REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.

Signature ……..

Date…….

CASE NO: A38/2017
17/1/2019

In the matter between:

AGNES MASHEGOANYANA MANALA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] The Appellant was convicted in the Magistrates' Court of Nebo on one count of theft and was sentenced to 18 months (eighteen) months imprisonment. She now appeals against both conviction and sentence imposed, leave to appeal having been granted by the Court *a quo*. The Appellant was released on bail in an amount of R 1 000.00 pending this appeal on 16 June 2013 after her conviction and sentence on 21 May 2013.

[2] It is alleged in the charge sheet that on or about the 4 December 2012 to 12 January 2013 and at Jane Furse in the district of Nebo the Appellant did unlawfully and intentionally steal a cash amount of R 9 969.00 the property or in the lawful possession of Rebel Picardi or David Disegoane. The Appellant was an employee of the Rebel Picardi Liquor Store. She pleaded not guilty to the charge and was legally represented throughout her trial.

[3] The manager of the store, Mr David Disegoane testified that he appointed the Appellant as a cashier and that a cash register was assigned to her where she had to select her own 4-digit pin code for security purposes. This pin code was not supposed to be shared among the cashiers and that the Appellant would bear the consequences of any discrepancy that may occur.

When the manager discovered that there was a shortage of empty bottles, he discovered that the cash register of the Appellant had paid out the money.

The transactions were done on the Appellant's cash register under her name and 4-digit pin code. The manager further testified that there was only one

method used to check as part of his daily business if any money was stolen on the system. The version of the manager was never disputed by the Appellant. The Appellant also never disputed that there was a shortage of money.

[4] When the Appellant was confronted she admitted to the manager that she took the money and she even said that her co-workers, Tshepo Tsegoane and Samuel Choma taught her how to steal money from the till. She even agreed to repay the money but the manager's seniors decided that she must be brought to Court. She made the confession spontaneously and voluntarily. This confession was later repeated to a Police Captain.

[5] In her evidence in defence the Appellant could not take the matter any further save to persist that her pin code was known to her co-workers who could have possibly taken the money from her till.

[6] It is trite that a Court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial Court – see **R v Dhlumayo and Another 1948 (2) SA 677 (A)**.

[7] In **S v Francis 1991 (1) SACR 198 (A) at 198 - 199** the approach of an appeal Court to findings of fact by a trial Court was crisply summarised as follows:

"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be

correct. In order to succeed on appeal, the Appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has in seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

In **S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e – f**, the Court held:

"…….. in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

[8] The evidence of the manager in this regard should thus be accepted. It is highly improbable that the manager would expect from the Appellant to select her own pin code and allow her to make the pin available for use by other employees. No one was, according to the manager, allowed to use her pin code. The Appellant was clearly aware of how to steal money by pretending that it was paid out for empty bottles. She in any event, admitted that she was taught by the other two co-workers how to do it.

[9] In *casu* the question is whether there is a reasonable possibility that the Appellants version may be true. The answer is in the negative and I make a

finding that the trial Court correctly convicted the Appellant on the theft of the money. There is no reason why the version of the manager should not be accepted. The manager at first did not want to prosecute the Appellant and he was willing to allow her to pay back the money. If the Appellant did not take the money why would she offer to pay it back to the manager. The conviction of the Appellant on theft can therefore not be interfered with.

[10] What remains to be considered is whether the effective sentence of 18 (eighteen) months imprisonment is appropriate. On the 22 November 2018 and in anticipation of the hearing of this appeal on 7 December 2018 I addressed a letter to both the Director of Public Prosecutions and Legal Aid South Africa, the relevant contents whereof are the following:

"Our concern is that this matter has long been pending. The accused was sentenced on 21 May 2013 and released on bail pending appeal on 11 June 2013. It is now more than five years that the accused who was supposed to have served an 18 months imprisonment has been out on bail.

Even if the conviction were to be confirmed, can it be said that such an accused should be called upon to undergo a period of imprisonment after the lapse of five years period? Is it in the interest of justice to further postpone this matter or call upon the accused to undergo the period of imprisonment?

Counsel are requested to prepare heads of argument and address the appeal Court on the 7 December 2018 in the light of the following authorities:

1. State / Michele and Another 2010 (1) SACR 131 (SCA)

2. State / Jafta 2010 (1) SACR 136 (SCA)

3. State / Malgas and Others 2013 (2) SACR 343 (SCA)

4. State / Karolia 2006 (2) SACR 75 (SCA)

We look forward to your assistance in this regard."

[11] At the hearing of the appeal Counsel for the Appellant argued that it will not be in the interest of justice that the Appellant be called upon to serve her sentence of 18 months. Counsel further submitted that it is not clear from the available Court record that the Appellant had caused a delay in the prosecution of the appeal. There is an indication that there was a reconstruction of the Court record, which is an indication that the Court record had been missing, hence the appeal could not have been proceeded with in the normal cause. Counsel asked for an appropriate lenient sentence and submitted the following personal and mitigating factors to be considered by the Court:

1. The Appellant was 25 years of age during sentencing.
2. She is a first offender.
3. She is unmarried with two minor children aged 5 and 7 years to look after.
4. She lost her job as a result of this case, which is a punishment in itself.
5. The Appellant offered to pay back the money by way of regular deductions from her salary.

6. Circumstances under which the offence was committed – she was new at the job and was taught and influenced by colleagues to steal the money.

[12] Counsel for the Respondent / State argued that the Appellant must serve her full term of imprisonment. He submitted that it would be in the interest of justice to call upon the Appellant to serve the period of 18 months imprisonment.

