IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

22/8/2016

Case Number: A831/15

In the matter between:

FORTUNE DUBE Appellant

and

THE STATE Respondent

JUDGMENT

MAKUME J WITH HIM NKOSI AJ CONCURRING

[1] This is an appeal against sentence leave to appeal having been granted by this Court on petition.

[2] The appellant and one another appeared before the Regional Court in Benoni on two counts namely count 1: theft of goods read with the provisions of Section 51(2) of the Criminal Law Amendment Act No. 105 of 1997, goods to the value of R2 million being 2 Truck Trailers as well as groceries the property or in the lawful possession of Spar Stores. Count 2: Contravention of Section 17H(3)(f) of the Independent Communication Authority of South Africa Act No. 13 of 2000 read with Section 35(1) of the Electronic Communications Act No. 36 of 2001.

[3] The appellant who was legally represented pleaded guilty on the 3rd of March 2015 and was duly convicted in accordance with his statement in terms of Section 112(2) of the Criminal Procedure Act No. 51 of 1977.

[4] He was sentenced to 15 years imprisonment on count 1 and to 12 months imprisonment on count 2. The Court ordered that the sentence of 12 months in count 2 should run concurrently with the sentence of 15 years in count 1.

[5] In passing sentence the Learned Magistrate made some unfortunate remarks about the nationality of the appellant. I refer in particular to the following statement made by the Magistrate:

> "You are the third Zimbabwean I see today and it is forever housebreaking and theft or theft. And I can understand why. It is because maybe in your own country circumstances are dire, there is no economy left. And now people seem to steal in this country before too long we would be like Zimbabwe, there will be no economy."

[6] The common law right of each accused person to a fair trial which is now entrenched constitutionally must be respected and if there is any indication that a presiding officer shows bias based on facts that have nothing to do with the case before him or her then this right is being interfered with.

[7] The Magistrate in the Court below had no right to have uttered the words referred to above. In uttering the said words the presiding officer generalised about Zimbabweans.

[8] That statement may well be understood in certain quarters to be promoting xenophobia. Navsa ADP in the matter of ***Nkabinde v Judicial Services***

Commission **2016 (4) SA 1 (SCA)** at page 5 paragraph 1E-F quoting a pronouncement by Lord Hailsham says the following:

> "That judicial officers sometimes develop 'judges disease', the symptoms of which are pomposity, irritability, talkativeness, proneness to *obiter dicta*."

If anything the present case demonstrates just that about the Magistrate. It was unnecessary for the Magistrate to have made such a remark and in my view she misdirected herself in dealing with the sentence that she eventually passed.

[9] As if what was said in passing sentence was not enough the Magistrate in an annexure dated the 4th of March 2015 writes as follows:

> "Please note Accused is a Zimbabwean National and when paroled must be handed to the Department of Immigration."

This the Magistrate makes without giving reasons why the appellant should be dealt with in that manner. There is no factual or legal basis for that order in any case it is not the Magistrate's duty to deal with immigration issues. There is a Government Department that is constitutionally empowered to deal with such issues. That order is unconstitutional and must be set aside. This is despite the fact that the

appellant's legal representative informed the Court that the appellant was legally inside South Africa.

[10] I now turn to deal with the factual and legal grounds on which this appeal is based. Firstly it is argued that the state did not prove that the appellant was part of a syndicate or group of people to justify the passing of the minimum sentence of 15 years imprisonment in accordance with Part 2 of Schedule 2 of the Criminal Law Amendment Act No. 105 of 1997 which reads as follows:

> "Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft or an offence in Part 1-4 or Section 17, 20 or 21 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act 2004 –
>
> (b) involving amounts of more than R100 000 if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in execution or furtherance of a common purpose or conspiracy."

[11] I agree with counsel for the respondent that it is sufficient for the appellant to have been acting alone and not necessarily as part of a syndicate for him to be sentenced under the minimum sentence regime. However subparagraph (b) reads further that the person must have been acting in execution or furtherance of a common purpose or conspiracy.

[12] There is in this matter no evidence that the appellant was acting in execution or furtherance of a common purpose or conspiracy. The Magistrate in passing sentence did not mention that the appellant was part of a syndicate however during the address in mitigation of sentence the Magistrate posed the following questions to the appellant's legal representative:

"COURT: 'Ja', but are you saying then this was a syndicate activity?

MR MAWELA: Worship ...

COURT: What are you saying to me, that is the only conclusion I can come to.

COURT: So he was part of a big operation?

COURT: But I mean he participated with the group sir."

