THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 064/11

In the matter between:

SHELDON PATRICK FURLONG **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Furlong v State* (064/11) [2011] ZASCA 103 (1 June 2011)

Coram: NAVSA, SERITI JJA and PETSE AJA

Heard: **24 May 2011**
Delivered: **1 June 2011**

Summary: Criminal Law ─ sentence ─ accused charged with a contravention of section 36 of the General Law Amendment Act 62 of 1955 ─ magistrate equating offence with more serious offences ─ sentence set aside and substituted with a lesser sentence.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Mavundla J and Van Zyl AJ sitting as a court of appeal):

1. The appeal is allowed.

2. The order of the court a quo is set aside and in its place the following is substituted:

'1. The appeal is upheld.

2. The sentence imposed by the magistrate is altered to read as follows:

"The accused is sentenced to three years' and two days' imprisonment."

3. The substituted sentence set out in 2 above is antedated to 18 May 2007.'

JUDGMENT

PETSE AJA (NAVSA and SERITI JJA concurring)

[1] The appellant stood trial in the regional court, Musina, on a charge of contravening s 36 of the General Law Amendment Act 62 of 1955.[1]

[2] It was common cause at the trial that on or about 24 October 2006 the appellant was, at or near Beit Bridge in the regional division of

[1] S36 provides:
'Failure to give a satisfactory account of possession of goods. Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.

Limpopo, found in unlawful possession of an Audi Q7 four-wheel drive motor vehicle (the vehicle) valued at R750 000. There was a reasonable suspicion that the vehicle had been stolen as the appellant was unable to proffer a satisfactory account of such possession.

[3] Having pleaded guilty to the charge he was duly convicted as charged and sentenced to imprisonment for a period of seven years.

[4] The appellant unsuccessfully appealed against his sentence to the Pretoria High Court. Aggrieved by this result the appellant applied to the Pretoria High Court for leave to pursue a further appeal against sentence to this court, which was granted.

[5] The owner of the vehicle, Mr Hlanigani Joseph Maluleke testified in relation to sentence only. A summary of his evidence is set out hereunder. On 14 October 2006 at about 19h00 he was driving the vehicle on Klagobela Street in Atteridgeville when he realised that there was a white motor vehicle driving behind him. When he reached the end of the street, which was a cul-de-sac, a white motor vehicle parked behind him, rendering it impossible for him to execute a u-turn. Suddenly someone was pointing a gun at him alongside the driver's window of his vehicle, demanding that he alight. He complied and at that stage saw two other men opening the rear passenger door of his vehicle. Then he was shoved into the vehicle and instructed to lie face down as they drove from the scene.

[6] The hijackers searched Mr Maluleke and seized his automated bank teller cards. He was compelled to disclose the personal identity numbers of his bank cards under threat of death should the numbers

disclosed turn out to be false. Later he was ejected from the vehicle, pushed down a slope and bushy area, with both his hands tied behind his back. He managed to walk to a toll plaza on the N4 road between Rustenburg and Atteridgeville from where the police were summoned.

[7] Mr Maluleke subsequently learnt, on making enquires from Standard Bank and ABSA Bank, that a total of R18000 had been withdrawn from his bank accounts. When his motor vehicle was recovered by the police on 24 October 2006 his laptop, digital camera, bank cards and cheque book were missing. Due to the fact that he was robbed of his motor vehicle at night he could not identify his assailants. So much then for his evidence.

[8] It is apposite at this stage to mention that in his written statement in substantiation of his guilty plea in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, the appellant admitted all the essential elements of the offence charged including admitting that at the time of his arrest he was in no position to give a satisfactory account of his possession of the vehicle and that his dealings with the vehicle were at all material times intentional and unlawful.

[9] The circumstances in which an appellate court would be justified in interfering with a sentence of the trial court have been restated in a long line of judgments of this court. In *S v Mtungwa & 'n ander* 1990 (2) SACR 1 (A) this court held that once it is shown that one, some or all of the following factors exist the appellate court would be justified to interfere, namely: if the sentence is, for example, (i) disturbingly inappropriate; (ii) totally out of proportion to the magnitude of the offence; (iii) sufficiently disparate; (iv) vitiated by misdirection showing

that the trial court exercised its discretion unreasonably and (v) is otherwise such that no reasonable court would have imposed it. (See also *S v L* 1998 (1) SACR 463 (SCA); *S v Salzwedel & others* 1999 (2) SACR 586 (SCA); *S v Giannoulis* 1975 (4) SA 867 (A) at 868G-H; *S v Kgosimore* 1999 (2) SACR 328 (SCA) at para 10)

[10] On appeal before us the severity of the sentence imposed on the appellant was assailed on a number of bases. It was contended that the trial court paid little or no regard to the moral blameworthiness of the appellant; failed to give due weight to the fact that by pleading guilty the appellant had thereby expressed contrition; and committed a material misdirection by imposing 'an exemplary sentence' that had the effect of 'dramatically altering the existing sentencing patterns'.

