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

CASE NUMBER: A144/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
8/8/2014
DATE SIGNATURE

8/8/2014

In the matter between:

JACOB SIZWE NDARILA First Appellant
AARON MMELI MENZILE Second Appellant

And

THE STATE Respondent

JUDGMENT

STRAUSS, AJ:

1. The appellants were convicted in the Magistrate's Court, Delmas on 24 October 2013, to a single count of theft to the value of R68,000.00, and sentenced to a period of three years' imprisonment.

2. Both the appellants pleaded guilty in terms of section 112(2) of act 51 of 1977 and were thus duly convicted of theft.

3. Leave to appeal was granted by the court a quo in respect of sentence only.

4. The test applicable to appeal against sentence was set out in **S v Salzwedel 1999 (2) SACR 586 (SCA)** that:

"An appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence or sufficiently desparate or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably."

The general approach to be followed by a court of appeal when considering an appeal was as stated in: ***S v Peters 1987 (3) SA 717 (A)."***

"Met betrekking tot appèlle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie hof beklemtoon dat vonnisoplegging berus by die diskresie van die Verhoorregter en juis omdat dit so is, kan ek en sal hierdie hof nie ingryp en die vonnis van 'n Verhoorregter verander nie tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel, daar is ruimte vir hierdie hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike en onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appèlle teen vonnis beheers.

The appellants pleaded guilty on the basis that they stole motor vehicle parts from the complainant to the approximate value of R68,000.00. It further emerged that the appellants were staying

on the adjacent property next to the complainant, and luckily the goods were retrieved due to the appellant's arrest.

5. The court a quo held that it could not determine if the guilty plea was indeed a sign of remorse, it had regard to the fact that both the appellants before court were first offenders, and that the evidence was that theft was prevalent in the court's jurisdiction. The court a quo found the imposition of a fine not appropriate in the circumstances.

6. The court a quo was led with what was held in **S v Maswathupa 2012 (1) SACR 259 (A)"** *in view of the prevalence of offences that it is in general public interest that sentences should act as a deterrent and a message needs to go out to people that offences will be dealt with severely."*

7. The court a quo had regard to **S v Hlukela 2003 (10) SACR 642 (T)** "*when an option of a fine is granted it is desirable that it should be a real option and must be reasonably possible for the accused to pay a fine".*

and "*a fine should be adjusted to meet the financial position of the accused the court is to ensure that serious crime is not made to look trivial by imposing too small a fine".*

8. The court a quo also had regards to the fact that the first appellant was 31 years old with dependants, and the second appellant 21 years old with no dependants, and they were both gainfully employed.

9. The appellants both offered to pay a fine of R1,000.00 and requested that if a fine of more than R1,000.00 is imposed the court would consider

deferring the fine and they would speak to their employers. They both earned salaries of approximately R1,800.00 and R1,400.00 per month.

10. Although, I agree with the court a quo's view as set out above, I also find that there was no evidence to suggest that the appellants are not amenable to rehabilitation and could in fact not be rehabilitated. It seems that the crime was opportunistic of nature due to the fact that the complainant's residence is adjacent to where they were staying and there was no fence between the properties, and it was an easy way of getting money. They also did not commit this offence over any period of time.

11. Both the appellants also admitted to facts that it was a crime they committed for financial gain. They wanted to sell the items in order to get an income therefrom.

12. I am also aware of, as set out by Corbett, JA in the case of **Rabie** wherein it was stated: "*that a judicial officer should not approach a punishment in the spirit of anger because being human that will make it difficult for him to achieve the delicate balance between a crime, the criminal and the interests of society which is his task and the object of the punishment demanded of him".*

13. I find, that the court a quo placed too much emphasis on the prevalence of the theft in his jurisdiction, and the fact that the value of the goods was substantial, but the court a quo placed too little emphasis on the fact that all the goods were returned, and that the appellants before court pleaded guilty, and were also relatively young, and first offenders.

14. I therefore make the following order:

a) The appeal against the sentence is upheld.

b) The court a quo's sentence is amended as follows:

c) Both first and second accused are sentenced to three years imprisonment, which sentence is ante-dated to 24 October 2013, and a period of one year of prison sentence is suspended for a period of three years, on condition that both the accused are not convicted of an offence having an element of dishonesty.

S STRAUSS

ACTING JUDGE OF THE HIGH COURT

TJ RAULINGA

JUDGE OF THE HIGH COURT

I agree and it is so ordered