court File

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A390/2008

DATE: 6 FEBRUARY 2009

In the matter between:

DARRYL MULLER

versus

THE STATE

JUDGMENT

YEKISO, J:

This is an appeal against sentence only imposed on the appellant in the Regional Court for the division Western Cape held at Bellville.

The sentence imposed arises out of conviction of the appellant at the Magistrate's Court, Bellville, on 11 December 2007, on two counts of theft, which the State alleged were committed at Sonstraal Super Spar, Durbanville, on 8 July 2003 and on 16 July 2004.

After conviction, the magistrate who presided at trial became

of the view that in view of the appellant's previous convictions, the matter was of such a nature and magnitude that it warranted punishment in excess of his jurisdiction. In terms of Section 116 of the Criminal Procedure Act 51/77, the matter was then referred to the Regional Court for consideration and imposition of an appropriate sentence. The appellant was subsequently sentenced to five years imprisonment, both counts having been taken as one for purposes of sentence. In addition to the sentence so imposed, the appellant was warned in terms of section 286 of the Criminal Procedure Act.

The appeal is by leave of the court *a quo*, the relief sought being that the sentence be set aside on the basis that it is disturbingly inappropriate with the offences of which the appellant was convicted, and that it be substituted with an appropriate sentence, due regard had to the circumstances of this particular matter.

The grounds of appeal are in the main based on a contention on behalf of the appellant that in the determination of what he thought was an appropriate sentence the magistrate over-emphasised the interests of the community over and above the appellant's personal circumstances, that the magistrate laid much emphasis on the appellant's list of previous convictions, resulting in the *quantum* of sentence imposed being

inappropriate with the offences of which the appellant was convicted.

I shall now proceed to determine if there is merit in the appellant's contention.

It is, of course, trite law that a matter of sentence is always a matter which falls squarely within the discretion of the presiding judicial officer. A court of appeal will rarely, if ever, interfere with the exercise of such a discretion. It is only in those rare instances where the presiding judicial officer either has exercised his or her discretion injudiciously or has misdirected himself or herself, or where the presiding judicial officer has committed a material irregularity that a court of appeal will interfere with the exercise of such a discretion.

In the instance of this matter, the magistrate appears to have adopted a balanced approach of all those traditional factors that are normally taken into account in the determination of what ought to be an appropriate sentence. It is quite apparent, on basis of the record, that the magistrate, in taking into account the appellant's personal circumstances indeed laid much emphasis on the state of appellant's previous convictions, which he, and of course understandably so, thought were of an aggravating nature and as such warranting

such punishment as would act as a deterrent for the appellant from committing further similar crimes in future. He ultimately came to the conclusion that a sentence of five years imprisonment, coupled with a warning in terms of section 286 of the Criminal Procedure Act, was an appropriate sentence in the circumstances of this matter.

Whilst I do not have a problem with the approach adopted by the magistrate in the determination of what he thought to be an appropriate sentence in the instance of this matter, and in particular the *quantum* thereof, the only problem I have with the sentence, as imposed, is the cumulative effect thereof. It indeed is so that the magistrate, in considering punishment he ultimately imposed, did take into account the cumulative effect thereof. At the time the appellant appeared before the regional magistrate for sentence, the appellant was serving a sentence of somewhat four years and eight months imprisonment in respect of offences ostensibly committed subsequent to those offences for which sentence still had to be imposed. It appears that it is for these reasons and on account of the appellant's previous convictions that the magistrate decided against making an order that the sentences subsequently imposed not to run concurrently with the sentence the appellant was serving at the time or in suspending a portion thereof. He thereupon proceeded to

impose a sentence of five years imprisonment coupled with a warning in terms of section 286 of the Criminal Procedure Act, as has already been indicated. But then the effect thereof was that the appellant, after sentencing, was henceforth required to serve five more years over and above a period of four years and eight months imprisonment he was already serving at the time. In my view, the fairness of sentence or punishment imposed by the magistrate was, to a considerable extent, disturbed by the cumulative effect the sentence he subsequently imposed had on the appellant. As already pointed out, the appellant thus had to serve a period of somewhat nine years and eight months imprisonment subsequent to the imposition of the latter punishment. Whilst the period of five years imprisonment appears to be fair, fairness thereof in my view is exceedingly disturbed by the cumulative effect it had on the appellant.

The magistrate ostensibly became of the view that the appellant could not be rehabilitated without imposition of a long-term imprisonment. In this regard I disagree. In my view, the element of warning in the sentence he imposed would not only act as a further deterrent, but could also well achieve the object striven for by ordering that the sentences run concurrently as opposed to a long term of imprisonment as the magistrate seems to suggest in his judgment.

In view of what I have stated, I am of the view that there is justification to interfere with the magistrate's exercise of his discretion to the extent that the sentence of five years imprisonment imposed should be ordered to run concurrently with the sentences which the appellant was serving at the time of imposition of sentence in the current matter.

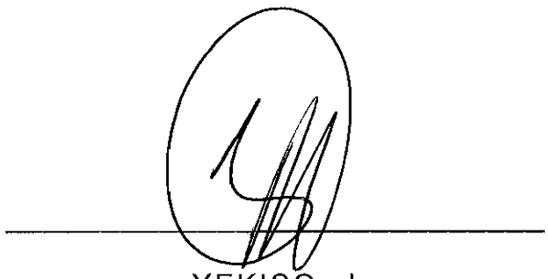
In the result, therefore, I would propose the following order, namely:-

1. That the sentence of five years imprisonment imposed by the magistrate, coupled with a warning attached thereto in terms of section 286 of the Criminal Procedure Act 51/1977 be CONFIRMED.

2. That, however, it be ordered that the sentence of five years referred to in the preceding paragraph RUNS CONCURRENTLY WITH WHATEVER SENTENCE THE APPELLANT WAS SERVING AT THE TIME OF THE IMPOSITION OF SENTENCE.

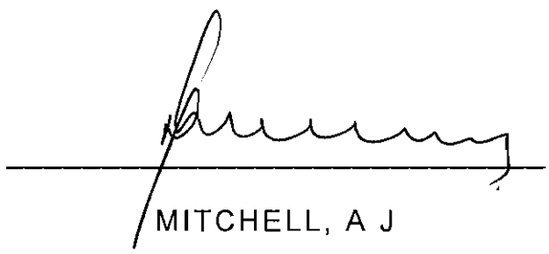
3. That the sentence be ANTEDATED DATED TO 7 FEBRUARY 2008.

It is so ordered.



YEKISO, J

I agree.



MITCHELL, A J