THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A102/2014

DATE OF HEARING: 3 DECEMBER 2015

DATE OF JUDGMENT: 11 DECEMBER 2015

In the matter between:

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

TIBANE, MARKUS Appellant

And

THE STATE Respondent

CORAM: Avvakoumides AJ and Hundermark AJ

J U D G M E N T

AVVAKOUMIDES, AJ

[1] The Appellant was charged with the following charges in the Kempton Park Regional Court:

- Count 1 – possession of suspected stolen property, contravention of section 36 of the General Amendment Act 62 of 1955, namely a Toyota Hilux bakkie.
- Count 2 – possession of suspected stolen property, contravention of section 36 of the General Amendment Act 62 of 1955, namely a Toyota Siyaya micro bus.
- Count 3 – possession of suspected stolen property, contravention of section 36 of the General Amendment Act 62 of 1955, namely a Toyota Dyna engine.
- Count 4 – possession of suspected stolen property, contravention of section 36 of the General Amendment Act 62 of 1955, namely a credit card from Standard Bank.
- Count 5 – fraud in respect of an identity document.
- Count 6 – fraud in respect of a death certificate.

[2] The Appellant pleaded not guilty to all the charges and was convicted of charges 1, 2, 5 and 6. The Appellant was sentenced as follows:

- In respect if count 1 – 6 years' imprisonment.
- In respect if count 2 – 7 years' imprisonment.
- In respect if count 5 – 10 years' imprisonment.

- In respect if count 6 – 10 years' imprisonment.

[3] The trail court ordered that the sentences in respect of counts 5 and 6 are to run concurrently, making the effective sentence one of 23 years. The appeal lies only against the sentence of the trial court.

[4] In S v Obisi 2005 (2) SACR 350 WLD, S v Rabie 1975 (4) SA 855 (A) at 857 D-E and S v De Oliveira 1993 (2) SACR 59 A at 667, it was held that the test on appeal is not whether or not the court sitting on appeal would have imposed another form of punishment, but rather whether the trial court exercised its discretion properly and reasonably when imposing sentence. I am mindful of the decision in S V De Jager 1965 (2) SA 616 (A) at 628 where the discretion of the appeal court was described as not having a general discretion to ameliorate the sentences of trial courts but that it is the trial court that has such discretion.

[5] It appears from the judgment of the court below that the trial court did indeed take into account the so called general factors set out in S v Malgas 2001 (1) SACR 469 (SCA) in sentencing. The question arises whether there are factors justifying intervention by this court. The trial court, in my view, and in respect of count 5, overemphasized the crime by stating that that Appellant had committed a series of transactions whereas the conviction was only in respect of one count. In respect of count 6 the trial court stated that the Appellant had done nothing insofar as the death certificate is concerned but that it might have been presumably been handed to an insurer. There was no evidence

that the Appellant had used the death certificate. In these two instances I am of the view that the trial court erred in its sentencing of the Appellant and misdirected itself.

[6] Counsel for the Appellant submitted that the cumulative effect of the sentences is shockingly harsh. I have had regard to the case of S v Robiyana & Others 2009 (1) SACR 104 (Ck) in which the following was held:

"*To the extent that the cumulative effect of the sentence might appear to be 'shocking', this result is the inevitable consequence of the appellant's own criminal activities, purposefully executed with contemptuous disregard for the law and rights of others. When an accused commits a number of criminal offences it is an inevitable consequence that the aggregates of the sentences that must accrue on each count will result in a total sentence which appears 'shocking'. This, however, does not mean that it is to be classified as shocking.*

A sentence is only to be classified as shocking if it is disproportionate to the crime in question. Whereas a court is required to be mindful of the cumulative effect of sentences, it is precluded from reducing the sentence on each or any one count to the extent of trivialising the gravity of the count in question."

[7] Mindful of the Robiyana decision I am of the view that the cumulative effect of the sentencing is disproportionate to the crimes in respect of counts 5 and 6. Under the circumstances, I am of the view that, in respect of counts 5 and 6,

an appropriate sentence should be imprisonment for a period of 3 years on each of these counts. I find it unnecessary to interfere with the sentences in respect of counts 1 and 2.

[8] Accordingly the appeal is upheld and the Appellant is sentenced as follows:

[8.1] In respect of counts 1 and 2 the sentences are confirmed as 6 and 7 years respectively.

[8.2] In respect of counts 5 and 6 the Appellant is sentenced to imprisonment of 3 years on each count.

[8.3 The sentences in respect of counts 5 and 6 are to run concurrently with the sentences in respect of counts 1 and 2.

[8.4] The effective sentence of the Appellant is thus 13 years.

[8.5] The sentence is antedated to 28 February 2012 in terms of section 282 of the Criminal Procedure Act 51 of 1977, being the date upon which the sentences were imposed.

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G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

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P. R. HUNDERMARK

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Representation for Appellant:

Counsel: E. Van der Merwe

Instructed by: K. Nel Attorneys

Representation for the Respondent:

Counsel: T. P. Mpekana

Instructed by: Director of Public Prosecutions