THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 703/2012
Reportable

In the matter between:

HENRY MALGAS First Appellant

SHON WILLIAMS Second Appellant

JOHAN BEYERS Third Appellant

ANDY JANSEN Fourth Appellant

and

THE STATE Respondent

Neutral citation: *Malgas v S* (703/12) [2013] ZASCA 90 (31 May 2013)

Coram: Navsa and Majiedt JJA and Willis AJA

Heard: 22 May 2013

Delivered: 31 May 2013

Summary: Appeal against sentence imposed approximately ten years ago – where long delays attributable to the inertia of the appellants themselves this cannot justify interference by this court – appeal dismissed.

ORDER

On appeal from: Western Cape High Court, Cape Town (Olivier AJ, with Fourie J concurring, sitting as court of appeal);

The appeal is dismissed.

JUDGMENT

WILLIS AJA (NAVSA and MAJIEDT JJA):

Introduction

[1] This appeal, with the leave of the court below, is against sentence only. The first appellant had been an inspector in the South African Police Service with a record of 16 years of service. The second appellant had been a constable. The third appellant had previously been a police officer. He had been discharged from the police service. The first, second and third appellants had been found guilty in the Regional court, Beaufort-West of housebreaking with intent to steal dagga from the exhibits storeroom of the Beaufort-West police station. The third and fourth appellants were found guilty of the theft of dagga from a motor vehicle that belonged to the police which had been parked on the premises of the same police station.

[2] They were all convicted on 5 November 2002. Sentence was imposed on 6 March 2003. The first and second appellants were sentenced to ten years' imprisonment each. The fourth appellant and Daniel Malgas were sentenced to eight years' imprisonment each. The third appellant was sentenced to a period of

imprisonment of eight years on count one and ten years on count three. Taking the cumulative effect of the sentences into account, the magistrate ordered that six years of the third appellant's sentence on count three run concurrently with the eight years on count one. The effective sentence for the third appellant was therefore twelve years' imprisonment.

[3] The Western Cape High Court in Cape Town (per Olivier AJ, Fourie J concurring) heard the appeal against conviction and sentence on 3 June 2011. The court below dismissed the appeals against the convictions in respect of all the appellants on 24 January 2012. Concerning sentence, the court below dismissed the appeals of the third and fourth appellants but upheld the appeals of the first and second appellants, reducing their sentence from ten years to eight years imprisonment each.

[4] None of the appellants has been in custody, after conviction, for more than a few months. At the time when the appellants were convicted they then had an automatic right of appeal to the High Court. After conviction and sentence the magistrate dismissed their application for bail pending the appeal. He did so on 6 March 2003. Although it does not appear from the record, it is common cause that all the appellants were nevertheless granted bail shortly after they had been convicted, pending the hearing of their appeal. This court knows neither who granted such bail nor the reasons that were given for doing so. The appellants' bail was extended on various occasions, mutatis mutandis, on the same terms and conditions as before. The last occasion their bail was extended was on 27 January 2012.

[5] On 17 February 2012 the court below dismissed the second, third and fourth appellants' application for leave to appeal against their convictions, and, although reticent, granted them leave to appeal to this court against their sentences as freshly

imposed and confirmed by the court below respectively. In the judgment of the court below granting leave to appeal to this court Fourie J said the following:

'Wat die vonnisse van die appellante betref, word slegs een grond van appèl geopper, naamlik dat ons nie genoegsaam ag geslaan het op die benadeling en trauma wat appellante gely het weens die lang vertraging met die aanhoor van die appèlle nie. Dit is sekerlik so dat 'n lang vertraging van hierdie aard benadeling en trauma tot gevolg kan hê, maar onssou verwag het dat, as dit die geval is, die appellante dit by die aanhoor van die appèl voor ons sou geopper het. Dit word egter eers nou op hierdie laat stadium feitlik *as nagedagte uit die mou geskud*. Desnieteenstaande kan die potensiaal vir benadeling en trauma nie sondermeer uitgesluit word nie.' (Emphasis added.)

On 21 September 2012 the court below granted the first appellant leave to appeal to this court against sentence. His bail was extended on terms similar to those of the other appellants. The State did not oppose the application.

[6] It appears from a ruling given in this matter by the regional magistrate on 10 November 2010 in relation to steps that were taken to reconstruct the record, that certain exhibits, documentary as well as actual physical items, had gone missing. These exhibits, it now turns out, were immaterial to the prospective appeal in the matter. The original docket went missing as did the magistrate's notes taken during the trial.

