In the High Court of South Africa
(Western Cape Division, Cape Town)

Case Number: A157/2021

In the matter between:

HENRICO ARENDSE **Appellant**

And

THE STATE **Respondent**

Bench: Savage, J and Lekhuleni, AJ.

Heard: 27 August 2021

Delivered: 30 August 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 30 AUGUST 2021 at 10h00.

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] This is an appeal against sentence. The appellant was convicted by the Paarl Magistrate Court on two counts of Theft out of a motor vehicle. In respect of each count, the appellant was sentenced to 36 months' imprisonment half of which was suspended for five years on condition the appellant was not found guilty of theft or

attempted theft committed during the period of suspension. The appellant was effectively sentenced to 36 months' direct imprisonment in respect of both counts. Aggrieved by this decision, the appellant applied for leave to appeal his sentence in term of section 309B of the Criminal Procedure Act 51 of 1977 (*"the Act"*) and his application was refused by the trial court. Thereupon the appellant petitioned the Judge President of this division in terms of section 309C(2)(a)(iii) the CPA. Pursuant thereto, leave to appeal against sentence was granted by this court. The appellant was released on bail pending the outcome of the appeal.

THE FACTUAL MATRIX

[2] The State preferred two counts of theft out of a vehicle against the appellant. The allegations against the appellant were that on 20 October 2018 he unlawfully and intentionally stole two car radios from two different vehicles of the complainant. As a result, two counts of theft out of a motor vehicle were levelled against him. Each radio was valued at R1300. The appellant who was legally represented throughout the trial, pleaded guilty to both counts. A statement in terms of section 112(2) of the CPA was prepared and submitted into the record.

[3] The facts of the matter gleaned from his 112(2) statement were that on the day in question the appellant went into the complainant's property. He jumped over the fence and opened the doors of the two vehicles of the complainant. He proceeded to remove the car radios of the two vehicles and left with them. He sold the radios and was later arrested by the police. One of the radios was recovered by the police and the other radio was not. After considering the statement and

admissions made by the appellant in his 112(2) statement, the trial court subsequently convicted the appellant on both counts. After listening to arguments in mitigation and aggravation of sentence, the court below sentenced the appellant to 36 months' imprisonment in respect of each count half of which was suspended for five months on normal conditions.

GROUNDS OF APPEAL

[4] The appellant's grounds of appeal can succinctly be summarized as follows:

1. The appellant contends that the magistrate erred in over-emphasising the prevalence of the type of offence and overlooked the personal circumstance of the appellant.
2. That the magistrate erred in sacrificing the appellant on the altar of deterrence to pay for and deter all of the community's related crimes.
3. That the magistrate erred by not giving proper and through consideration to the fact that the appellant was relatively young and was a first offender.
4. That the magistrate erred by not meticulously balancing the aggravating factors placed before her by the state with the mitigating factors placed on record by the defence.
5. That the magistrate erred by not giving proper and thorough consideration to the element of mercy especially in the light of the appellant being a young offender.

DISCUSSION

[5] In order to curb the spike of Covid-19 infections and in concurrence with the legal representatives of both parties we invoked the provisions of section 19(a) of the Superior Courts Act 10 of 2013 to dispose of the appeal on the written submissions of the parties without the hearing of oral argument. To this end, both parties filed comprehensive heads of arguments and I am indebted to them.

[6] It is a fundamental principle of our law that a court of appeal will not lightly interfere with an imposed sentence. Recently, in *S v McLean* (A112/21) [2021] ZAWCHC 158 (12 August 2021) at para 15, this court restated the trite principle of our law which has repeatedly been stressed by our courts that the imposition of sentence falls pre-eminently within the discretion of a trial court. The court also emphasised the fact that the powers of the court of appeal are relatively limited to those instances where the sentence is vitiated by misdirection or where the sentence imposed is startlingly inappropriate and induces a sense of shock or where there is a striking disparity between the sentence imposed, and that which a court of appeal would impose. The Supreme Court of Appeal *S v Jimenez* 2003 1 SACR 507 (SCA) para 6, found that even where a sentence does not seem shockingly inappropriate, a Court on appeal is entitled to interfere, or at least to consider the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion. (See, also *S v Petkar* 1988 (3) SA 571 (A); *S v Siebert* 1998 (1) SACR 554 (SCA)).

