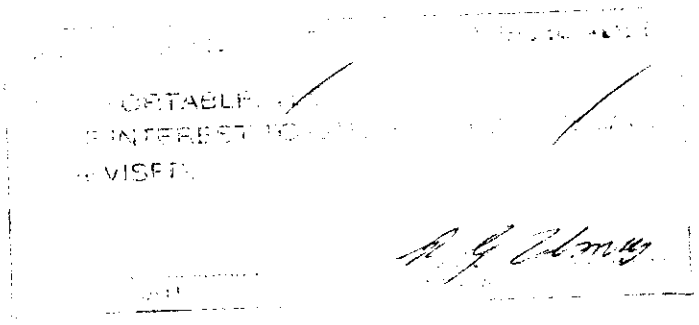
IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA) 16/11/12

CASE NO: A591/2008



IN THE MATTER BETWEEN:

FERNANDO DE ARAUJO CUNHA — APPELLANT

AND

THE STATE — RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] This appeal came before us nearly 20 years after the incident occurred which led to charges being brought against the appellant and his co-accused and 13 years after they were convicted on 27 September 1999. Leave to appeal was granted on petition against sentence on 13 January 2006. On 16 March 2006 the appellant was released on bail pending appeal, after having been incarcerated on 27 September 1999.

[2] On a perusal of the record it transpired that it took ± 5 years to finalise the trial. It would seem that various factors contributed to this delay. The appellant was out on bail for the duration of the trial.

BACKGROUND

[3] During 1993 two trucks were hi-jacked. Appellant's co-accused in this matter were involved in the hi-jacking of the vehicles. The appellant was not involved in the hi-jacking itself, but he acquired possession of the vehicles and the police ultimately found the trucks on his business premises and registered in his name. At the time the appellant operated a transport business. The appellant was charged with the 4 other accused with 2 counts of robbery with aggravating circumstances. Appellant was found guilty on 2 charges of theft. Accused one was found guilty on both charges of robbery with aggravating circumstances and accused 2, 3 and 4 were found guilty on one charge of robbery with aggravating circumstances.

[4] Accused one was sentenced to 10 years imprisonment on each count (effective 20 years). Accused 2, 3 and 4 were sentenced to 10 years imprisonment. Appellant was sentenced to 10 years imprisonment on each count (effective 20 years).

[5] The other accuseds' convictions were confirmed on appeal on 19 September 2005. The sentences of accused 2, 3 and 4 were confirmed but accused one's sentence was altered in that 5 years were suspended for 5 years on certain conditions.

INCOMPLETE RECORD

[6] The record before us is incomplete. The evidence of several witnesses does not form part of the record. There is also no record of the bail proceedings. The appellant's legal representative attributes the problems to the lapse of time. We were informed that it is not possible to reconstruct the record. Both the appellant and the respondent's legal representatives argued however that the record is adequate to enable us to consider on appeal the sentence imposed on the appellant. We are entitled to proceed to consider the appeal if the record can be regarded as adequate[1]. The evidence of inter alia the appellant on the merits as well as the evidence of the witnesses who testified in mitigation and the judgment on sentence form part of the record. Despite the shortcomings in the record, I am satisfied that the record is adequate so as to enable us to consider the sentence imposed on the appellant on appeal.

[1] S v Chabdei 2005(1) SACR15 SCA

THE DELAY

[7] In this matter the age old adagio "justice delayed is justice denied" came to mind. The incident which led to the charges being laid, as already stated occurred some 20 years ago. The accused were sentenced 13 years ago. It took more than 6 years since leave to appeal was granted for the matter to come before us.

[8] On a perusal of the record it is impossible to determine the reasons for the delay in finalising the appeal. During argument the DPP's counsel indicated that the appellant failed to take the necessary steps to pursue the appeal since his release on bail. She indicated during argument that the DPP tried to trace the appellant during 2008 but it transpired that he was no longer at his known address. The correspondence pertaining to this was not placed before us. Mr de Beer, on behalf of the appellant argued that the DPP was obliged to take steps to enrol the matter when the appellant failed to do so, and contended that both the appellant and the DPP are to blame. In the matter of **Mthembu v The State**[2] the following was said with reference to the obligations of convicted persons who are out on bail:

"Convicted persons out on bail pending appeal or application for leave to appeal are under an obligation to ascertain the outcome of their appeal processes and to present themselves to serve their sentences if the appeal processes fail".

[2] Case CCT 115/09 [2010] ZACC 8

[9] It is clear that an appellant has a duty to take steps to ensure a prompt finalisation of a matter. In this instance we had no information pertaining to the bail conditions, nor were we in possession of the correspondence by the DPP. We also don't have any information pertaining to any steps taken by the appellant, if any, to ensure the finalisation of the matter.

[10] In the light of the paucity of information pertaining to the delay. I am of the view that although the appellant should have taken steps to pursue the appeal, the DPP is primarily obliged to ensure that matters are finalised within a reasonable period of time. In my view the DPP should have proceeded to enrol the matter when appellant failed to take the necessary steps to pursue the appeal. The DPP in my view has a duty to society to ensure that the administration of justice runs smoothly and in accordance with the spirit and ethos enshrined in the Constitution. They would fail in their duty to uphold the Constitution if they leave the finalisation of matters in the hands of appellants who may abuse the system by their inaction.