The Trial and the Relevant Factual Matrix

[7] During the presentation of the State's case, damning evidence of a direct and circumstantial nature, corroborated in fine detail, was given against the appellants. None of them testified in their own defence. The appellants were correctly convicted on the strength of the totality of the evidence. The offences in question were committed on 12 November 1999 and 10 January 2000.

The Sentences

[8] More than eight years passed before the appeal was heard in the court below. There is no affidavit on record by any of the appellants which explains the delay in the prosecution of their appeal. Their counsel conceded that there is no explanation at all on the record for the delay between 2003 and 2009, when the matter was enrolled again. This enrolment was not at the initiative of the appellants but, according to the record, occurred at the behest of the investigating officer who appears to have arranged its enrolment. At that stage there were a number of appearances in the regional court in an attempt to trace the missing exhibits and to reconstruct the record. The appellants have not taken the court into their confidence as to how this unsatisfactory state of affairs concerning the tardy hearing of their appeal may have come about.

[9] It was only when the Registrar's office filed a 'notice for the filing of heads of argument' that the prosecution's attention was drawn to the delay. The appellants filed their heads of argument on 5 April 2011 and the State theirs on 12 May 2011. No allegation has been made by the appellants that, for example, they paid promptly for the transcription of the proceedings but that, through no fault of their own this was not timeously prepared.

[10] When the magistrate gave his judgment refusing bail he observed, cogently, that 'die vonnisse nie anders kan wees as gevangenisstraf nie. Dit is net 'n kwessie van hoe lank. Ek is dus van mening dat om borg te weier gaan nie julle benadeel nie'. Entirely correctly and with an almost eerie perspicacity he reasoned that '(I)nteendeel om vir u te laat uitgaan nou op borg en later die hele huis van kaarte inmekaar te laat val gaan vir u werklik 'n benadeling wees'. This case underlines the fact that bail after conviction should be approached with caution.

[11] The first appellant was married. At the time that he was sentenced he had three minor children. Mrs Van Niekerk, the attorney then appearing for the second appellant, said during her argument in mitigation of sentence that ‘bo en behalwe die feit dat hy ‘n polisiebeampte was, is hy maar net ‘n doodgewone mens soos enige ander beskuldigde wat voor u verskyn’. After his discharge from the police service, the third appellant had had been persistently out of work. The first and second appellants had no previous convictions. The third and fourth appellants did have previous convictions. The third appellant’s previous conviction was for an assault committed in 1989. The fourth appellant had a previous conviction for possession of dagga in 1984 and another two for possession of stolen property in 1995, as well as a conviction for possession of an unlicensed firearm in 1997.

[12] It has been submitted to this court by Mr *Calitz*, who appeared on behalf of the appellants, that this lengthy period of time is, in itself, an exceptional circumstance that should be taken into account in the evaluation of their sentence by this court. Mr *Calitz* submitted that the lengthy period of time which it took to construct the record necessitated a revisiting of the sentences which had been imposed. Mr *Calitz* conceded, however, that if it was clear that the appellants had adopted a supine attitude to the prosecution of the appeal, the ‘exceptional circumstance’ of the long delay could not fairly operate in their favour.

[13] It is common cause that there is indeed only one ground that can be considered in this appeal; namely whether the eight year delay from the imposition of sentence by the magistrate to the hearing of the appeal in the court below, in and of itself, justifies a lighter sentence.

[14] Mr *Theron*, who appeared on behalf of the State, submitted that if the appellants had been in custody all this time it is highly unlikely that their erstwhile attorney would have made no enquiries or taken no steps to expedite the appeal.

The fact is that they had not been in custody. He drew attention to the fact that it nowhere appears that their attorney of record at all relevant times did anything to ensure a timeous hearing of the appeal. He also pointed out that, for all the appellants' protestations about the difficulties in reconstructing the record, particularly in respect of the missing exhibits, they do not explain why their attorneys had no copies, as one would have expected. He submitted further that it was clear that the appellants had sought to manipulate the administration of justice. Mr *Theron*, with justification, enquired rhetorically whether the appellants had hoped that the whole question of their appeal would quietly go away. He submitted further that, in view of the extensive corruption in our country, the court should proceed with the utmost caution before interfering with the sentences imposed on these appellants.

Conclusions

[15] There have been instances where this court has interfered with sentence on the ground of the delay in the hearing of an appeal. In *S v Karolia*[1] the court approved the following from *The Queen v CNH*[2]: 'This court is always hesitant to return a respondent to prison'. In *Karolia* approximately four years passed before the appeal was heard in this court. This court substituted a suspended sentence and a fine for the custodial sentence originally imposed.