The following factors where submitted in aggravation of sentence:

1. The Appellant was in a position of trust and was given a pin code for security reasons.
2. She planned the offence by side lining the security features of the till with fictitious transactions to hide the fact that she removed money from the till.
3. The money was taken over a period of time.
4. The complainant lost money and given the financial position of the Appellant, he will never be able to recover it from her.
5. Theft is a serious offence and the penalty should be a warning to would-be perpetrators not to steal from their employers.

[13] This Court took into consideration both the mitigating and aggravating factors in the case. Of importance it is found that there is no indication that the

Appellant is to blame for the late prosecution of her appeal. A five years period of the delay in the prosecution of the appeal is rather an inordinate delay. After a period of five years since the sentencing the Appellant's personal and / or family circumstances might have changed for the better or worse. The question remains as to whether it is in the interest of justice to remove the Appellant away from her family for her to undergo the term of imprisonment.

[14] In **S v Malgas and Others 2013 (2) SACR 343 (SCA)** the Appellants' appeal on conviction and sentence was finalised after a period of eight years since their release on bail pending appeal. The issue to be decided on appeal was whether the eight-year delay, from the imposition of sentence by the Magistrate to the hearing of the appeal, in and of itself, justifies a lighter sentence. The SCA decided that there could be no automatic alleviation of sentence merely because of the long interval of time between the imposition of sentence and the hearing of an appeal for those persons fortunate enough to have been granted bail pending the appeal. The Court held that it was only in truly exceptional circumstances that this should occur. The Court stated that the Appellants in this case had adopted a supine attitude to the hearing of their appeal. They were to blame for the long delay in bringing the matter to finality, and the predicament in which they found themselves was largely of their own making. The Court concluded that if the Court were to regard this

case as yet another exception, it would undermine the administration of justice. The appeal was dismissed.

[15] In **S v Michele and Another 2010 (1) SACR 131 (SCA)** the High Court when granting leave to appeal to the Supreme Court of Appeal expressed the view that the lengthy delay in the prosecution of the appeal was a factor which the Supreme Court of Appeal might take into consideration in regard to the question of sentence. Indeed the Supreme Court of Appeal upheld the appeal on sentence and reduced same considerably. The Appeal Court held that while an appeal Court would generally only consider the facts and circumstances known when sentence was initially imposed it has recognised that in exceptional circumstances factors later coming to light may be taken into account on appeal where it is in the interest of justice to do so. The Court further held that the Appellants in this case had been obliged to wait for a period of six years without clarity as to their future and that this was a factor to which the Court should have regard in the assessment of an appropriate sentence.

[16] In **S v Jaftha 2010 (1) SACR 136 (SCA)** ten years had lapsed after conviction and sentence before a warrant for arrest of the Appellant (Jaftha) was issued. On appeal the Appellant sought to explain and to place before the Court of appeal facts that show that imprisonment was no longer warranted. The State did not object to the application to place the Appellant's evidence before the Court in the form of an affidavit and the State did not question the truth of the

allegations. Accordingly, the sentence of three years imprisonment for driving under the influence of alcohol imposed ten years ago had to be set aside and a new sentence of payment of a fine of R 10 000 or two years imprisonment was substituted.

[17] The principle laid down in **Jaftha** supra is that ordinarily, in an appeal against sentence, only facts known to the Court at the time of sentencing should be taken into account. But the rule is not invariable. Where there are exceptional or peculiar circumstances that occur after the sentence is imposed it is possible to take these factors into account and for a Court on appeal to alter the sentence imposed originally where this is justified.

[18] There has been instances where the appeal Court has interfered with sentence on the ground of delay in the hearing of an appeal. In **S v Karolia 2006 (2) SACR 75 (SCA) [2004] 3 All SA 298** the Supreme Court of Appeal approved the following dicta from The Queen v CNH (Court of Appeal for Ontario, 19 December 2002 para 54)

"This Court is always hesitant to return a Respondent to prison"

In **Karolia** approximately four years passed before the appeal was heard in the SCA. The appeal Court substituted a suspended sentence and a fine for the custodial sentence originally imposed.

[19] In **S v Jaftha**, supra Lewis JA, who delivered the judgment of the Court said:

"Ordinarily, of course, only facts known to the Court at the time of sentencing should be taken into account."

The learned Judge referred to R v Verster 1952 (2) SA 231 (A), R v Hoson 1953 (4) SA 464 (A) and Goodrich v Botha and Others 1954 (2) SA 540 (A) at 546 A-D.

Lewis JA went on to say that:

"The State also accepts that the ten-year delay (between sentence in the Magistrates' Court and the hearing of the appeal in the Supreme Court of Appeal) is exceptional and that the sentence should be revisited. In my view, the sentence imposed ten years ago should be set aside and a new sentence considered."

[20] Taking into consideration the facts of this case, this Court comes to a conclusion that there are exceptional circumstances justifying a finding that it will not be in the interest of justice to call upon the Appellant to undergo a term of imprisonment for 18 (eighteen) months.

In the premises the following order is made:

1. The appeal against conviction is dismissed.
2. The appeal against the sentence of 18 (eighteen) months is upheld to the extent that the sentence of 18 (eighteen) months is wholly suspended for a period of three years on condition the Appellant is not convicted of theft committed during the period of suspension.

3. The suspended sentence takes effect from the 7 December 2018.

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E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I agree

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M S SIKHWARI
ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For the Appellant	**:**	**Mr L M Manzini**
		Legal Aid South Africa
		Polokwane Justice Centre
For the Respondent	**:**	**Adv. J J Jacobs**
		Director of Public Prosecutions
		Limpopo, Polokwane