THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 454/10

In the matter between:

JOHANNES HENDRICUS TRUYENS **Appellant**

v

THE STATE **Respondent**

Neutral citation: *Truyens v The State* (454/2010) [2011] ZASCA 110 (1 June 2011).

Coram: Cloete and Cachalia JJA and Meer AJA
Heard: **26 May 2011**
Delivered: **1 June 2011**

Summary: Foreman on a farm convicted of theft of 48 cattle in terms of s 11 of the Stock Theft Act, 57 of 1959. The motive for the theft was to sell the cattle for money to pay for medical expenses related to the terminal illness of the appellant's children. A magistrate imposed a sentence of four years' imprisonment under s 276(1)(i) of the Criminal Procedure Act 51 of 1977, which was increased on appeal to an effective sentence of eight years' imprisonment by a provisional division. The Supreme Court of Appeal set aside the sentence imposed by the high court and reinstated the sentence originally imposed by the magistrate.

ORDER

On appeal from: North West High Court, Mafikeng (Hendricks and Gura JJ sitting as court of appeal):

The following order is made:

(1) The appeal is upheld;
(2) the order of the court below is set aside;
(3) the sentence imposed by the regional magistrate is reinstated.

JUDGMENT

CACHALIA JA (Cloete JA and Meer AJA concurring):

[1] The appellant, Mr Johannes Hendrikus Truyens, was convicted for the theft of 48 head of cattle in contravention of section 11 of Act 57 of 1959 by a Regional Court, sitting at Koster in the North West Province. He initially tendered a plea of not guilty, but changed his plea to guilty after three state witnesses had testified. After considering the testimony and a pre-sentencing report prepared by a forensic criminologist, Dr Irma Labuschagne, the trial court (Mr C P Nel), sentenced the appellant to four years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the Act). This meant that he would have to serve a minimum period of eight months' imprisonment before being considered for placement under correctional supervision.[1] He appealed to the North West

1 Section 73(7)(a) of the Correctional Services Act 111 of 1998.

High Court, Mafikeng.

[2] The judges to whom the matter had been allocated (Hendricks and Gura JJ) notified counsel for both the state and the appellant that they were considering increasing the sentence. After hearing argument, they increased his sentence to 12 years' imprisonment and suspended four years. The appellant was therefore sentenced effectively to eight years' imprisonment.[2] The high court refused him bail and leave to appeal further, but this court granted the necessary leave. The appellant has been in custody for just over two years since he began serving his sentence on 30 April 2009.

[3] There were three grounds upon which the appellant sought leave to appeal against the sentence. First, that the high court committed an irregularity by failing to ask the magistrate for additional reasons for the sentence that he imposed, before it decided to increase the sentence. Second, that it was irregular for the court not to have informed the appellant personally in writing that the court was considering increasing the sentence. In this regard the appellant sought to lead further evidence before this court to show that had he been so informed, he would have sought advice with a view to bringing a formal application to withdraw his appeal. Third, that the effective sentence imposed on the appellant was excessively harsh.

[4] Ms Zwiegelaar, who appeared for the appellant, did not press either of the first two grounds with any confidence. Regarding the first ground, it has long been the law that though it is desirable for an appeal court, before increasing a sentence, to request reasons from the magistrate for having imposed the sentence, this is not a hard and fast rule and a failure to do so does not in any case amount to a misdirection.[3] In this case the learned magistrate had given a detailed and carefully reasoned judgment on sentence. So it would not have served any purpose for the high court to have asked for further reasons to be

2 Unreported case no. CA 95/07.
3 *R v Swanepoel* 1945 (AD) 444 at 451.

furnished. In any event, the learned magistrate at the request of this court did respond by stating briefly that in retrospect he would have imposed the same sentence, but without reference to s 276(1)(i) of the Act.

[5] The second ground, that the appellant should have been informed personally that the high court was considering increasing the sentence, also has no merit. The appellant's counsel and attorney of record were informed, albeit not in writing, of the high court's view. They were given sufficient time to, and did, prepare submissions on this question. Once the appellant appointed legal representatives to conduct his defence and his appeal, it would have been irregular for the court or state counsel to communicate directly with him without reference to his lawyers. If the appellant has any complaint, it is with his lawyers – not the court – who he says did not properly advise him that the sentence could be increased.

[6] I turn to consider the merits of the appeal. The facts are these. The appellant was employed as the foreman on a cattle farm and thus occupied a position of trust. He stole his employer's cattle – 48 in total – valued at the time at between R105 000 and R120 000. The theft occurred on three occasions between April and May 2005. He thereafter sold the cattle for a total amount of R83 000.

[7] The appellant's personal circumstances were set out comprehensively in the pre-sentencing report. In summary, the appellant's age was 46 when he committed the offences and 48 when he was sentenced. He is now 51. He is married with four children born of the marriage, respectively in 1986 and 1989 (both sons) and twin girls in 1990. At the time of his trial he was employed as a contractor in Iraq at a salary, in rand terms, of R43 000 per month. His wife earned R12 000 per month as a credit manager at a commercial bank.

