REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

15/9/16

CASE NO: A721/2015

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

03/September 2016 .....

DATE SIGNATURE

In the matter between:

EMMANUEL MFANA RADEBE **APPELLANT**

and

STATE **RESPONDENT**

J U D G M E N T

YACOOB, AJ:

1. The appellant was convicted on 29 May 2014 in the regional court, Piet Retief, of receiving stolen property and driving a motor vehicle without a valid licence, after pleading guilty. He was sentenced on the same day to four years' imprisonment for receiving stolen property and one year for driving without a licence. He had no prior convictions. He appeals only against the sentences imposed, with the leave of this court.

2. The appellant was apprehended on 24 October 2013, in a vehicle which had been stolen in an armed robbery during September 2013. He was driving without a valid licence. He stated in his explanation of plea that he had purchased the vehicle for R10 000 and that he had suspected at the time of purchase that the vehicle was stolen, but ignored his suspicions.

3. The appellant is a chicken seller with three children, who was at the time of conviction 34 years old. He made a profit of about R1000 a month. At the time of sentence he indicated that he had R5000 available with which to pay the fine.

4. It is well established in our law that sentencing is a matter of discretion for the trial court, which must exercise its discretion judicially, and that a sentence will not be interfered with on appeal except where the discretion has not been exercised judicially, is unreasonable or disproportionate, or induces a sense of shock. Where a misdirection by the trial court vitiates its exercise of discretion, the appeal court is entitled to consider sentence afresh, while a sentence that is shocking or disproportionate may only be interfered with if the discrepancy between that and what the appeal court may impose is substantial. See for example *S v Anderson* 1964 (3) SA 494 (AD) at 495C-E; *S v Malgas* 2001 (2) SA 1222 (SCA) at [12].

5. In this case, it appears from the record that the magistrate, Mr Hallat, conducted the sentencing procedure in such a manner that his discretion was not exercised judicially, and, in fact, is vitiated.

6. I deal below with the sentences imposed for each charge separately.

RECEIVING STOLEN PROPERTY

7. As I have set out above, the appellant pleaded guilty to receiving stolen property, and the prosecutor in the case accepted the plea. There was no version other than the appellant's version before the Court. The State did not attempt to prove that the appellant had committed theft, robbery, or any other offence, although the appellant had initially been charged with theft.

8. In the prosecutor's address regarding sentence, he submitted that the appellant's explanation of plea comes very close to theft, presumably because the appellant had admitted that he was suspicious of whether the vehicle had been stolen property. The prosecutor also made reference to the vehicle having been stolen in an armed robbery in September 2012. He stated that the appellant had said he had been in possession of the vehicle for a very long time, which was not the evidence before the court.

9. The prosecutor also made reference to the fact that there was false documentation for the vehicle and asked the court to infer that the appellant had had help or a favour to obtain these. There was no evidence of this, nor was the appellant charged with any offence relevant to the irregularity of the papers, apart from those he had pleaded guilty to.

10. In passing sentence, the magistrate made the following comments, the vast majority of which had no basis in any evidence or submissions before the court, and many of which were not relevant:

    a. that he didn't know where someone who makes R1000 per month chicken farming would get R10 000 to buy a car;

    b. that the appellant had "dieselfde storie" as a man earlier that morning, that he was going to Pongola to a traditional healer when he was apprehended;

    c. that the previous accused, like the appellant "het vir die Hof 'n storietjie vertel" that he bought, or got, or borrowed a car from someone else who "nodeloos om te sê" could not be found (despite the appellant's plea explanation having been accepted, the magistrate made it clear that he did not believe the appellant and was suspicious of the appellant);

    d. that the court was taking the appellant's version "met a knippie sout";

    e. that he wished people would think of a new reason why they are in possession of a vehicle when they are caught at roadblocks;

f. that he (the magistrate) himself knows that vehicles that have been stolen go over the border to Swaziland on the road past Piet Retief;

g. that a working vehicle that is purchased for R10 000 must have been stolen;

h. that the State accepted the plea because they probably could not prove the charge of armed robbery or robbery or theft;

i. that this kind of crime is a big problem that the police do nothing about;

j. that the senior echelons of the police had decided to close the vehicle theft unit, despite the prevalence of vehicle theft;

k. that people drive stolen vehicles over the border because they have connections with the police;

l. that the court had had police officers before it who permitted "hierdie tipe van ding";

m. that most evidence is that people drive past to the border post, turn off the tar road onto a dirt road to get into Swaziland, and that nobody does anything about it, and

n. that this is the reason so many vehicles are stolen, because it is a profitable occupation.

11. The magistrate then proceeded to impose a sentence of four years for the offence of receiving stolen property.

12. It is evident that the magistrate considered a number of things that were neither placed before him in evidence nor as submissions, and which were irrelevant to the charge to which the appellant had pleaded guilty, and the circumstances of his plea.

