



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No A93/2011

In the matter between:

**THEMBELANI NGQUKUMBA**

**Appellant**

and

**THE STATE**

**Respondent**

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**VARIATION TO JUDGMENT IN TERMS OF RULE 42(1)(a):  
FRIDAY 13 MAY 2011**

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**CLOETE AJ:**

**INTRODUCTION**

[1] The appellant, who had pleaded not guilty, was convicted in the regional court at Cape Town on one count of theft on 8 November 2010 and, on the same day, sentenced to two years direct imprisonment. With the leave of the trial court he appeals against his sentence only.

## **BACKGROUND**

[2] In order to consider the sentence imposed by the trial court, it is necessary to briefly refer to the events of 22 May 2010, when the appellant committed the offence.

[3] The complainant testified that on the afternoon of that day he was sitting in front of the main house on the property at which he lives (he and his wife have a small home at the back of the property). The door to his home was open since he was watching football at the main house and intended to return to his home shortly thereafter (his wife was asleep inside). He saw the appellant going into his home, followed him and caught the appellant red handed with his (i.e. the complainant's) wallet halfway into his pocket. The complainant pushed the door closed to prevent the appellant from escaping.

[4] The complainant, a police reservist, checked the appellant's hands and his pocket. The appellant tried to run away and during the course of the scuffle which ensued the complainant grabbed his wallet out of the appellant's pocket. Nothing had been removed from the wallet. The complainant's wife awoke and the complainant instructed her to telephone the police. The appellant was arrested shortly thereafter. The complainant also testified that, in an attempt to escape from the complainant, the appellant broke the handle on the door to the complainant's home.

[5] The appellant was also identified by the complainant's wife during the course of her testimony.

[6] The complainant testified that his wallet contained bank cards, a driver's licence and an amount of approximately R100.00 in cash.

[7] The appellant's version was that he had indeed been at the complainant's home but that he had gone there to ask for directions. As he was standing at the door, the complainant came running towards him and grabbed him, and did not give him the opportunity to explain his presence. He denied that he had stolen the complainant's wallet.

[8] The magistrate accepted the evidence of the state witnesses and rejected that of the appellant.

[9] Although it was common cause that the appellant had no previous convictions, a perusal of the record makes it clear that the magistrate was strongly influenced by the prevalence of theft in the area in which the crime was committed. He stated that *"what makes it serious, it is a prevalent offence, it comes in this court quite often"*. This factor, together with *"the fact that he is not really remorseful about anything that happened"* appeared to weigh more heavily with the magistrate than the appellant's personal circumstances and absence of any previous convictions. The appellant's personal circumstances will be dealt with hereunder.

#### **THE APPLICABLE LAW**

[10] It is trite that the circumstances entitling a court of appeal to interfere in a sentence which another court has passed are limited, and these



circumstances were summarised by Marais, JA in *S v Malgas* 2001(1) SACR 469 (SCA) at 478d-g as follows:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.

[11] A judicial officer is entitled to make use of his personal knowledge regarding the prevalence of crime in his jurisdictional area. The judicial officer, however, has a duty to inform the parties of his intention to make use of personal knowledge or to take judicial notice of facts. The party concerned must be afforded the opportunity to address the court on the facts of which judicial notice will be taken and to lead such evidence as he or she deems necessary. It is irregular for a judicial officer merely to take into account the information without affording the party concerned the opportunity of dealing with this information: see *S v Chipape* 2010(1) SACR 245 (GNP) at 253c-e.

## **EVALUATION**

[12] It is clear from the record that the magistrate did not inform the parties prior to passing sentence of his intention to take judicial notice of the prevalence of theft in his jurisdictional area. In the particular circumstances of this matter the reliance placed by the magistrate on the prevalence of theft in the area constitutes, in my view, a misdirection on his part.

[13] At the time of his conviction, the appellant was 32 years old. He is a first offender. He has three small children whom he supports financially. When he was convicted he was employed as a painter and in receipt of a regular income. The appellant obtained matric and went on to study further, having completed a course in logistics. The complainant did not suffer any injuries. Neither did his wife. It seems clear that the crime was opportunistic and had not been planned by the appellant in advance.

[14] It is accepted that, since the appellant was employed, he had no need to steal from the complainant. Further, he did not voluntarily surrender the complainant's wallet to him and it was only retrieved by the complainant because of his (i.e. the complainant's) prompt action. It is also so that the appellant did not show remorse for the crime. It should however be borne in mind that, once convicted, the appellant did not attempt to apply for leave to appeal against his conviction, but against his sentence only.

[15] To my mind, the magistrate did not place sufficient weight on the appellant's personal circumstances and the sentence of two years direct



imprisonment was disturbingly inappropriate. The appellant had requested the imposition of a suspended sentence. The appellant has now served approximately six months of his sentence.

[16] As I have found that the magistrate not only misdirected himself but also imposed a sentence which is disturbingly inappropriate, this court is entitled to interfere with the sentence imposed by the lower court.

[17] Having regard to the above and to all of the circumstances in this matter, it seems to me that a fair sentence would be to impose two years imprisonment of which 18 months is suspended for a period of 5 years on condition that the appellant is not found guilty during the period of suspension of an offence involving the element of dishonesty and in respect of which he is sentenced to imprisonment without the option of a fine. From a practical point of view therefore the appellant is entitled to be released immediately.

### **CONCLUSION**

[18] I would therefore propose the following order:

**“The appeal against sentence is upheld. The sentence of two years direct imprisonment is substituted with two years imprisonment of which 18 months are suspended for a period of 5 years on condition that the appellant is not found guilty, during the period of suspension, of an offence involving the element of dishonesty and in respect of**

which he is sentenced to imprisonment without the option of a fine. The appellant is thus entitled to his immediate release. “

**JUDGMENT AND ORDER VARIED IN TERMS OF RULE 42(1)(a)**

[19] As it has become apparent since judgment was delivered herein that the appellant was released on bail on 7 December 2010 and has thus not served any portion of his sentence, paragraphs 15 and 17 of this judgment and the order in paragraph 18 of this judgment are varied as set out below:

[20] To my mind, the magistrate did not place sufficient weight on the appellant's personal circumstances and the sentence of two years direct imprisonment was disturbingly inappropriate. The appellant had requested the imposition of a suspended sentence.

[21] Having regard to the above and to all of the circumstances in this matter, it seems to me that a fair sentence would be to impose two years imprisonment of which 18 months is suspended for a period of 5 years on condition that the appellant is not found guilty during the period of suspension of an offence involving the element of dishonesty and in respect of which he is sentenced to imprisonment without the option of a fine.

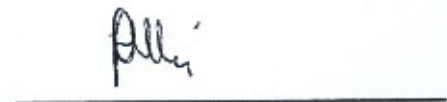
[22] I would therefore propose the following order:

"The appeal against sentence is upheld. The sentence of two years direct imprisonment is substituted with two years imprisonment of which 18 months are suspended for a period of 5 years on condition that the appellant is not found guilty, during the period of suspension, of an offence involving the element of dishonesty and in respect of which he is sentenced to imprisonment without the option of a fine."

A handwritten signature in dark ink, appearing to read 'J. Cloete', written over a horizontal line.

J I CLOETE

ALLIE, J: I agree. It is so ordered.

A handwritten signature in dark ink, appearing to read 'Allie', written over a horizontal line.

R ALLIE