[11] The critical issue for determination in this appeal therefore is whether the trial court committed a material misdirection of the nature alleged or there is otherwise justification warranting interference with the sentence imposed by the trial court. Allied to that issue is the question whether the court a quo should have come to a conclusion different to the one reached by it.

[12] The magistrate based his reasoning for the sentence imposed on the following factors: (a) the seriousness of the offence that the appellant was convicted of, aggravated by the fact that the vehicle concerned had been hijacked; (b) the alertness of the police that led to the recovery of the vehicle meant that their 'good work' was deserving of appreciation to be reflected by imposing a sentence that 'would encourage them to combat crime in the future as they have in this case'; (c) that car-hijackers and thieves would continue relentlessly with their nefarious activities for so

long as there were people such as the appellant who hold themselves ready to dispose of hijacked and stolen vehicles; (d) the prevalence of the offence in the area of jurisdiction of the trial court.

[13] In making these observations on reaching a decision on an appropriate sentence the trial court was in fact equating the offence that the appellant was charged with with the offence of robbery and/or theft. Put differently he was being punished for more serious offences than the one he was being charged with. In particular the magistrate appeared intent on punishing the appellant for the actions of the hi-jackers. This is a material misdirection which is inextricably linked with the trial court's decision on an appropriate sentence. There is no doubt that it is that view that resulted in a more severe sentence. This court is thus at large to interfere.

[14] Although the learned magistrate was at pains to point out that he would take care not to sacrifice the appellant on the altar of deterrence, I am satisfied that, given the severity of the sentence that he ultimately imposed on the appellant, he in fact only paid lip service to this laudable principle.

[15] It remains to consider what, in the circumstances, is an appropriate sentence in substitution of the one imposed by the trial court and confirmed by the court a quo.

[16] We were informed by counsel for the appellant at the hearing of the appeal ─ following inquiries made by him from correctional services at the behest of this court ─ that the appellant had been released under correctional supervision on 20 May 2010. The appellant was sentenced to

seven years' imprisonment on 18 May 2007, which then means that he had served three years of his seven year sentence. Prior to his conviction he was in police detention for four months awaiting trial. He was at the time of his conviction a first offender and 40 years of age. It must be mentioned that, although he pleaded guilty to the charge, it is not possible to discern, on the evidence before us, whether his guilty plea can be taken as an expression of genuine remorse or was rather provoked by a stark realisation on his part that the State had 'an open and shut' case against him, in which event his guilty plea would be a neutral factor.[2] The appellant also had two minor children then aged 11 and 15 years who, it would appear, were solely dependant on him for their livelihood. He had just found employment as a despatch clerk from which he would have earned a salary of R2000 per month.

[17] The appellant's counsel submitted on his behalf that the appellant's role was merely to deliver the vehicle to someone in Zimbabwe. This submission appears well founded.

[18] There are aggravating factors that are deserving of due consideration. The appellant was convicted of a serious offence. It is thus perfectly understandable that the learned magistrate gave the appellant's plea for an option of a fine short shrift. As stated before he had been found in possession of a relatively new motor vehicle, worth almost R800 000, which was on the verge of being whisked away beyond the borders of this country.

[19] There is no doubt that a sentence of 7 years' imprisonment is more appropriate in the case of theft of a motor vehicle. And as pointed out

[2] See *S v Barnard* 2004 (1) SACR 191 (SCA) at 197g-h.

before the magistrate in sentencing the appellant appeared intent on punishing the appellant for the acts of the hi-jackers. The period spent in jail by the appellant awaiting trial and the fact that he has already been released under correctional supervision are relevant factors in a decision concerning an appropriate sentence.

[20] In my view the state rightly conceded that a suitable sentence in all the circumstances of this case is the period of imprisonment already served. The effect of the order below is that there will be no further period of imprisonment to be served by the appellant. Thus the sentence will be antedated.

[21] In the result the following order is made:

1. The appeal is allowed.
2. The order of the court a quo is set aside and in its place the following is substituted:

‘1. The appeal is upheld.

2. The sentence imposed by the magistrate is altered to read as follows:

“The accused is sentenced to three years’ and two days’ imprisonment.”

3. The substituted sentence set out in 2 above is antedated to 18 May 2007.’

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XM Petse
Acting Judge of Appeal

APPEARANCES

APPELLANT:	HL Alberts Instructed by Pretoria Justice Centre, Pretoria; Bloemfontein Justice Centre, Bloemfontein.
RESPONDENT:	SR Sibara Instructed by Director of Public Prosecutions, Pretoria; Director of Public Prosecutions, Bloemfontein.