

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

DATE: 14/3/05

Magistrate:

THABAZIMBI

Review Case no.: N993/04

High Court Ref. No.: 130

THE STATE VS JOSEPH MASHELE

REVIEW JUDGMENT

WEBSTER J

The accused was convicted in the Magistrate's Court, Thabazimbi, on a charge of contravening the provisions of section 117(a) read with section 1 of the Correctional Service Act No. 111 of 1998, that is, escaping from lawful custody. He was sentenced to three (3) years' imprisonment. The matter is before me by way of automatic review.

When the matter first served before me I directed a query to the Director of Public Prosecutions (DPP) as to whether the sentence was not too severe. A memorandum from the DPP is now to hand. The views expressed by the counsel are most helpful.

The background to this case is short. The accused was detained in one of the cells at the Northam Police Station together with other detainees, on a charge of murder. Some of the inmates had hacksaw blades. They sawed through the metal burglars of a window. The accused then escaped with the other inmates of the cell. This version which was given by the accused in his statement in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977, was accepted by the Public Prosecutor. The accused was correctly convicted.

The accused was arrested after a month.

Escaping from custody is generally regarded as a serious offence. In determining what an appropriate sentence should be various factors must be considered together with those that traditionally form the "triad": that is trite. Dealing with these factors BECK C,J. held in *S v Lajeke* 1990(2) SA 880 TKGD at page 881 D - F: " ... Whether the escape was accompanied by violence to persons or property.

Whether the escape was premeditated or opportunistic and tempted.

What particular motives the accused had for escaping.

Whether there was a conspiracy with others to escape.

The duration of his liberty before re-arrest.

The extent to which the State was put to trouble and expense to effect his re-arrest.

This enumeration is not intended to be exhaustive, and of course there are always the considerations to be borne in mind of the prevalence or otherwise of the offence and the personal circumstances of the offender."

In *casu*, there was no violence used. The damage to the cell was restricted to the burglar bars. The escape, though premeditated by those who had hacksaws was an opportunistic one by the accused. There is nothing to suggest that he had been party to any conspiracy to escape. There is no evidence of how the accused was re-arrested or the

circumstances surrounding such re-arrest or the expense that the State was put to in securing this re-arrest. These circumstances are all mitigatory.

The accused's circumstances, shortly stated, are that he was 35 years of age. He is unmarried. He was employed as a general assistant on a construction site earning R980 per month. He has a Standard Five level of education.

Viewed against this background the sentence imposed on the accused is, as State counsel have remarked in their memorandum, "shockingly inappropriate". I agree. It is not in accordance with justice and has to be set aside.

The following order is granted:

- 1. the conviction is confirmed;**
- 2. the sentence is set aside and substituted with:
"The accused is sentenced to twelve months' imprisonment."**
- 3. A copy of this judgment must be forwarded to the trial Magistrate.**

G. WEBSTER
JUDGE IN THE HIGH COURT

I agree.

D S S MOSHIDI
ACTING JUDGE IN THE HIGH COURT