[8] The older son and the twin girls suffer from a rare condition called cystic

fibrosis, which is a genetic disease that attacks the lungs. The family has been advised that the life expectancy of the 'children' affected is only between 25 and 30 years, although some patients have been known to live longer with proper medical care. The older son was, at the time of the trial, on a waiting list for a heart and lung transplant. When the matter was argued before us we were informed that he was 25 years old and had been admitted to hospital to undergo the operation.

[9] The children are unable to live normal lives and are largely dependent upon their parents. The family is thus under great stress, which is exacerbated by the considerable medical costs that treatment of this condition demands. The family has medical aid, but it does not cover all their costs. The family is therefore also under severe financial pressure.

[10] The learned magistrate found that the motive for the theft was to meet these medical costs and to ameliorate the difficult circumstances of the children. The money was not spent on luxuries. In this regard he accepted the criminologist's assessment that this crime was one of need and not of greed.

[11] It must be emphasized that the motive for the crime – what the accused believed and intended – is the central enquiry when deciding, for the purposes of sentence, whether the moral blameworthiness of an accused has been reduced.[4] The learned magistrate found, correctly in my view, that the circumstances here provided a compelling case for such a reduction.

[12] I should mention that the trial court was aware, and took account of *dicta* in this court to the effect that personal economic necessity, including having to meet the costs of high medical expenses, cannot condone theft or fraud of some magnitude when committed by design over a period.[5] It is however, a mitigating factor in reducing the extent of censure that may be appropriate for the

4 *S v Ferreira* 2004 (1) SACR 454 (SCA) para 44.
5 *S v Lister* 1993 (2) SACR 228 (A) at 233e-f.

commission of a crime.[6]

[13] Also counting in the appellant's favour, the trial court considered, was that the appellant was contrite. In this regard the learned magistrate said that even though the appellant initially pleaded not guilty and conducted his own defence, when he was able to obtain legal assistance after three witnesses had testified for the state, he changed his plea to guilty. More importantly, he did not put up a false version in an attempt to evade responsibility, which indicates contrition. On the contrary, in a letter to his employer before first appearing in court, he confessed fully to the charges and expressed the hope that he now had a chance to change his life. He also promised to compensate his employer for his loss. Between December 2005 and January 2006 he paid R20 000 in two instalments of R10 000 each. The first was paid before his arrest on 22 December 2006. Dr Labuschagne observed that this conduct is consistent with remorse because it demonstrated the appellant's insight into the damage he had caused.

[14] The trial court correctly considered that the appellant was employed in a position of trust, which he abused by committing the crime, as an aggravating factor. Furthermore, it observed, the crime was planned and took place on three occasions over two months. He could have stopped after the first, or even the second time, but he persisted. In effect, said the trial court, he committed three separate crimes but was charged with only one.

[15] The appellant had three previous convictions for theft, housebreaking and fraud. These had occurred almost 30 years ago. The trial court took them into account, but properly accorded little weight to them.

[16] The pre-sentencing report ruled out direct imprisonment for the appellant because of the strong mitigating factors in this case. However, the difficulty with a sentence of correctional supervision, Dr Labuschagne said, was that it could not

6 *Cf S v Kearns* 1999 (2) SACR 660 (SCA) at 663g-h.

be properly monitored because the appellant worked overseas. She thus recommended a fine together with a suspended sentence. This sanction would allow him to work so that he can provide for his family and would also have a deterrent effect.

[17] From his judgment it is apparent that the learned magistrate grappled with the difficult question of what an appropriate sentence would be in the unusual circumstances of this case. The appellant's financial circumstances, the magistrate said, was not a matter about which the court could do anything. And even though the magistrate expressed sympathy for the appellant's personal circumstances, especially the severe health needs of his children, he came to the view that a wholly suspended sentence did not commend itself. In this regard the abuse of the employer's trust weighed heavily with him. He thus decided that a sentence of four years' direct imprisonment would be appropriate, but considered that he should impose it in terms of s 276(1)(i) of the Act.[7]

[18] In deciding to employ this provision the learned magistrate relied on two recent decisions of this court. The first was *S v Scheepers*,[8] which held that:

'When the sentencer considers that a custodial sentence is essential, but the nature of the offence suggests that an extended period of incarceration is inappropriate' the s 276(1)(i) option 'should always be in the foreground.'

The second was *S v Oosthuizen*,[9] which reiterated this approach.

