellants requested the court to suspend a part of the 7 years imprisonment imposed by the magistrate, as well as a part of the 10 years imposed on the third appellant.

[11] In **S v Abrahams 2002 (1) SACR 116 (SCA)** at par 26 Cameron JA held:

*"[26] This was made clear in Malgas. Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as 'ordinarily appropriate' is a consideration that the courts are 'to respect, and not merely pay lip service to'. **When sentence is ultimately imposed, due regard must therefore be paid to what the Legislature has set as the 'bench mark'.** The Constitutional Court has held that the approach enunciated in Malgas steers an appropriate path -*

'which the Legislature doubtless intended, respecting the Legislature's decision to ensure that consistently higher sentences are imposed in relation to the serious crimes covered by s 51 and at the same time promoting 'the spirit, purport and objects of the Bill of Rights'"

[12] The court has carefully considered the sentences and cannot find that the magistrate had misdirected himself or that there was any irregularity. The court *a quo* took into consideration the individual participation of the appellants in committing the theft. The court has to agree with counsel for the respondent that the sentences are not inappropriate or shockingly harsh. Therefore this court will not interfere with the sentences.

[13] The following order is made:

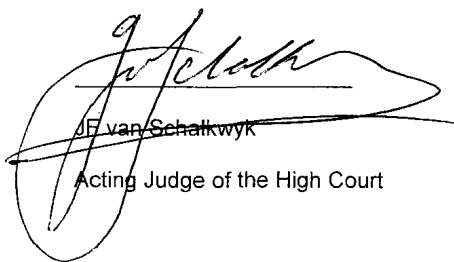
The appeal against the sentences is dismissed.



C Pretorius

Judge of the High Court

I agree,



JF van Schalkwyk

Acting Judge of the High Court

Case number : A978/11

Heard on : 4 February 2013

For the Appellant	:	
Instructed by	:	David H Botha, Du Plessis & Kruger
For the Respondent	:	Adv Wilsenach
Instructed by	:	Director of Public Prosecutions
Date of Judgment	:	