[7] The record of the trial court reveals that the appellant was 25 years old. He lives with his mother and was working as a farm worker. He earned R750 per week. The court was informed that the appellant used his income to support his mother. The appellant went as far as grade 7 at school. He was a first offender and had no previous convictions and had no pending cases against him. It was also argued on behalf of the appellant in the court a qou that the appellant helped the police in recovering one of the stolen radios and that this should count in the appellant's favour. The court was asked to blend its sentence with a measure of mercy and to impose a wholly suspended sentence. The State prayed for a custodial sentence and implored the court to send a message to the community that this type of offences will not be accepted by court.

[8] The imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. It is a nuanced process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an accused. That measure is achieved by a consideration, and an appropriate balancing, of what the well-known case of *S v Zinn* 1969 (2) SA 537 (A), at 540G-H described as a 'triad' consisting of the crime, the offender and the interests of society' (see *S v Clayton Arendz and Others,* Case number CC96/09 (01 March 2010) (ECH). The *Zinn* triad is applicable in all sentencing proceedings and these factors should be considered in a balanced manner.

[9] In my view, the cumulative effect of the sentence imposed by the court below is so disproportionate and evokes a sentence of shock. The court below over

accentuated the seriousness of the offence and overlooked the personal circumstances of the appellant. The judgment of the court a quo on sentence deals solely with the interests of society and the seriousness of the offence and nowhere can this court find where the trial court had taken the personal circumstances of appellant into consideration save for stating the age of the appellant and that he pleaded guilty. More importantly, the trial court confused the personal circumstances of the appellant which were placed before her by her attorney. She stated that the appellant was being maintained by his mother and that there was no need for him to commit this offence, when in truth, it was the appellant who was maintaining his mother. From the reading of the record, it is very clear that this fact was not at all considered by the trial court.

[10] In her judgment on the application for leave to appeal, the court a quo noted that it did not impose a maximum term of imprisonment and that this is evident that she showed mercy by suspending half of the sentence. The trial court also noted that since it started to impose these stiff sentences in its court, the number of new cases in her court, have declined tremendously which is clear nexus between the appropriateness of the sentences and this type of offences.

[11] It may be so that pursuant to the sentences imposed by the trial court the number of new cases have dwindled. However, it must be stressed that each case must be dealt with according to its own merits. It must be emphasised that a one size fits all approach does not at all find application in sentencing. Each case must be dealt with according to its own merits. In this regard, I agree with the views expressed by Terblanche SS: '*Twenty Years of Constitutional Court Judgments:*

What Lessons are there about Sentencing? PER / PELJ 2017(20) at p.26, that courts have to carefully individualise their sentences by considering all the factors relevant to the matter, in particular those mitigating or aggravating the crime and those that affect the culpability of the offender. (See *S v Maake* 2011 (1) SACR 263 (SCA) paras 19-20). The learned author notes that courts are endowed with a wide discretion, because every case is unique and the sentence has to cater for each important unique feature of the case.

[12] This principle enunciated above was supported by the Supreme Court of Appeal in *S v Jimines* (*supra* at para 6), where the court said that 'while it may be useful to have regard to sentences imposed in other similar cases, each offender is different, and the circumstances of each crime vary. Other sentences imposed can never be regarded as anything more than guides taken into account together with other factors in the exercise of the judicial discretion in sentencing.' In my view, the court a quo erred in the exercise of its discretion. It is further my considered view that the trial court adopted a skewed approach in sentencing and committed a misdirection that warrants an intervention by this court.

[13] It must be stressed that no one should be deprived of his freedom without a just cause. The deprivation of liberty for an extended period of time must be proportional to the offence committed and must be justified by having regard to all the factors of the triad. Section 12(1)(e) of our Constitution guarantees the right not to be treated or punished in a cruel, inhuman or degrading way. In my considered view, a disproportionate sentence that fail to strike a balance on the triad but instead,

gives prominence to one factor of the triad over the other, is unconstitutional as it offends against section 12(1)(e) of the Constitution.

