REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

7/06/2017
DATE

SIGNATURE

Case number: **A30/2017**

In the matter between:-

MASHAVELE, ANDRIANO PAUL Appellant

and

THE STATE Respondent

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] The appellant was convicted in the Regional Court, sitting in Johannesburg, on a charge of motor vehicle theft and sentenced to 10 years imprisonment.

[2] An application for leave to appeal was dismissed. The matter comes before us with leave of this court against sentence only.

[3] The appellant had pleaded not guilty and had tendered no explanation as envisaged in terms of Section 115 of the Criminal Procedure Act 51 of 1977 as amended ('*the CPA*'). The appellant was legally represented throughout the proceedings.

FACTS UPON WHICH THE APPELLANT WAS CONVICTED

[4] At 9h00 on 19 November 2011, Mr Hugo had parked his Toyota Prado ('*the vehicle*') at the Market Theatre. At 13h00 when he returned, the vehicle was gone. At 17h00 in the afternoon he received a call from his tracking company that the vehicle had been located. At about 15h00, the appellant arrived at the home of Ms Musetsho, driving the vehicle. About an hour later, the police arrived and found the vehicle in the garage. The GPS had been removed and the number plates had been replaced. The ignition was broken as well as the driver's lock. On the left hand side of the steering column a panel had been removed and wires were exposed.

PROBATION OFFICER

[5] The appellant called a probation officer, Ms Ntshona, who had prepared a report on his behalf. She testified about her findings. She explained that the appellant originated from Maputo and that he was a legal immigrant in South Africa. He came from a structured family background where both parents were emotionally, physically and financially responsible for the wellbeing of their children. The appellant is the sixth born among seven siblings in his family. Both parents have passed away. As at date of testifying, being 19 March 2014, he had a child who was two months old. He had been cohabiting with his partner since 2007 in a shack in a back yard in Soweto.

His partner was unemployed and financially dependant on him. Their child is the recipient of a child support grant. The appellant's older brother passed away in 2007 since which time the appellant has taken over the financial responsibilities and support of his other siblings.

[6] The appellant dropped out of school during 2004 when he was doing Grade 10. He relocated to Johannesburg where he did tiling and construction jobs. He earned R150 per day.

[7] The appellant has no previous convictions and at the time of the interview, was 28 years of age.

[8] Ms Ntshona emphasized that the crime of motor vehicle theft was extremely prevalent. She opined that because the appellant had assumed no responsibility for his actions, his prognosis for rehabilitation was poor and that he was not a candidate for correctional supervision. She recommended direct imprisonment.

MAGISTRATE'S REASONS

[9] In sentencing the appellant, the court *a quo* had regard to the following facts:

a. The personal circumstances highlighted in the pre-sentencing report.
b. That the appellant was a first offender.
c. That as a result of the offence, he had lost his employment.
d. That he had not taken responsibility for his actions and had not shown any remorse.
e. That the appellant shared the moral blameworthiness of the offence with a co-perpetrator.
f. That the appellant has offered no compensation to the victim of the crime in an effort to mitigate the impact of the crime on him.

g. That the offence is prevalent within the court's area of jurisdiction.

h. That the vehicle stolen is a high end 4x4.

[10] The learned magistrate weighed all of the aforegoing facts up against his duty to protect the community against the actions of an individual member of society and his obligation to deter others from committing the offence of vehicle theft. The court assumed that this type of offence would ordinarily be visited with a medium to long term of imprisonment.

GROUNDS OF APPEAL

[11] The appellant submitted that the term of imprisonment of 10 years is harsh and strikingly inappropriate. It was argued that it induces a sense of shock.

[12] During argument it became apparent that the court *a quo* had misdirected itself when it found that '*.....the accused has spent relative to the case being on the roll a short time in prison prior to sentence*'. The appellant was arrested on 19 November 2011 and although bail had been set at R 5000, he only managed to pay this somewhere between 23 August 2012 and 3 September 2012. This meant that the appellant had been in custody for a period of approximately one year before managing to raise the bail monies. This period the learned magistrate did not take into consideration at all. The learned magistrate probably had regard to the period from date of conviction, being January 2014, to date of sentencing, being March 2014, when he made the statement quoted hereinbefore.

TEST ON APPEAL

[13] If an appeal court finds that the sentence of the trial court is disturbingly inappropriate or is violated by a misdirection and/or indiscretions, it will follow as a matter of course that the sentencing discretion was not properly applied. See *S v Romer* [2011] JOL 27157 (SCA).

[14] This court needs to determine whether the effective term of 10 years imprisonment imposed by the trial court is strikingly inappropriate and whether it induces a sense of shock.

ANALYSIS OF CASES RELATING TO MOTOR VEHICLE THEFT

[15] After the filing of the heads of argument this court requested both parties to file a note in which the 10 most recent cases relating to motor vehicle theft in the South Gauteng, North Gauteng, Supreme Court of Appeal and Constitutional Court be identified and be accompanied by a short summary of the facts of the case and the sentence imposed.

[16] This court is indebted to counsel for their efforts in this regard and in particular to Mr Mbaqa, counsel for the respondent, whose note was prepared in the highest traditions of the profession. Having honestly and accurately summarised the relevant case law, he concluded that a generally accepted sentence for theft of a motor vehicle ranges from 5 to 7 years imprisonment.

[17] In what follows, I summarise and analyse the relevant case law borrowing generously from the notes provided by both parties:

S v Mahlangu 1990 (1) SACR 223 (T)

The accused in this case was convicted of theft of a motor vehicle and sentenced to 3 and a half years imprisonment. On appeal, Van Der Walt J, held

that the Magistrate was blinded by the seriousness of the offence and had had insufficient regard for the Appellant and his potential for rehabilitation. The court held that the sentence was too heavy in the circumstances and the sentence was reduced to one of **18 months imprisonment, suspended for five years**.

S v Steyn 1991 (2) SACR 8 (A)

The Appellant was involved in a motor vehicle accident. He transported the damaged motor vehicle to his home and reported it to the police as stolen. The motor vehicle was found in the Appellant's garage 14 months after he had reported it stolen. The Appellant was charged and convicted of theft of a motor vehicle and sentenced to **three (3) years imprisonment of which half was conditionally suspended.** The Appeal Court concluded that the sentence imposed by the Regional Magistrate could not be regarded as startlingly inappropriate. The appeal on sentence was accordingly dismissed.

S v Coales 1995 (1) SACR 33 (A)

The Appellant in this case was charged together with his wife. They were tried and convicted in the Regional Court on charges of Housebreaking with intent to steal and theft. The Appellants had also stolen a motor vehicle (a light delivery van). The facts of the case reveal that the Appellant and his wife broke into a number of business premises and had stolen various items to the value of R3000. The stolen motor vehicle was never recovered by the police. In the course of the last burglary, the Appellant and his wife were struck by remorse and handed themselves over to the police. They then confessed to all the crimes which they had committed. The trial court imposed a sentence of seven (7) years and nine (9) months imprisonment. Their Appeal to the Provincial

Division was dismissed. The Appellants appealed further to the Appellate Division. F.H Grosskopf JA held that the Appellants' contrition and remorse were material mitigating factors to which more weight should have been given, that insufficient regard had been paid to the cumulative effect of the sentences and that an effective sentence of seven years and nine months was excessive under the circumstances. The Appeal Court accordingly concluded that the appeal on sentence had to succeed. The sentence was reduced to an effective term of **five years and nine months imprisonment,** with an additional four years imprisonment which was suspended.

