THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 96/2008
No precedential interest

In the matter between:

SIPHO BONGINKOSI MSANE **FIRST APPELLANT**

ROBERT LIJUVWANI KONE **SECOND APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Msane v The State* (96/2008) [2008] ZASCA 118 (26 September 2008).

Coram: Lewis, Mlambo and Cachalia JJA

Heard: 27 August 2008

Delivered: 26 September 2008

Summary: Criminal law – attempt – appropriate sentence. Sentence – duplication of punishment.

ORDER

On appeal from: High Court, Johannesburg (Goldstein and Khampepe JJ sitting as Full Court).

1 The appeal succeeds and the order of the Johannesburg High Court is set aside.

2 In its place the following order is substituted:

The appeal against sentence succeeds and the sentence imposed by the Regional Court is altered to read:

'(i) On count one the accused are sentenced to four years' imprisonment of which one year's imprisonment is suspended for a period of five years on condition that they are not convicted of extortion or of a contravention of the Prevention and Combating of Corrupt Activities Act 12 of 2004, during the period of suspension.

(ii) On count two the accused are sentenced to one year's imprisonment which is ordered to run concurrently with the sentence imposed on count one.'

JUDGMENT

MLAMBO JA (LEWIS and CACHALIA JJA CONCURRING):

[1] The appellants were convicted by the Johannesburg Regional Court of extortion and the unlawful possession of 17 ecstasy tablets.[1] On the extortion count they were sentenced to four years' imprisonment one of which was

[1] In terms of s 4 of The Drugs and Drug Trafficking Act 140 of 1992 it is an offence to be found in possession of a substance decreed dangerous and dependence producing.

suspended for five years on condition that they were not convicted of extortion or of a contravention of s 1(1) of the Corruption Act 94 of 1992 committed during the period of suspension. On the drugs related count they were sentenced to one year's imprisonment. The sentences on the two counts were ordered to run consecutively, resulting in an effective four year imprisonment sentence.

[2] In an appeal to the Johannesburg High Court the extortion count was altered to one of an attempt. That court (Goldstein and Khampepe JJ), did not, however, interfere with the sentence imposed, hence this appeal with leave of this court.

[3] The facts very briefly are that the appellants, a sergeant and constable respectively, attached to the Hillbrow Crime Intelligence Unit of the South African Police Services (SAPS) had apprehended the complainant, Ms Susan Schesser, on a routine patrol, and found 17 ecstasy tablets in her possession. They arrested her but demanded that she pay them an amount of R4 000 on receipt of which they would drop charges and return the ecstasy tablets to her. She agreed to make the payment and arranged to do so the following day.

[4] However, Schesser decided to report the incident to the Anti Corruption Unit of the SAPS which decided to entrap the appellants using her as bait. She was provided with marked money and instructed to meet the appellants at their rendezvous to hand over the money. Schesser met the appellants as arranged and as she was about to hand the money over to them, a police vehicle happened to pass by not far from them. The appellants became suspicious and instructed her to follow them to another area where the handover would be done. As they drove off members of the Anti Corruption Unit pounced and on searching the appellants' vehicle found the 17 ecstasy tablets in their motor vehicle and arrested them.

[5] It is not in dispute that upon their arrest the appellants had not yet taken the money from Schesser. They could therefore not be convicted of

extortion proper, and the court a quo was correct in altering that conviction to one of an attempt. That court, however, did not alter the sentence imposed by the regional court. The issue now before us is whether the alteration of the conviction should have resulted in a decreased sentence as contended by the appellants.

[6] The court a quo did not elaborate on any reason it may have had for refusing to interfere with the sentence. In this regard the court a quo, apparently as an afterthought, as it had already dismissed the appeal, stated simply: 'Of course there is the one aspect, and that is that we have now corrected the conviction by reducing it from one of extortion to one of attempted extortion, but in my view that does not justify reducing the sentences'.