[19] Against this background the question that arises is whether the court below was correct to have interfered with the sentencing magistrate's exercise of his discretion. In *S v Wimpie Barnard*[10] this court cautioned that:

'A Court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially or properly. A misdirection that would justify interference by an

7 *Cf S v Wimpie Barnard* 2004 (1) SACR 191 (SCA) where this court imposed a sentence of five years' imprisonment under s 276(1)(i) for the appellant's theft of R30 069 from his employer over a period of 15 months. The appellant had abused his position of trust.
8 *S v Scheepers* 2006 (1) SACR 72 (SCA) para 10.
9 *S v Oosthuizen* 2007 (1) SACR 321 (SCA) para 11.
10 469/2002.

appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'[11]

[20] Where there is no clear misdirection by the trial court to justify interference by an appeal court, the remaining question, as this court said in *S v Whitehead*,[12] is:

'. . . (W)hether there exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed – or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly or disturbingly inappropriate – as to warrant interference with the exercise of the learned Judge's discretion regarding sentence.'(Internal references omitted.)[13]

[21] The court below felt itself at liberty to interfere on two grounds. First, the appellant's previous convictions, 'though it happened long before, indicates that he has a propensity to steal'. Second, it compared the sentence the court imposed in *S v Hendrik Tiro Lephoro*[14] – also involving stock theft – with this case and concluded that the sentence of four years under s 276(1)(i) was 'shockingly light and totally disproportionate to the gravity of the seriousness of the offence . . .'.[15] In *Lephoro* several accused were sentenced to 10 years' imprisonment, three of which were suspended, making the effective term of imprisonment seven years.

[22] With regard to the first ground, the previous convictions, it is difficult to understand how the high court came to this conclusion in the face of the careful reasoning by the learned magistrate. Some of those offences were committed during the appellant's adolescence, and others when he was 21 years old. The appellant committed the present offence as a middle aged adult, under unique

11 2004 (1) SACR 191 (SCA) para 9.
12 1970 (4) SA 424 (A).
13 Ibid at 436C-E.
14 Unreported case no CA 28/2006 (Bophuthatswana Provincial Division).
15 See n1 above para 22.

circumstances. This is hardly evidence of a predatory predilection.

[23] Concerning the second ground – the reliance on the *Lephoro* case – there were fundamentally different circumstances present there. Several accused, working in concert, stole eight head of cattle valued at R21 000. They committed the crime in the Taung area where the population relies on their livestock as their main source of income. Most importantly, that case involved a crime of greed, not one of need, as was the case here. And there was no suggestion that the accused had shown any sign of remorse. Again, this is an important difference.

[24] There is another reason why the reliance on a case or cases involving stock theft is not appropriate here. Stock theft is a sensitive issue in many farming communities. This is because it is difficult for farmers to prevent the crime and equally difficult for perpetrators to be apprehended and prosecuted. Cattle farmers are therefore particularly vulnerable to this type of crime. The courts have reflected these concerns by progressively imposing tougher sentences – usually direct imprisonment – on offenders.

[25] But I do not think that the circumstances of this case warrant comparison with typical stock theft cases. The appellant is not a cattle rustler. He stole his employer's cattle so that he could raise money to meet the desperate medical needs of his children. Furthermore, his employer is not reliant on his cattle as his main source of income and that is why he did not seek a compensatory order. In this regard, his employer testified that the main reason that he pressed charges in this case was because he wanted to see justice done.

[26] So, it is not surprising that Mr Jacobs, who appeared for the state, had difficulty defending the reasoning of the court below. This brings me to whether there was any proper basis to interfere with the sentence imposed by the trial court. In my view once the learned magistrate came to the view that custodial sentence was the only appropriate sentence, but that a sentence in excess of

five years was not called for, he was not only entitled to apply the s 276(1)(i) sentencing option but, on clear authority from this court, obliged to consider whether its application was suitable. Whether direct imprisonment – not in terms of s 276(1)(i) – was too lenient a sentence in these circumstances is a matter on which there may well be divergent views. But it would not be justified for an appeal court to interfere with the sentence imposed by the trial magistrate after his sensitive and careful reasoning. In my view, the sentence of four years' imprisonment in terms of s 276(1)(i) was in any event 'not shockingly inappropriate'. The fact that the learned magistrate in retrospect is of the view that a sentence of four years' direct imprisonment may have been more appropriate does not detract from my conclusion, or his, that the original sentence was not unduly light.

[27] I should add that there is a misconception that a sentence under s 276(1)(i) of the Act is a softer option than an ordinary sentence of direct imprisonment. It is not. It merely grants the Commissioner the latitude to consider an early release under correctional supervision – after a sixth of the sentence is served – and only if the personal circumstances of the offender warrant it. The Commissioner in any event has the authority under s 276A(3)(a) of the Act to apply to the sentencing court to reconsider a sentence not exceeding five years' imprisonment, or exceeding five years' imprisonment where the date of release is no more than five years hence.

[28] For these reasons I would set aside the sentence imposed by the court below and reinstate the sentence of the trial court.

The following order is made:

(1) The appeal is upheld;
(2) the order of the court below is set aside;
(3) the sentence imposed by the regional magistrate is reinstated.

A CACHALIA

JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	C J Zwiegelaar Instructed by Grobler Levine Soonius, Mafikeng Naudes Inc, Bloemfontein
RESPONDENT:	D G Jacobs Instructed by Director of Public Prosecutions,

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