[13] It is clear that at the time of formulating the sentence the presiding officer had concluded in the absence of any evidence that the appellant was acting in furtherance of a common purpose with a group. In the matter of ***S v Van der Merwe*** **2011 (2) SACR 509** at 518 paragraph 30 Rampai J writing for the Court said the following:

"[30] It has been held that where an accused pleads guilty and hands in a written statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 detailing facts on which his plea is premised and the prosecutor accepts the plea, the plea so explained and accepted constitutes the essential factual matrix on the strength of which sentence should be considered and imposed. Such an essential factual matrix cannot be extended or varied in a manner that unduly impacts on the measure of punishment as regards the offence. The plea once accepted defines the lis between the prosecution and the defence. Once the parameters of the playing fields are so demarcated it becomes foul play to canvass issues beyond. The rules of fair play have to be strictly enforced. In this instance it was not."

[14] In his Section 112(2) statement the appellant said the following:

"All along I knew what I was doing, stealing was an offence punishable in law however I reconciled my action and I proceeded to steal the trailer. I had the intention to deprive Spar of its lawful possession."

[15] There is nowhere in the statement where the appellant implies that he was stealing in furtherance of a common purpose with other people. Accordingly I find that it was

wrong to have decided that simply because of the value of the stolen items therefore the minimum sentence as prescribed in Part 2 of the Schedule 2 was applicable without proving that the appellant was acting in furtherance of a group or a syndicate the Magistrate misdirected himself in this matter.

[16] The next issue to consider is whether the Court *a quo* did investigate the presence or absence of substantial and compelling circumstances before imposing the minimum sentence of 15 years. On reading the record the impression I get is that the Magistrate approached the matter on the basis that a prescribed minimum sentence would be imposed as a matter of course unless the personal circumstances of the appellant disclosed exceptional circumstances. That approach is clearly wrong as was said in the matter of ***S v Vilakazi*** **2009 (1) SACR 522 (SCA)** at page 566.

[17] ***S v Malgas*** **2001 (1) SACR 469 (SCA)** has clearly set out the guidelines to be taken into consideration when dealing with the minimum sentence. The Court in that matter said that all factors traditionally taken into account in sentencing whether or not they diminish moral guilt continue to play a role and none is excluded at the outset from consideration in the sentencing process.

[18] The appellant was 34 years old at the time of this offence he is married and has two children besides that he also supports 6 other children of his brother and a sister

who had already passed away. He was self-employed and owned a truck with which he did deliveries.

[19] The Learned Magistrate casually dismissed the appellant's personal circumstances as playing no mitigating role by amongst others saying that his wife and other relatives will look after the children and by saying that every criminal has got children. In this regard the Learned Magistrate misdirected himself and accordingly this Court has the right to intervene and impose an appropriate sentence.

[20] The Learned Magistrate paid little or no attention to the circumstances around this offence. The Magistrate failed to take into consideration that the appellant pleaded guilty and showed remorse instead he says if indeed the appellant was remorseful then he should have pleaded guilty at the first appearance in Court and not some seven months later. This conclusion that because of the delay he therefore does not show remorse is in my view incorrect.

[21] The further mitigating facts that the Magistrate did not take into consideration are that the stolen goods were recovered in full virtually within hours of the theft, the appellant had been in custody for seven months prior to the conviction and sentence and lastly that the appellant did not benefit anything from the theft instead there is a likelihood that his truck may be forfeited to the state. In other words the appellant has come out worse off as a result of his actions.

[22] In my view the sentence of 15 years is excessive and is disturbingly inappropriate and under the circumstances this court is entitled to intervene.

[23] In the result I propose to make the following order:

(i) The appeal against the sentence of 15 years in count 1 is upheld.

(ii) The sentence of 15 years is set aside and in its place the following is substituted:

(a) The accused is sentenced to direct imprisonment for a period of 10 years on count 1.

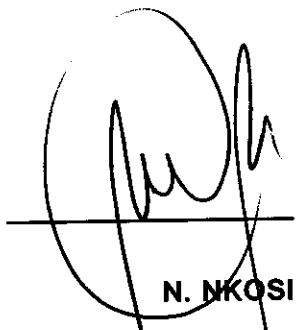
(b) The sentence of 10 years is antedated to the 4th of March 2015.

Dated at **Pretoria** on this the **19th day of August 2016.**

M.A. MAKUME

JUDGE OF THE HIGH COURT

I agree



N. NKOSI

ACTING JUDGE OF THE HIGH COURT

CASE NO: A831/15

HEARD ON: 18 August 2016

FOR THE APPELLANT: MS. M.M.P. MASETE

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. J.P. VAN DER WESTHUYSEN

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: