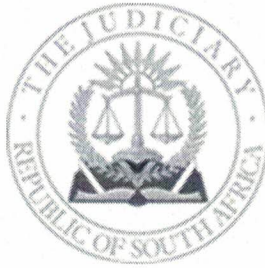


REPUBLIC OF SOUTH AFRICA



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

CASE NO: A136/2019
DPP REF NO: 10/2/5/1-2019/111

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

[31 JANUARY 2020]


.....
SIGNATURE

In the matter between:

MOYO, MELLO

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] The appellant, Mr Mmelo Moyo, pleaded guilty to and was convicted by the Randburg regional court of count 1, contravening section 49 (1) (a) of the Immigration Act 13 of 2002 (unlawfully entering and remaining in the Republic without a valid passport, visa or asylum seeker permit); count 2; fraud; count 3, robbery. On count 1 he was sentenced to two years imprisonment of which one year was suspended for five years. Regarding count 2, he was sentenced to five years of which two years was suspended for five years. Lastly, he was sentenced to eight years imprisonment on count 3, of which three years was

suspended. The sentences were suspended on customary conditions. Effectively the appellant was sentenced to nine years imprisonment. The trial court also recommended that the appellant be subjected to an inquiry for possible deportation by the relevant authorities subject to the immigration laws. The appeal against sentence is with leave of the trial court.

- [2] The appellant's statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 (the CPA), was confirmed and placed before the trial court. The state placed before court a section 212 statement of the CPA in terms of which it appeared that the asylum-seeker's permit in the name of the appellant was false. No other evidence was led either on the merits or sentence. The factual matrix regarding this matter as set out in the statement is as follows. Regarding count one, the appellant admitted that on or about 17 March 2017, in the regional division of Gauteng, he unlawfully entered and remained in the Republic in contravention of section 49 (1) of Act 30 (sic) of 2002 without a valid passport or any valid visa or any asylum-seeker's permit.
- [3] In respect of count two, he admitted that he unlawfully, falsely and with the intention to defraud and to the prejudice or potential prejudice of the Republic of South Africa, Department of Home Affairs, gave out and pretended that he had a valid asylum-seeker's permit, whereas in truth and in fact he knew that he had a false or fake asylum-seeker's permit and was not entitled to reside in the Republic of South Africa.
- [4] Lastly, regarding the third count, he admitted that on the day and place as alleged in the charge sheet, whilst in his sober senses he entered the complainant's premises, after which he unlawfully and intentionally assaulted the complainant and did then and with force take a Samsung cell phone, R850-00 in cash as well as a Dell laptop. The appellant confirmed that the said items were in the complainant's lawful possession.
- [5] The appellant was arrested on the same day but remained in custody until his conviction and sentence after abandoning his bail bid. Initially the matter was set down for trial on 11 October 2017. However, the appellant changed his legal representative. The matter was subsequently postponed several times at the defence's request. For example, it was postponed for a possible plea. There was no plea tendered. It was then postponed for representations to the

State which were unsuccessful. Subsequently, it was postponed to 29 November 2017. The trial could not proceed as the defence counsel was reportedly sick. There were further adjournments on account of the fact that the defence counsel was unavailable. Later, it was postponed due to the absence of a Zimbabwean interpreter as well as for purposes of reconstructing the docket as it had in the meantime become lost.

- [6] The appellant admitted to two previous convictions. On 16 February 2008 he paid R1000-00 as an admission of guilt for assault common. On 31 August 2016 he was found guilty of possession of suspected stolen property in contravention of section 36 of Act 62 of 1955. Consequently, he was sentenced to pay R3000-00 or four years imprisonment suspended for three years on customary conditions.
- [7] The trial court took into account that the offences which are the subject of this appeal regarding sentence were committed whilst the appellant had a suspended sentence hanging over his head. The charge sheet reflects that the appellant was 42 years of age upon his arrest. However, it was placed on record without more that he was in fact 48 years old, a grade 9 drop-out, married with two wives and a father of five children who ranged in ages between four and 17 years. It was also placed on record that the appellant had been in the Republic of South Africa for the past 20 years. The purpose had been in search of greener pastures. He used a van to transport goods for a living.
- [8] On appeal it was contended by counsel on behalf of the appellant that the sentence imposed by the trial court was unduly harsh as he had pleaded guilty at the nearest available opportunity. It was further contended that an effective five years imprisonment would be justifiable considering the circumstances.
- [9] It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. In *S v Blank* 1995 (1) SACR 62 (A) at page 65 H-J Grosskopf JA put it as follows:

'It has repeatedly been emphasised by this Court that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial Judge and that a Court of appeal can interfere only where such discretion was not properly exercised. One of the ways in which it may be shown that a trial court's discretion was not properly

exercised is by pointing to a misdirection in the court's reasons for sentence. The principle in this regard is expressed as follows by Trollip JA in *S v Pillay* 1977(4) SA 531 (A) at 553E-F:

"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence. It must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".

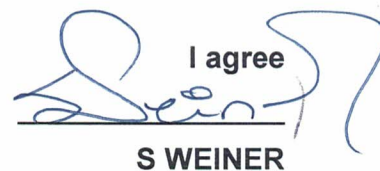
- [10] It hardly bears mentioning that all three offences are not only serious but very prevalent. Counsel for the appellant readily conceded that the offences committed were serious. However the trial court in a detailed judgment took cognisance thereof as well as the appellant's personal circumstances alluded to above, including the fact that he had been in custody from the day of his arrest to his conviction and sentence. It was placed on record during the trial that the appellant did not cooperate with the authorities regarding the origin of his falsified asylum papers.
- [11] Three cell phones, of which only one belonged to the complainant, were recovered upon the arrest of the appellant and not the rest of the stolen items. The trial court was of the view that foreigners who come to the Republic as economic or political refugees have an obligation to stay within the parameters of the law. Those who commit crimes in the host country such as ours which is 'already crime-ridden' are in essence biting the hand that feeds them. I agree.
- [12] The appellant's true identity, age and other personal details remain unknown since he did not testify. This was not the appellant's first brush with the law. Significantly, the current offences, as the trial court observed, were committed whilst the appellant had a suspended sentence hanging over his head for an offence that had an element of dishonesty. I am unable to find any misdirection in the sentence imposed by the sentencing court. In instances where offences are serious and prevalent, the personal circumstances of an

offender are less significant. Against this background, such mitigating factors as may exist regarding this matter pale into insignificance when viewed against the objective gravity of the offences committed. I remain of the view that the effective sentence imposed is appropriate, fair and proportionate to the offences that the appellant was convicted for.

[13] In the result the appeal against sentence is dismissed.



T P MUDAU
[Judge of the High Court,
Gauteng Local Division,
Johannesburg]



I agree

S WEINER
[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Hearing: 28 January 2020

Date of Judgment: 31 January 2020

APPEARANCES

For the Appellant: Adv N Makhubela

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For the Respondent: Adv MM Mbaqa

Instructed by: DPP JHB

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