[14] The court a quo gave a long judgment on the application for leave to appeal without making a ruling whether or not another court may come to a different conclusion to the one it reached. What I find concerning in that judgment is that the court lamented the fact that it remained in the dark as to how the appellant knew that the vehicles were not locked; how the appellant knew when the premises were not guarded and on how he knew how to gain entry to the complainant's business premises. The trial court also noted that it was in the dark as to how did it come that the appellant decided to assist the police.

[15] It must be stressed that it was the duty of the court below to question the appellant to clarify this information during the plea proceedings. Although the appellant was legally represented the trial court still had a duty to ensure that all the relevant evidence is available when it sentenced the appellant. Section 112(2) of the CPA makes it abundantly clear that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement. Subsection 3 of the same section echoes the same sentiments. The relevant parts of section 112(3) provides that there is nothing in this section that shall prevent the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

[16] On a conspectus of all the evidence placed before court, I am of the view that the court a quo adopted a skewed approach on sentence. Indeed the magistrate overemphasised the prevalence of the offence in her jurisdiction and failed to individualise and evaluate the appellant before her. From the reading of her judgment on sentence and all the analogies that she makes, it seems to me the magistrate approached sentencing in a spirit of anger. This in my view, clouded her mind in the exercise of her judicial discretions. I consider the finding of Kotze AJA as he then was, in *S v Rabie* 1975 (4) SA 875 (A) at p. 866, apposite in this matter. In a concurring judgment the judge said:

> 'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.'

[17] It is appreciated that theft out of a motor vehicle is a serious offence however, this is not the only consideration of the triad. It was incumbent upon the trial court to consider the personal circumstances of the accused and the interest of society and to impose a sentence that strikes an equilibrium in the three competing factors.

[18] As discussed above, the appellant in this case was a first offender. He was 25 years old. He was remorseful for what he did. He pleaded guilty to the charge and he did not waist the court's time. He cooperated with the police in their investigation and

this led to the recovery of one of the stolen radios. He was the bread winner at home and supporting his mother. He was employed as a farm worker and earning a salary R750 per week. In my view, a collective consideration of all these factors should have persuaded the trial court to impose a wholly suspended sentence on both counts.

[19] The cumulative effect of the sentence imposed by the trial court is startlingly disproportionate and evokes a sense of shock. In my view, it is prudent not to remit the matter to the trial court as all the relevant facts are on record. This matter has been outstanding since 2018 and I want to believe that the appellant is yearning for the finalisation of the matter. His first appearance in court was on the 24 October 2018. It is almost three years that this matter has been pending in the courts. The remittance of this matter to the court a quo will unnecessarily further delay the finalisation of this case.

[20] I have considered the personal circumstance of the appellant. I have considered the arguments on appeal from both the State and from the appellant. I have also considered the fact that the appellant is a first offender as well as arguments from both sides presented before the trial court as recorded and I am of the view that a sentence of eighteen (18) months' imprisonment which is wholly suspended in respect of both counts is appropriate in the circumstances.

ORDER

[21] In the result, I propose the following order:

21.1 The two sentences in respect of count 1 and 2 respectively of thirty six months imprisonment of which eighteen months is suspended for a period of five years on condition the accused is not found guilty of theft, attempted theft, contravening section 36 or 37 of Act 62 of 1955 committed during the period of suspension are hereby set aside and replaced with the following sentence:

21.1.1 The accused is hereby sentenced to eight (18) months' imprisonment which is wholly suspended for a period of five years on condition the accused is not found guilty of theft, attempted theft, contravening sections 36 or 37 of the General Law Amendment Act 62 of 1955 committed during the period of suspension. Both counts are taken together for the purposes of sentence.

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LEKHULENI AJ

WESTERN CAPE HIGH COURT

I agree, and it is so ordered

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SAVAGE J

WESTERN CAPE HIGH COURT