13. The appellant appears to be bearing the burden of other matters that the magistrate has heard, and of evidence that the magistrate has come across in other matters, or in other circumstances.

14. The magistrate has not exercised his discretion judicially in considering the appellant's sentence, and this court is free to consider sentence afresh.

15. The appropriate sentence for receiving stolen property varies in the case law from correctional supervision,[1] to a fine and a suspended period of imprisonment for one year,[2] to two years[3] (each of these for the receipt of one stolen vehicle), to an effective six years for five vehicles where evidence connected the accused with the thefts,[4] and, in an extreme case, fifteen years for 102 counts.[5]

16. It must be taken into account that the first appellant is a first offender, and is a breadwinner.

17. The appellant's counsel suggested that a sentence of four years, two of which are suspended, is appropriate. I agree.

DRIVING WITHOUT A VALID DRIVER'S LICENCE

18. The appellant pleaded guilty to driving on a public road without a driver's licence. There was no evidence before the court whether he had ever had a driver's licence or his licence had merely expired. Nor was there any evidence that he had been driving recklessly or dangerously, or regarding his driving skills in general. He was also not charged with any offence of reckless or dangerous driving.

19. In considering sentence, the magistrate made the following remarks:

    a. that he (the magistrate) drives about 200km or more on ten or twelve days a month, and not a day goes by that he does not have to take evasive action as a result of people "wat geen idee het how om 'n voertuig te bestuur nie, wat glad nie die reëls van die pad ken nie, wat glad nie eers agter 'n voertuig se stuurwiel behoort te wees nie";

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[1] *S v Siebert* 1998 (1) SACR 554 (A)
[2] *S v Skweyiya* 1984 (4) SA 712 (A)
[3] *Sv Mani* 2002 (2) SACR 393 (E)
[4] *S v Moller* 1990 (3) SA 876 (A)
[5] *National Director of Public Prosecutions v Kyriacou* 2003 (2) SACR 524 (SCA)

b. that the appellant is one of those people, and

c. that the appellant would long ago had obtained a licence if he knew how to drive properly.

20. The magistrate then proceeded to impose the maximum sentence, of a year in prison without a fine, on the appellant, again for a first offence with no aggravating circumstances to which the appellant had pleaded guilty.

21. The magistrate took into account his own frustrations of sharing the road with incompetent drivers, and imposed them on the appellant, with no evidence to support his conclusions.

22. Again, he has failed to exercise his discretion judicially. In addition, the imposition of the maximum sentence in the circumstances of this case, and the fact that the magistrate did not order that it run concurrently with the sentence of four years, induces a sense of shock. It appears to this court that the magistrate also allowed his view that the appellant was guilty of theft colour his judgment, in imposing this sentence.

23. In the circumstances, it is our view that a fine would have been appropriate. The appellant's counsel suggests that a fine suspended for five years would be appropriate, as it would serve as a deterrent. This suggestion has merit.

CONCLUSION

24. The magistrate's approach in this case is regrettable. Had the appellant not pleaded guilty, his right to be presumed innocent would have been affected. As it is, the magistrate appears to have presumed the appellant guilty of offences with which he was not even charged, and for which there was no evidence.

25. It is well establisehd that judicial officers must be careful of taking into account information obtained extra-curially, even when that information was obtained in other trials that judicial officer has heard. In particular, if the judicial officer intends to take judicial notice of such information, she must give the accused

the opportunity to respond to the court and adduce evidence if necessary (*S v Chipape* 2010 (1) SACR 245 (GNP) at [33]-[34]).

26. In this case the magistrate did not permit the appellant an opportunity to address him on the issues on which he appears to have relied in deciding the appellant's sentence. The magistrate also failed to consider this matter on its own merits. The appellant's rights to a fair trial were at risk.

27. The fact that the appellant chose to plead guilty protected him from any serious breach of his rights, because the magistrate was not called upon to decide the appellant's guilt. Even this impediment the magistrate attempted to overcome in the sentencing procedure. This is cause for concern.

ORDER

28. I order as follows:

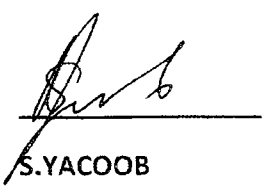
    a. The appeal against sentence is upheld.

    b. Both sentences imposed by the magistrate are set aside and substituted with the following:

        i. In respect of receiving stolen property, the appellant is sentenced to four years imprisonment, two of which are suspended for five years.

        ii. In respect of driving without a valid licence, the appellant is sentenced to pay a fine of R500, suspended for five years.

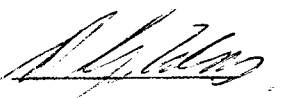
        iii. Both sentences are to run from 29 May 2014.



S.YACOOB

ACTING JUDGE OF THE HIGH COURT

I concur and it is so ordered



R.G TOLMAY

JUDGE OF THE HIGH COURT

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