

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape, Kimberley)**

Case Nr: CA & R 67/09
Case Heard: 09/11/2009
Date Delivered: 13/11/2009

In the matter:

ABEL MOSS

Appellant

versus

THE STATE

Respondent

Coram: Kgomo JP *et* Mjali AJ

JUDGMENT ON APPEAL

KGOMO JP:

- [1] This appeal, which is against sentence only, is devoid of any merit and only serve to further clog up the already overladen rolls. The Magistrate Kakamas, Mr Morolong, instead of committing the appellant to the Regional Court in terms of s116 of the Criminal Procedure Act, 51 of 1977 ("the CPA"), to impose a sentence which would undoubtedly have exceeded the three-year maximum punitive jurisdiction of that court, inexplicably merely exhausted its jurisdiction by

sentencing him to three years imprisonment. This section, to refresh faded memories, provides that:

"116. Committal of accused for sentence by regional court after trial in magistrates court. –

(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion –

(a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or

(c) that the accused is a person referred to in section 286A(1),

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction."

- [2] When the appellant belatedly applied for leave to appeal, condonation for the belatedness having been granted, Mr Morolong was not available to hear the application. It fell to Magistrate Ms Annenè Du Toit to hear the leave to appeal which she granted on these grounds (translated):

"I have considered the grounds of appeal as set out in your Notice for Leave to Appeal. I grant the application on all the grounds (three grounds) tabulated in the Notice marked Exhibit E. These are your personal circumstances; the fact that the complainant has

recovered the bulk of her stolen property; the element of deterrence and retribution and the fact that the [sentencing Magistrate] found that a sentence of direct imprisonment is the only appropriate sentence in the circumstances. The Court has also not considered alternative options to imprisonment.”

[3] The appellant was born on 16 April 1968 at Augrabies (Upington), Northern Cape. He was 40 years old when he was sentenced on 26 August 2008 to three years imprisonment. During his life time he accumulated an impressive catalogue of previous convictions stretching from December 1980, when he was 12 years, to 30 October 2007, when he was convicted of the unlawful possession of cannabis. He notched up 20 convictions which can be categorised as follows:

3.1 Ten convictions involving dishonesty. Notably in September 1998 he was sentenced to three years imprisonment for the possession of suspected stolen goods and in August 2003 he was found guilty of dealing in rough or uncut diamonds in contravention of the relevant laws. Strangely, he was sentenced to a mere one year suspended sentence in the latter instance.

3.2 The appellant was convicted of seven offences involving violence. Two rapes and two indecent assaults on separate occasions. The rest are

assaults. He clearly has a propensity for violent crimes; some are very serious.

3.3 Two of the offences involve the possession of dagga and one driving a motor vehicle without a driver's licence.

[4] Cognizant of the foregoing it is startling that during the application for leave to appeal the prosecutor, Mr Michael Shivuri, did not oppose the granting of leave; in fact he supported it. He made the following misleading statement in the course of addressing the Court:

"Your Worship the checking --- the last conviction with regard to the previous conviction was 1997 --- and the accused was sentenced in 2008 ---. Your Worship in checking the age of those convictions ---, I think it was 11 years --- by then. More than 10 years. The State has no objection with regard to the application ---."

What the prosecutor was looking at is not on record. Certainly the appellant's Criminal Record (SAP 69) printout, which record he admitted in court and what we relied on in para 3 above, does not bear the prosecutor out. State counsel, Ms Jolene Mabaso, who argued the appeal conceded prosecutor Shivuri's aberration.

- [5] The less said concerning the reasons why Magistrate Ms Du Toit granted leave to appeal the better. She certainly was unmindful of the legal requirements that an applicant for leave to appeal has to satisfy. The test still is that there must be reasonable prospects of success. That is trite.
- [6] In the case at hand the appellant broke into the house of the complainant and stole from it goods to the value of R2 461-00. Some of them valued at of R1 586-00 were recovered. Not because appellant was overcome by a guilty conscience but because he was caught out and the goods retrieved. If he played any part in the recovery he would have shown some contrition and confessed to his misdemeanour, which was furthest from his mind. The recovery of the goods, in the whole scheme of things, hardly produces a ripple effect as a mitigating feature.
- [7] A court of appeal cannot increase a sentence beyond the maximum punitive jurisdiction of a lower court even where the appellant had been given adequate notice of its intention to do so.
- [8] Magistrates and prosecutors must avoid this type of shoddy work, work that has the potential of bringing the administration of justice into disrepute. If the

appellant was previously properly punished he would not have interfered with the bodily integrity and property of the community on these numerous occasions.

[9] The appeal must fail. The appellant must be warned that he risks being declared a habitual criminal if he next commits an offence.

[10] **In the premises I make the following order:**

1. The appeal is dismissed.
2. The appellant is warned that he may be declared a habitual criminal if he is convicted of another offence which is deemed serious enough for the imposition of such a sentence.

**F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

I concur.

G N Z MJALI
ACTING JUDGE
NORTHERN CAPE DIVISION

For Appellant :
On Behalf of:

Adv J. Cloete
Legal Aid Board

For the Respondent:
On behalf of:

Adv J. Mabaso
DIRECTOR OF PUBLIC
PROSECUTIONS, KIMBERLEY