[16] In *S v Michele*[3] this court substituted a suspended sentence for the direct sentence of imprisonment that had previously been imposed. The court referred with approval to *Karolia* and said:

'While an appeal court will generally only consider the facts and circumstances known when sentence was initially imposed, this court has recognised that in exceptional circumstances factors later coming to light may be taken into account where it is in the interests of justice to do so.'[4]

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[1] *S v Karolia* 2006 (2) SACR 75; [2004] 3 All SA 298 (SCA) at para 38.
[2] *The Queen v CNH* Court of Appeal for Ontario, 19 December 2002, para 53.
[3] *S v Michele and another* 2010 (1) SACR 131 (SCA).
[4] At para 13.

[17] In *S v Jaftha*[5] 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.'[6] She referred to *R v Verster*,[7] *R v Hobson*[8] and *Goodrich v Botha and others.*[9] Lewis JA went on to say that:

'The State also accepts that the ten-year delay [between sentence in 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.'[10]

In *Jaftha* this court substituted a fine of R10 000, or two years' imprisonment, for a three-year custodial sentence which had been imposed for a conviction of drunken driving (a contravention of s 122(1)(*a*) of the Road Traffic Act 29 of 1989).

[18] Rule 67 (10) of the Magistrates' courts rules imposes a duty on the clerk of the court to prepare a copy of the record of the case. Contrasted against this, rule 51(3) of the Uniform rules provides that in criminal appeals:

'The ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the court shall rest on the appellant or his or her legal representative: Provided that where the appellant is not represented by a legal representative, such responsibility shall rest on the director of public prosecutions.'

[19] If one reads subrule 66(7) of the Magistrates' courts rules, together with subrules (3), 4(*a*) and (9), it is plain that it is the responsibility of accused persons to pay for and obtain the transcripts of the proceedings in their criminal trials unless they are unable to pay therefor – in which case they may apply to the magistrate for a reduced charge. There has been no suggestion that an application was made by the appellants to the magistrate for a reduced charge. The appellants were not

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[5] *S v Jaftha* 2010 (1) SACR 136 (SCA).
[6] At para 15.
[7] *R v Verster* 1952 (2) SA 231 (A).
[8] *R v Hobson* 1953 (4) SA 464 (A).
[9] *Goodrich v Botha and others* 1954 (2) SA 540 (A) at 546A-D.
[10] At para 16.

impecunious at the relevant time and they enjoyed the benefit of legal representation up to and including the time of their appeal in the court below.

[20] There can be no automatic alleviation of sentence merely because of the long interval of time between the imposition of sentence and the hearing of the appeal for those persons fortunate enough to have been granted bail pending the appeal. The phenomenon whereby inertia descends upon an appeal, like a cloud from the heavens, once bail has been granted to an accused after conviction and sentence, has been recurring with increasing frequency, especially in certain parts of the land. Our own experience as judges indicate that the clouds have been accumulating ominously, like a storm which is gathering momentum. Although from time to time the long delay between the passing of a custodial sentence and the hearing of an appeal may justify interference with that sentence, it is only in truly exceptional circumstances that this should occur. Each case must be decided on its own facts.

[21] The appellants have adopted a supine attitude to the hearing of their appeal. Their attitude to this case throughout has been to adopt the attitude of a nightjar in the veld: do as little as possible, hope that nobody will notice and expect that the problem will go away. Fortunately for the administration of justice, the appellants do not enjoy a nightjar's camouflage. They may have hidden but they have not been invisible.

[22] It will be hard on the appellants and their families that, ten years after their sentencing by the magistrate, they should now have to report to jail to commence serving their sentences. We have anxiously reflected upon the needs of justice in this case, including the requirement that this court should show mercy to and compassion for our fellow human beings. Having done so, the conclusion remains inescapable that, if this court were to regard this case as yet another 'exception', it would undermine the administration of justice. The appellants are to blame for the

long delay in bringing this matter to finality. The predicament in which the appellants find themselves is largely of their own making.

[23] The first and the second appellants may reflect on the fact that they were fortunate in having their sentences reduced on appeal to the court below. The magistrate correctly took into account the fact that it was an aggravating factor that they were police officers at the time of the commission of their crimes. It should not be forgotten that these were offences committed within the precincts of a police station which, in a democratic state, serves as one of the symbols of law and order. The crimes in question violated a national symbol that, alongside the town hall and the magistrate's court, is especially important in the platteland.

[24] The appeal is dismissed.

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N P WILLIS
ACTING JUDGE OF APPEAL

APPEARANCES:

For the Appellants:	*N M Calitz*
	Instructed by:
	The Legal Aid Board, Cape Town
	The Legal Aid Board, Bloemfontein
For the Respondent:	*J A Theron*
	Instructed by:
	Director of Public Prosecutions, Cape Town
	The Director of Public Prosecutions, Bloemfontein