

A 903/09 ISG

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

DATE:

12/10/09

Magistrate
POLOKWANE

Case No: D09/09
High Court Ref No: 561

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO. ☒
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SIGNATURE

THE STATE V MANYEGA LUCAS CHIPAPE

REVIEW JUDGMENT

LEGODI, J

I find it necessary to give a detailed judgment in the matter.

1. When this matter was initially laid before me on automatic review, I raised my concerns regarding sentence as follows:

“1. Did the trial court consider correctional supervision as a sentencing option, particularly

regard been had to the fact that the accused is a first offender and relatively still young?

2. If not, would this not have amounted to an irregularity?
3. If it was considered, what militated against ensuring that necessary evidence or information was laid before the court to enable the court to properly consider correctional supervision as a sentencing option?
4. What militated against any form of sentence than direct imprisonment?"

2. To these queries, the trial court's response can be summed up as follows:

- 2.1 That on the day of the accused's trial, there were three cases of stock theft.

- 2.2 That the trial court did consider the correctional supervision sentence or suspended sentence.
- 2.3 That due to the seriousness of the case, people in the community might take the law into their own hands against the accused.
- 2.4 That in rural areas, black people rely on cattle farming. That you can deprive a black person of anything, but not of his cattle farming.
- 2.5 That due to the escalation of stock theft in the area, the community is likely to take the law into their own hands to protect their cattle.

The Director of Public Prosecutions in his comments, amongst others expressed himself as follows:

“6.8.1 It goes without say that the crime of which the accused was convicted is serious. The court *a quo* had a duty to impose a sentence that would

reflect the community's indignation and repugnance felt towards the crime.”

3. Further, having referred as to the case of *S v Madihlaba* 1990 1 SA 76 (T), where a member of a trial court was found guilty of assault with intent to do grievous bodily harm, for having imposed a corporal punishment on a female who was alleged to have been found guilty by the trial court on a suspicion of stealing a sheep. She was lashed six times over her buttocks with a sjambok and sustained serious injuries.
4. On appeal in that case regarding the assault charge, it was found that the member of the tribal court exceeded its powers and actually that he took the law into his hands.
5. I think the Director of Public Prosecutions referred us to this case, just to emphasise how easy people can take the law into their own hands, when a stock theft offence is committed.

6. I think, one should pause for a moment and say, no one is allowed to take the law into his or her own hands. Secondly, judicial function requires one to be impartial and at the same time independent and exercise such judicial powers or functions without fear of any kind.

Thirdly, sentencing is an exercise of a discretion which discretion must be exercised judicially and fearlessly.

7. In sentencing, one has to consider the nature, magnitude and effect of the offence itself, the interest of the society, the interest of and circumstances surrounding the offender and circumstances under which the offence was committed. In appropriate cases, the sentencing court should also take into account an element of mercy.
8. All of these factors have to be considered on an equal basis without overemphasising or less emphasising the one against the other.
9. In the instant case, I think stock theft as an offence in rural areas was unduly overemphasised and by so doing,

disregarded every other option of sentencing other than direct imprisonment.

10. I think, our judgments, if well motivated to deal with all the relevant factors and communicated in a manner that will make the community to understand, should be sufficient to dispel any idea of any person taking the law into his or her own hands.
11. To allow the community to dictate to our courts as to what kind of sentences ought to be imposed, would instead, bring the administration of criminal justice system into a disrepute.
12. Not every serious offence, should justify a direct imprisonment. I deal later with this aspect. I turn now to deal with the interest of the community.
13. While the public is entitled to protection against any one individual, one cannot sacrifice the individual entirely in offering that protection to it. The most, the court can do consistently with justice is to protect the public for as long a period as seems commensurate with the accused's deserts.

[See *S v Mkise* 1973 3 SA 284 (N)] “For as long a period” referred to in *Mkise’s supra*, I do not understand it to mean direct imprisonment at every given time where the offence is serious and rife. If this was to be the case, then other relevant factors might be unduly overshadowed by the approach.

14. Whilst society expects that a serious offence must be punished, it also expects that mitigating circumstances should be taken into consideration and that the accused’s specific position be accorded thorough consideration. [See *S v Holder* 1979 2 SA 20 (A) 81A-B] Sure, the seriousness of the offence and the protection of society should have been considered on an equal basis with mitigating factors.

15. As they say, where the nature of the offence and interest of society are considered, the accused to a certain extent is still in the background. But, when he as a culpable human being is considered the spotlight must be focused fully on his person in its entirety, with all its facts. He is not regarded with a primitive desire of revenge, but with humane compassion which demands that mitigating factors be

investigated in each case, however, serious, the offence might be. [See *S v Du Toit* 1979 3 SA 846 (A)]

16. This must then bring me to consider the personal circumstances of the accused. He was a first offender. He attended school up to grade 11. He stopped going to school at the beginning of January 2009. He was born in 1985 and thus about 23 years at the time of the commission of the offence. The appellant was therefore still relatively young at the time of the commission of the offence. He has been a law abiding citizen until February 2008 when he committed the offence in question. Despite his age, it appears that the accused continued to be at school until well above 21 years old. This in my view should have prompted more probing. I deal with the role of a presiding officer during sentencing later.

17. The accused pleaded guilty to the charge and he was convicted on his plea. By this, indicated a sign of remorse, which in my view, required an element of mercy to be considered. Remember, mercy in a criminal court means that justice must be done, but it must be done with

compassion and humanity, not by rule of thumb, and that a sentence must be assessed not callously or arbitrary or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation. [See *S v Van der Westhuizen* 1974 4 SA 1 (C)] The accused having pleaded guilty, took the court into his confidence and told the court during plea questioning the circumstances under which the offence was committed.

18. On 17 February 2008, after having stolen the bull, he sold it for R2 800.00 to the Matega family. Matega-family had a wedding ceremony and the bull was slaughtered there. He used the money to buy clothes and groceries. Whilst stealing for food or clothing can never be an excuse, it looks like this was not a blatant greediness on the part of the accused. I find it necessary whilst on this, to turn to the role of a presiding officer during sentencing.
19. The presiding officer must be in possession of all necessary material facts relating to sentence. Although it is the duty of the parties to place the relevant and necessary facts before him, where they fail to do so, the court has a duty to see to it

that it is done. [See *S v Phakate* 1978 4 SA 477 (T); *S v Sithole* 1969 4 SA 286 (N) 287C-E.] This has the effect that a presiding officer during sentencing cannot afford to play a passive role. He or she has to play an active role. However, as he or she does so, must remain impartial and objective throughout during the procedure of sentencing.

20. After obtaining the necessary information, it is the duty of the presiding officer to consider all relevant facts and factors relating to sentence. Failure to consider an important fact whether mitigating or aggravating, may clearly cause an unjust sentence. [See *S v Pillay* 1977 4 SA 531 (A) 534H-535G]

21. I venture to say, similarly, failure to obtain relevant facts and factors relating to sentence, where the parties have failed to do so, may amount to an irregularity. Remember, all relevant factors have to be considered on an equal basis. That is, you need to have relevant facts relating to seriousness of the offence, interest of the society, interests of and circumstances surrounding the offender and circumstances under which the offence has been committed.

Failure to have facts relating to all of these factors, may impede on the presiding officer's ability to exercise its discretion properly.

22. The trial court in the instance case, was faced with an accused person who had shown remorse, a first offender, but even most importantly an accused person who at the age of 23 years was still doing grade 11. He failed to register for 2009. This should have prompted the trial court to probe for more information regarding the accused social and home background. For example, why would a young man like the accused steal in order to buy food and clothing? An enquiry regarding his family background could have been important. Failure to seek for this information has the effect of a prejudice on the accused. This must immediately bring me to consider correctional supervision as a sentencing option.
23. The trial court in its response to the query raised with it, responded as follows: I am stating this at the risk of repeating myself:

“The court did in fact consider the correctional supervision or suspended sentence. The court found that due to the seriousness of the case, the community might like to take the law into their own hands against the accused. In rural areas, black people rely on cattle farming. Farming with cattle is a wealth. You can deprive a black person of anything, but not of his cattle farming. Due to escalation of stock theft in the area, the community is likely to take the law into their own hands to protect their cattle. Most of the people in the rural areas do not regard suspended sentencing as an effective sentence. They regard it as discharge.”

24. I want to deal with the quotation in three stages or compartments. Firstly, correctional supervision as a sentencing option, secondly, consideration of judicial notice during sentencing and lastly, suspended sentence as a sentencing option.

Correctional Supervision as a Sentencing Option

25. The trial court should deal during its judgment with a correctional supervision as a sentencing option so that it

appears clearly that it was truly considered as such. In the instant case, there was no probation officer's report to enable the trial court to consider correctional supervision under section 276(1)(h) of Act 51 of 1977 as a sentencing option. Therefore, the assertion that it so considered such an option could not have been based on any facts.