[11] The appellant is in terms of the Constitution[3] entitled to have a matter finalised within a reasonable time, this must also include appeal procedures. Especially the 6 years delay which occurred before the matter came before us cannot by any stretch of the imagination be regarded as reasonable. It is virtually impossible to ensure that justice is done when a delay like this occur.

[3] The constitution of the Republic of South Africa, 1996, sec 35(e)

THE SENTENCE

[12] It is trite that the question of sentence is best left in the discretion of the trial court and that it should only be interfered with if there is a material misdirection or if the sentence is "shocking", "startling" or "disturbing inappropriate[4]".

[13] In the judgment on sentence the learned magistrate dealt extensively with all the relevant aggravating and extenuating circumstances. He considered the evidence in mitigation and evaluated it properly before he came to his conclusion. He specifically dealt with the effect that the appellant's actions had on his business and family and in my view quite correctly found that these consequences should be expected when one chooses to resort to crime. He quite correctly took into consideration the fact that the appellant was driven by greed as he did not come from a background of poverty as the other accused did. In my view he did not misdirect himself when he imposed the same sentence on appellant as he did on accused 1, despite the fact that appellant was found guilty of a lesser crime. If it was not for people like appellant who obtain stolen goods, people like the other accused won't see crime as a solution to their circumstances. In the light of the aforesaid I do no find any misdirection pertaining to the sentence imposed.

[14] However, the inordinate long delay in bringing this matter to its final conclusion poses certain difficulties. The appellant has a constitutionally

[4] Inter alia S v Malgas 2001(1) SACR 469 at 478D-G

enshrined right to a finalisation of proceedings against him without unreasonable delay[5]. It transpires from the record that he spent approximately 6½ years in jail before he was released on bail. He was incarcerated from date of conviction until 16 March 2006. He has been on bail for a period of 6½ years before this matter was heard.

[15] Unfortunately no facts were put before us pertaining to his present situation. There is however also no evidence before us that he led anything but an exemplary life since his release. It is regrettable that no evidence was put before us pertaining to his present situation but I am of the view that we can accept that to send him back to jail at this point will be highly disruptive to him and his family. We considered postponing the matter to get further information, but decided against it as it would lead to a further delay.

[16] The delay, the period that he was incarcerated as well as the fact that he has been out on bail for a long time are facts that arose subsequent to him being sentenced, and the question that arises is whether we can take these facts into consideration. In the matter of **Goodrich v Botha**[6] the learned judge indicated that a court may in "exceptional circumstances" take cognisance of facts that arose subsequent to the trial. In the matter of **S v Harman**[7] the following was said in this regard:

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[5] Sec 35(e) Constitution of the Republic of South Africa, 1998
[6] 1954(2) AS 540 at 546 A
[7] 1991(1) SACR (C) 326 g-i

"The general approach in these matters is that a Court of appeal decides whether a judgment was right or wrong according to the facts which existed at the trial. Goodrich v Botha and Others 1954(2) SA 540 (A) at 546A. Schreiner JA in that case left open the possibility that a Court may, in exceptional circumstances, take account of subsequent events. This approach was followed in S v Drummond 1979(a) SA 565 (RA) and in S v Sithole 1988(4) SA 177 (T)."

[17] I am of the view that in the interest of justice we should take the facts that arose subsequent to him being sentenced into consideration. The delay should be considered with reference to sec 35(e) of the Constitution, to which I have already referred. We should therefore consider the effect of any order that we make on the appellant and make an order, in the interest of justice, which would prevent the necessity of the appellant being sent back to jail. In my view it is impossible to properly apply the triad consisting of the crime, the offender and the interest of society after the effluxion of such a long period of time[8]. The appellant's interest in my view should take preference in the light of the Constitutional imperative to see to the finalisation of proceedings without unreasonable delay, as well as the circumstances of this case.

[18] Consequently I make the following order:

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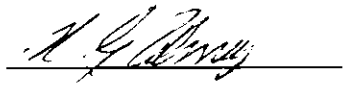
[8] S v Zinn 1969(2) SA 537 A

18.1 The sentence is set aside, and substituted with the following:

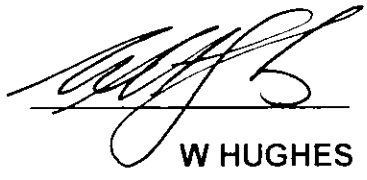
18.2 "The appellant is sentenced to 10 years imprisonment on each count. Four years on the second count is suspended for 4 years on condition that the appellant is not found guilty of an offence of which dishonesty is an element during the period of suspension. The sentences are ordered to run concurrently".



R G TOLMAY

JUDGE OF THE HIGH COURT

I AGREE:



W HUGHES

ACTING JUDGE OF THE HIGH COURT

F DE A CUNHA v THE STATE

CASE NO: a591/2012

DATE OF HEARING:	6 NOVMEBER 2012
DATE OF JUDGMENT:	16 NOVEMBER 2012
ATTORNEY FOR APPELLANT:	MARIUS BOTHA ATTORNEYS
	SUNWALD PARK
	BOKSBURG
ADVOCATE FOR APPELLANT:	ADV C DE BEER
ATTONREY FOR RESPONDENT:	STATE ATTORNEY (DPP)
ADVOCATE FOR RESPONDENT:	ADV M J MAKGWATHA