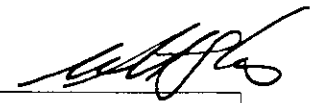


7/11/2012 

Reportable: ~~Yes~~ / No
Circulate to Judges: ~~Yes~~ / No
Circulate to Magistrates: ~~Yes~~ / No

IN THE HIGH COURT OF SOUTH AFRICA

NORTHGAUTENGHIGHCOURT, PRETORIA

CASE NO: A163/2012

HEARD: 05/11/2012

DELIVERED: 07/11/2012

In the matter between:

KABELO RICHARD PHAKEDI

APPELLANT

and

THE STATE

RESPONDENT

Coram: Prinsloo J et Hughes AJ

JUDGMENT

HUGHES AJ

- [1] The appellant was charged with one count of theft. It is alleged that on 12 April 2007 he put his hand through an open window of an unoccupied Volkswagen Beetle and stole a motorised gate controller valued at R100.00. On 31 March 2009 he appeared in the Klerksdorp Magistrate court and was legally represented. On 18 November 2009 he pleaded guilty to the charge

preferred against him and was duly convicted. On 18 January 2010 he was sentenced to six years imprisonment. Leave to appeal in respect of the sentence was granted on 04 February 2010.

[2] In mitigation of sentence the following factors were placed before the presiding officer:

- (a) The appellant was 35 years of age at the time of the commission of the offence;
- (b) He is unmarried but has two children, a boy aged sixteen years and a girl aged six;
- (c) His highest standard of education is standard eight (grade 10). He had worked at Kuma Wholesalers earning R600.00 per week prior to his arrest;
- (d) He has been in custody for nine months awaiting trial in respect of this matter;
- (e) He pleaded guilty from the outset and as such illustrated a measure of remorsefulness. He also saved the court a lot of time that could have been spent during a full-blown trial.
- (f) The item stolen was of little value. No damage was done to the car and apart from some inconvenience to the complainant for the loss and non-use of the remote control gadget the complainant suffered no prejudice.

[3] The aggravating factors are that:

- (a) Theft is a serious crime and the community needed to be protected against the like of the appellant who deprive them of their property.

- (b) The appellant's lists of previous convictions stretch from as far back as 28 October 1996 to 27 May 2008 (eight in total). Those of relevance are:
- (i) On 17 September 2004 he was convicted of being in possession of suspected stolen property and was sentenced to a fine of R1500.00 or six months imprisonment and a further R1000.00 or three months imprisonment which was suspended for three years;
 - (ii) On 19 December 2004 he was convicted of theft and sentenced to five months imprisonment;
 - (iii) On 05 January 2006 he was again convicted of being in possession of property suspected to have been stolen and was sentenced to six months imprisonment.

[4] Ms Augustyn appeared on behalf of the appellant and Mr Pienaar on behalf of the state. I am indebted to both counsel for their heads of argument which were of great assistance. In Mr Pienaar's heads of argument reference is made to a few decided cases where pronouncements are made that theft from a motor vehicle is considered a serious offence and very prevalent in South Africa.

[5] In considering the issue of sentence, I am mindful of the principles set out in **S v Pillay 1977 (4) SA 531 (A) at 535E-G**:

"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 misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".

- [6] In addressing sentence I am also mindful of the *dictum* in **S v Rabie 1975(4) SA 855 (A) at 862G-H**:
"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." This approach of *"the triad consisting of the crime, the offender and the interest of society"* was further enunciated in **S v Zinn 1969 (2) SA 537 (A) at 540G**.
- [7] It is so that the appellant was convicted of a serious offence which merits severe punishment. However, "courts must guard against an over-eager imposition of exemplary sentence and must not over-emphasise the gravity of the offence and the interest of the community at the expense of the interests and personal circumstances of the particular offender". **See S v Smith 2002 (2) SACR 488 (C) at 490H-J**.
- [8] The magistrate made the following remarks upon imposing sentence:

"Nou u is 'n person wat gereeld met die gereg bots....Die hof hou egter in gedagte dat die waarde van die eiendom hier ter

sprake nie baie hoog is nie, maar u het hierdie misdaad gepleeg in 2007 en dit blyk dat u het vir 'n tyd daarmee weggekom... Dit is moeilik vir die Suid-Afrikaanse Polisie om misdadigers op te spoor in gevalle soos hierdie en diefstalle van uit motorvoertuie is aan die orde van die dag. U het hierdie item gesteel uit hierdie voertuig. Wat u daarmee wou doen weet die hof nie. Dit is 'n item wat waardeloos is, maar die hof wonder of u dit nie wou gebruik het om dalk toegang tot die perseel te verkry op 'n latere stadium nie veral wanneer die hof kyk na u rekord... Die gemeenskap soos die hof reeds vir u vermeld het is so te sê "up in arms" oor hierdie tipe van misdade en die hof moet gehoor gee aan hierdie tipe van krete van die gemeenskap af. Die hof moet probeer om hulle eiendom te beskerm teen mense soos u"

- [9] It is evident that the Magistrate failed to balance and judicially assess all the factors relevant before sentencing. Though there is an acknowledgment that the item taken from the motor vehicle was not of much value, even so the Magistrate placed a lot of emphasis on the court's obligation to society and to the fact that the appellant almost got away with this offence. It is evident that not much weighing up of the aggravating features against the mitigating factors had taken place. Further, no consideration was given to the fact that the appellant pleaded guilty; that he had been in custody for a period of nine months awaiting this trial; was in gainful employment prior to his arrest; had two children to maintain; that no damage occurred to the motor vehicle and that the item taken was of little or minimal value.

- [10] Even in the face of the listed aggravating factors a sentence of six years for theft of an item worth R100.00 is shockingly harsh. The dictates of justice therefore require that the sentence be

considered afresh and be ameliorated. In my view a sentence of four (4) years imprisonment would be appropriate.

In the circumstances the following order is made:

1. The appeal against sentence succeeds to the extent that the sentence of six (6) years imprisonment is set aside and is replaced with the following:

“(a) The accused is sentenced to a term of four (4) years direct imprisonment.

(b) In terms of article 103 Act 60 of 2000 the accused is declared unfit to possess a firearm”.

2. In terms of Section 282 of the Criminal Procedure Act 51 of 1977 this sentence is antedated to 18 January 2010.



HUGHES AJ
NORTH GAUTENG HIGH COURT
PRETORIA

I concur



PRINSLOO J
NORTH GAUTENG HIGH COURT
PRETORIA