26. The lack of information as indicated earlier in this judgment, could have been indicated in the probation officer's report, had such a report been insisted upon. I am therefore not satisfied that the trial court did truly consider correctional supervision as a sentencing option.
27. The introduction of correctional supervision as a sentencing option has ushered in a new phase in South African Criminal Justice System. [See *S v R* 1993 1 SA 476 (A) and 1993 (1) SACR 209 (A)].
28. The legislature is said to have indicated that, as a whole, punishment whether it be rehabilitation or, if needs be, highly punitive in nature, is not necessary or even primarily attainable by means of imprisonment. It is the duty of the

judicial officers to use these ample means at their disposal. It is particularly important to realise that there is now the possibility of imposing finely tuned sentence without resorting to imprisonment with all its known disadvantages for both the prisoner and broader community [*S v R supra*; also see *S v E* 1992 (2) SACR 625 (A)]

29. It is now possible for a trial court to impose severe punishment even regarding every serious offences without making use of imprisonment and without thereby sometimes, if not most of the time, destroying whatever good characteristic remain as far as the offender or prisoner is concerned. It is now possible to impose a severe punishment and to serve the interests of the community by imposing a deterrent and strict sentence other than imprisonment.
30. The accused in the present case was sentenced to eighteen months direct imprisonment, the trial court having found that this was the only sentence the community would accept. I have very serious problem with this finding. I also do not support the view as expressed by the Director of Public

Prosecutions. Had the trial court truly considered correctional supervision as a sentencing option, it would have required a probation officer's report. A well motivated and considered report, could as well have advised the trial court to send the accused into the community, to serve people there. The accused had already spent a considerable period of time serving his sentence. He was sentenced on 18 March 2009. He had therefore already served about six months in jail. Had it not been for this, I would refer this matter back to the trial court for probation officer's report and for consideration of sentence afresh. An appropriate order would later be made herein. I now turn to deal with the other issue raised earlier in this judgment.

The Trial Court's Consideration of Judicial Notice during Sentencing

31. The taking into consideration of judicial notice during sentencing seems to be supported by the office of the Director of Public Prosecutions and it expressed itself as follows:

“6.5 The court *a quo* took judicial notice of the fact that theft of stock and produce is rife in the district of Dendron.”

Having said this, the Director of Public Prosecutions then concluded as follows:

“6.7 It goes without saying that the crime of which the accused was convicted is serious. The court *a quo* had a duty to impose a sentence that would reflect the community's indignation and repugnance felt towards the crime.”

Considering what the trial court in its response to the queries raised the trial court appears also to have taken judicial notice of black people's attitude regarding cattle farming.

32. It is so that a judicial officer acquires knowledge regarding, for example, the prevalence of a particular crime within his district or other aspects relevant to sentencing. It is said, it will be unrealistic and undesirable to expect him to close his eyes to such knowledge because that will prevent him from

taking into account an obviously relevant factor in sentencing. It has been decided that the presiding officer is entitled to make use of his personal or own knowledge regarding the prevalence of crime in his jurisdictional area. [S v *Malinga* 1962 1 SA 439 (T), R v *Motlagomang and 2 Others* 1958 1 SA 626 (T) 628-9.]

33. However, the presiding officer has a duty to inform the parties of his intention to make use of personal knowledge or to take judicial notice of facts as well as the notice of the knowledge. This is especially so where use of such knowledge will adversely affect sentence as far as one of the parties is concerned. The party concerned must be afforded the opportunity to address the court on the fact or facts which will be taken judicial notice of and to lead such evidence as he or she deems necessary. It will be irregular merely to take into account the information without affording the party the opportunity of dealing with such facts. [See S v *H* 1977 2 SA 954 (A) 960G-H.] Use of personal knowledge should also not be taken too far and evidence remains desirable. [See S v *Abt* 1977 (2) PH H136 (NC)].

34. The following are said to be the aspects of judicial notice and sentencing:

- (i) Statistics regarding crime like stock theft, must fall within the local community's knowledge before a court can take judicial notice thereof. The expression by the trial court in the instant case suggested that it was within the local community's knowledge that black people regard cattle farming as their wealth. I have a problem with a generalisation of this statement. In the past, blacks could own nothing except few cattle, goats or sheep especially in South African. Most of which donated to them by their masters. Things have changed now. Many blacks are working and they are dependent entirely on their earnings as workers and some as business people. Therefore to make such a general statement without leading evidence would have been dangerous and prejudicial to the accused.
- (ii) The information must not lead to specific occurrence or incident. Like in the present case, the trial court took into account the three cases of stock theft that were

before him on the date the accused was tried. This approach too was dangerous. First, those who were appearing in the three cases should have been presumed innocent. It could as well be that no stock theft at all is proved in those cases. Therefore evidence was needed before the trial court could place reliance on the three cases.