[7] The submission advanced to us on the appellants' behalf in this regard is that in imposing sentence on count one their personal circumstances, especially the fact that they retained their jobs despite these offences due to their outstanding record as policemen, were not given proper consideration by the courts below. Furthermore, so the submission went, as the regional court had sentenced them based on a completed offence, the alteration thereof to an attempt by the high court should 'logically have altered the sentence'.

[8] That, in my view, is not the test. The test, this being an appeal, is whether in imposing sentence the courts below committed any misdirection and, if not, whether the sentence is shockingly inappropriate. The nature of the offence and the particular circumstances of the matter and the personal circumstances of the offenders remain relevant in the determination of an appropriate sentence.

[9] The appellants' criticism of the sentence imposed by the regional court on count one is that it failed to have regard to all relevant personal factors. However, I consider that the regional court properly applied its mind to all relevant factors before imposing the sentence upheld in the court a quo. In particular that court took account of the personal circumstances of the

appellants, especially that they were both highly regarded members of the police force and had family responsibilities. The court also took account of the pre-sentence reports filed on behalf of the appellants recommending non-custodial sentences. In the final analysis the regional court was of the view that extortion was a very serious offence and was prevalent in its area.

[10] The second criticism, directed at the high court, is that it should have reduced the sentence since it found that only attempted extortion had been committed. In my view, the appellants' stance in this regard is misplaced. Generally, as Snyman[2] says, a 'lesser punishment is imposed for attempt than for the completed crime'. The basis advanced for this view is that 'from the viewpoint of the retributive theory of punishment, either no harm or less harm (compared to the completed crime) has been caused'. Each case must, however, be decided on its own facts.

[11] In my view moral blameworthiness plays a critical role in the determination of an appropriate sentence and, extortion, as found by the regional court, is a very serious offence. This offence, especially when committed by law enforcement officers, is morally reprehensible. The fact that we are here dealing with attempted extortion does not detract from the moral reprehensibility of the appellants' conduct. Had Schesser not reported the matter to the Anti Corruption Unit, the appellants' crime would probably not have been detected. Clearly the mere fact that the conviction was altered to an attempt does not make the offence less morally blameworthy, as it would have had the appellants changed their minds about going ahead with the deal and not completed the commission of the offence. In my view the sentence imposed for the attempted extortion does not induce a sense of shock.

[12] During argument we raised the issue whether the sentence imposed on the drugs possession count should have been ordered to be served concurrently with the sentence on the attempted extortion count. It is important in this regard to take account of the fact that the appellants took possession of the ecstasy tablets only for the purpose of safekeeping, so to

[2] C R Snyman *Criminal Law* 5 ed (2008) p 294.

speak, until they were paid the extortion money. It is also relevant that such possession was to aid the extortion and as such their conduct constituted in essence the commission of a single offence. In my view the imposition of consecutive sentences under these circumstances without due consideration that one is essentially dealing with one offence amounted to a duplication of punishment. It is in this respect that the regional court and court below misdirected themselves. See *S v Mathebula* 1978 (2) SA 607 (A) at 613D-E where Trollip JA stated:

'As stated above, these two crimes must, for purposes of conviction and punishment, be regarded as separate and distinct. Extreme care was therefore required in the exercise of the discretionary power to avoid any duplication of punishment in passing sentence on count 3 . . .'

See also *S v Morten* 1991 (1) SACR 483 (A) at 485i-j. In these circumstances a proper exercise of discretion would have dictated that the sentence of one year's imprisonment imposed on the drugs count be ordered to run concurrently with the attempted extortion count. The appeal should, in my view, succeed to this limited extent only.

1 The appeal succeeds and the order of the Johannesburg High Court is set aside.

2 In its place the following order is substituted:

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(ii) On count two the accused are sentenced to one year's imprisonment which is ordered to run concurrently with the sentence imposed on count one.'

D MLAMBO
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	E S CLASSEN
INSTRUCTED BY:	DAVID H BOTHA, DU PLESSIS & KRUGER INC; JOHANNESBURG
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