S v Stanely 1996 (2) SACR 570 (A)

In this case the Appellant pleaded guilty to motor vehicle theft and was sentenced to six (6) years imprisonment. On appeal, Van Schalkwyk J considered the sentence imposed by the Magistrate excessively harsh and replaced it with the following: A period of eight (8) months imprisonment suspended for one year on condition that within the period of suspension, the Appellant pay compensation to the complainant of R10 000 in terms of the provisions of s 297 of the Criminal Procedure Act and four (4) years imprisonment from which the Appellant might be placed under correctional supervision by the Commissioner in terms of the provisions of s 276(1)(i) of the Criminal Procedure Act. The Appellant lodged a further appeal to the Supreme Court of Appeal. The Appellant argued that the sentence imposed by the court *a quo* amounted to a splitting of the sentence into two components which had the effect of punishing the Appellant for the theft of the stolen BMW motor vehicle, of which he was convicted and for the theft of the golf clubs and personal

effects, of which he was neither charged nor convicted. Oliver JA held that in order to overcome the technical problems, the sentence should be reformulated. The sentence of the Court a quo was substituted with the following: **Four years imprisonment** from which the Appellant might be placed under **correctional supervision** in his discretion by the Commissioner in terms of the provisions of s 276(1)(i) of the Criminal Procedure Act, and of which a period of **one year's imprisonment was suspended for three years** on condition that within the period of suspension the Appellant pays compensation to the complainant of R10 000 in terms of the provisions of s 297 of the Criminal Procedure Act.

S v McConnell 2001 (2) SACR 625 (T)

The Appellant was convicted on a charge of theft of a motor vehicle and sentenced to five (5) years imprisonment. On appeal Van Der Westhuizen J and Coetzee J held that the trial court erred in not having sufficient regard to the personal circumstances of the Appellant as the Appellant was not mentally developed that it could be expected of him to behave like a normal adult. The sentence was found to be shockingly inappropriate. The Court reasoned that a five year sentence for a first offender who suffered mental disabilities was shockingly inappropraite and had to be set aside. The sentence was substituted with one of **two years Correctional Supervision**.

S v Naidoo 2010 (1) SACR 499 (GSJ)

The Appellant, an adult 34 year old male, was convicted on a charge of theft of a motor vehicle and sentenced to 15 years imprisonment in terms of section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997. The main reason that

led the trial court to consider a prescribed sentence of 15 years imprisonment was because the stolen vehicle in this matter was a truck with the value in excess of R500 000. The Appellant was by employed by a transport company as a driver. The stolen truck was therefore a vehicle dedicated to the Appellant as driver. The Appeal Court, per the Honourable Mathopo J and Robinson AJ, held that section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 was not applicable and that the reliance on it was a misdirection. The sentence imposed was one of **eight (8) year's imprisonment of which three years was conditionally suspended for five years.**

S v Gerber 2006 (1) SACR 618 (SCA)

In this case the Appellant worked as a penal beater. He was convicted on a charge of theft of a motor vehicle. The Appellant was sentenced to ten (10) years imprisonment of which three (3) years was conditionally suspended. The Appellant's appeal was not successful in the High Court. He was however granted leave on petition to appeal further to the Supreme Court of Appeal. The court considered the increasing incidents of vehicle theft, as well as the fact that vehicles became ever more expensive and that sentences have become dramatically more severe. The Court also considered that the highest sentence for the theft of a single motorcar appeared to be seven (7) years imprisonment. The Court concluded that the sentence handed down by the trial court was shockingly inappropriate. The sentence was then set aside and a sentence of **seven year's imprisonment of which two years were conditionally suspended** was imposed.

Dlamini v The State (634/2013) [2015] ZASCA 50 (27 March 2015)

The Appellant was convicted on 4 counts of motor vehicle theft. The Appellant was sentenced to seven years on each count. The Appellant's application for leave to appeal against both his convictions and sentences was refused by the Regional Magistrate. Having petitioned the Supreme Court of Appeal, per the Honourable Bosielo, Leach and Majiet JJA, concluded that a sentence of **7 years imprisonment** for each count of the theft of the motor vehicles was not shocking.