- (iii) The facts and circumstances of every specific crime must still be considered on its own merits and the trial court must still exercise its discretion in each individual case. As I said earlier in this judgment, the trial court in my view, overemphasised the seriousness of the offence and interest of the community as against the personal circumstances of the accused, his attitude towards the offence displayed by his plea of guilt and the circumstances under which the offence was committed.
- (iv) The accused should be informed of the court's intention to take judicial notice of certain facts as well as the nature of the facts and the accused should be

afforded the opportunity to lead evidence and to address the court. All of this, the trial could have failed to do and this omission too, should be found to have amounted to irregularity. Again, this would have been an appropriate case to remit the matter to the trial court for reconsideration of sentence, but as I said, the accused has already served about six months of his eighteen months. I now turn to deal with the other issue raised earlier.

Suspended Sentence as a Sentencing Option

35. Section 297 is instructive on the aspect. It deals with conditional or unconditional postponement or suspension of sentence quite very clear from the provisions of section 297, that suspension of a sentence is not a light sentence, and it should not be seen as a discharge. If a suspended sentence as a sentencing option, was to be disregarded for fear that the community might take the law into their own hands because they see it as a discharge, then there must be something wrong with the manner in which we communicate over judgments to the ordinary members of our society. As I said earlier, the court's exercise of discretion in sentencing

must be dictated by all relevant factors and not allow the feeling of the community to usurp such a discretion.

36. Remember, imprisonment, should be seen as a not most commonly imposed sentence. It is a punishment which is imposed for the most serious crimes. For example, for criminals who offend regularly and are not deterred by other forms of punishment. Most people have a very high regard for imprisonment and believe that it will not only protect them from offenders but also rehabilitate those offenders. However, in practice imprisonment is less ideal than it is often made out to be. [See *The Guide to Sentencing in South Africa*, Terblanche at 239.]
37. In the instant case, it looks like the trial court decided to go the route of general deterrence than individual deterrence. General deterrence sentence is used as an example to other potential offenders. The belief is that the threat of similar punishment will cause such potential offender to refrain from committing crime. (See again *Terblanche's* work at page 179 paragraph 8.3.2.1)

38. It is said that despite this widely belief, there is an ever growing body of research showing that general deterrence cannot be accepted as a fact. (See also Beyveld "A bibliography on general deterrence 1980"). Personally I tend to agree with this view. One needs to be realistic with the ever growing population in prison. This is a national problem in waiting if it is not already a major problem. Sending an offender to prison has to have a purpose to serve. That is, an offender will learn something in prison and would not find it necessary to reoffend by the time he or she comes out of prison.
39. However, the danger of sending first offenders at the slightest stroke of a person, is that, because of over population in prison, the authorities are just not having the muscle to deal with appropriate programmes to mould and rehabilitate the offenders. Secondly, because of the uneasy access to these programmes, offenders idle in prison at the risk of new offenders been influenced by others, making their eventual release a danger to the society. This, has the effect of making a person worse than what he or she was when he went into prison.

40. In my view, the converse is an ideal if one was to impose an individual deterrence. With the individual deterrence, the idea is that a man, being a rational creature, would refrain from commission of crime, if he should know that the unpleasant consequence punishment will follow commission of certain crimes. It is thus the inhibiting effect of the threat of punishment. This in my view, is the essence of a suspended sentence.
41. A suspended sentence is a reminder to an offender. It is like a red light fleshing in the eyes and mind of the offender everytime when he or she is tempted to reoffend. It is not in the interest of the society to create more criminals by sending everyone to jail. That is, sending every offender to jail and when they come out, they not scared of reoffending because they got used to prison's life.
42. A person who was never in jail would be more fearful of jail than the one who had a taste of life in prison. Therefore, it is important as far as possible to keep first offenders out of jail

insofar as it might be possible. Of course there are cases

which are so serious that one cannot escape a jail term. The present case, is not one of those cases. Again, the accused had already served about six months.

43. In conclusion, I would make an order as follows:

43.1 The conviction of the accused is confirmed.

43.2 The sentence of eighteen months imposed on the accused is set aside and substituted with:

"The accused is sentenced to six months imprisonment. The sentence is antedated to 18 March 2009 being the date on which the accused was sentenced."


M F LEGODI
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree


A M L PHATUDI
JUDGE OF THE NORTH GAUTENG HIGH COURT

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