S v Davies 2016 JDR 1866 (GJ)

The Appellant had pleaded guilty to the offence of theft of a motor vehicle.

In his plea explanation the Appellant indicated that he played no part in the commission of the robbery. He however merely assisted the robbers to sell the stolen motor vehicle to another person. He pleaded guilty because, even though he did not know about the robbery, he was suspicious that the motor vehicle being a Mercedes Benz could have been stolen. As a result, he was paid an amount of R300 for the role he played in getting a buyer for the motor vehicle. Based on his plea of guilty, which the State also accepted, the Appellant was convicted and sentenced to 5 years imprisonment by the trial court. The Appeal Court as per Honourable Satchwell J, Masipa J and Mashile J considered in aggravation of sentence that the Appellant lacked remorse, the Appellant had acted as an intermediary between the robbers and the murderers and the purchasers of the stolen motor vehicle, the Appellant had accepted monies which he said he was given for his services, he had carried on with his life and never alerted the police about this motor vehicle which he found/ thought to be

suspicious to begin with. It was only after his arrest that he had he had directed the SAPS to the purchaser. The court held that a plea of guilty did not always indicate remorse. In mitigation of sentence the Court of Appeal considered that the Appellant was a first offender, he had three children and that he was employed. The Court in this matter however held that the Appellant should have considered his personal circumstances before he engaged himself in criminal activity. The Court also held that first offenders do get sent to prison.The Court in this matter concluded that:

"I see nothing to suggest that a sentence ***of 5 years imprisonment*** *is shocking or inappropriate to the facts of this crime, the personal circumstances of the accused or the concerns of the community. I see nothing to suggest that this sentence is out of touch with the sentences imposed throughout the country and by the highest court in respect of theft of motor vehicles."*

ASSESSMENT

[18] To use as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust, is an acceptable method, see *S v Malgas,* 2001 (1) SACR 469 (SCA) at 480H-481A.

[19] Having regard to the sentencing pattern, which emerges from the cases quoted hereinbefore, I am driven to conclude that the sentence imposed by the court *a quo*, was shockingly inappropriate to the facts of this crime. In my view, the peculiarities of this case do not warrant a deviation from the general imposition of between 5 and 7 years imprisonment. The aggravating factors considered by the court *a quo* do not justify the sentence which was imposed. In my view, an interference with the trial court's sentence is justified.

[20] Having regard to all the circumstances of this case, including the fact that the appellant had spent one year (prior to raising bail) and two months (from conviction to sentence) in prison before sentencing, I would consider an effective term of 7 years imprisonment appropriate of which two years are to be suspended on certain conditions.

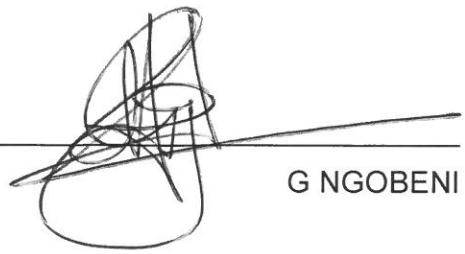
ORDER

[21] The appeal against sentence is accordingly upheld and the order of the trial court is set aside and substituted for the following order, which order is thus to be effective from 19 March 2014:

1. The appellant is sentenced to seven (7) years imprisonment of which two (2) years are suspended for a period of five (5) years on condition that the appellant not be found guilty of the offence of theft, receipt of stolen property knowing it to be stolen or of a contravention of sections 36 or 37 of the General Law Amendment Act 62 of 1955, during the period of the suspension.
2. The Appellant remains unfit to possess a firearm in terms of the provisions of section 103 of the Firearms Control Act 60 of 2000.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree



G NGOBENI

Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 6 June 2017
Judgment delivered: 8 June 2017
Appearances:
For Appellant: Adv M. Buthelezi
Instructed by: Johannesburg Justice Centre
For Respondent: Adv M. M. Mbaqa
Instructed by: Director of Public Prosecutions