115/96

Reportable
Appeal No 269/96
169/96

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

RICHARD THOMAS MICHAEL STANLEY **Appellant**

and

THE STATE **Respondent**

Court: Hefer, F H Grosskopf and Olivier JJA

Date of hearing: 9 September 1996

Date of delivery: 27/9/96

JUDGMENT

Olivier JA:

The appellant was charged with theft in the Regional Court of the Southern Transvaal held at Germiston, it being alleged that on 7 May 1992 and at the Gosforth Park Race Course at Germiston he stole a BMW motor vehicle ('the BMW') the property of Mr Peter Matthews.

The appellant pleaded guilty to the charge and was convicted. After evidence in mitigation had been

presented, he was sentenced to six years' imprisonment.

The appellant appealed to the Witwatersrand Local Division of the Supreme Court against the sentence. Van Schalkwyk J (with whom Goldstein J concurred) regarded the sentence imposed by the magistrate as excessively harsh and set it aside. It was replaced by the following sentence:

> '1 *A period of eight months' imprisonment suspended for one year on condition that within the period of suspension the appellant pays compensation to the complainant of R10 000 in terms of the provisions of section 297 of the Criminal Procedure Act.*
>
> 2 *Four years' imprisonment from which the appellant may be placed under correctional supervision in his discretion by the commissioner in terms of the provisions of section 276(1)(i) of the Criminal Procedure Act.'*

Against this sentence the appellant, with the leave of the court *a quo*, appealed to this Court. In granting leave Van Schalkwyk J (with the concurrence

of Goldstein J) made mention of the fact that the sentence imposed by him and his colleague was mainly attacked on the basis that it was technically incorrect for want of compliance with the provisions of section 297 (1) (b) of the Criminal Procedure Act ('the Act'). The court had, so he stated, imposed a sentence which had two components, while, it was argued, the provisions of the Act required that a single sentence be imposed. Reference was made to the judgment in S v Labuschagne and Others 1990 (1) SACR 313 (E). Van Schalkwyk J also stated that the legal representative of the state had conceded that the sentence imposed, although appropriate, was technically incorrect and did not conform with the provisions of section 297 (1) (b) of the Act: On this basis leave was granted to appeal to this Court against the sentence imposed.

On behalf of the appellant it was argued in this Court:

(1) That though appellant conceded that golf clubs and other personal effects of Mr Matthews were locked in the boot at the time of the theft, and were still missing after the BMW had been recovered by the police, the appellant was never charged with their theft, and it was never proved that he had stolen them.

Consequently, these facts being common cause, the first part of the sentence imposed by the court of appeal was improperly imposed and constituted a material misdirection.

(2) Alternatively, that the sentence imposed by the court *a quo* amounts to splitting a sentence into two components which has the effect of punishing the appellant for the theft of the BMW, of which he was convicted, and for the theft of the golf clubs and personal effects, of which he was neither charged nor convicted.

(3) In a further alternative, that by imposing the 'incorrect' suspended sentence, the court *a quo* clearly had the intention that the appellant should not serve any period of imprisonment; but by imposing the balance of the sentence, namely four years' imprisonment from which the appellant may be placed under correctional supervision in his discretion by the commissioner in terms of section 276 (1) (i) of the Act, the court had overlooked that in terms thereof the appellant would in fact be compelled to serve at least one-sixth of such term, i.e. eight months, in prison. The submission was made that the second part of the sentence is irreconcilable with the first part thereof.

(4) And, finally, that a wholly suspended sentence or a sentence in terms of section 276 (1) (h) (correctional supervision) would be the appropriate sentence in the present case.

In turning first to consider the argument raised by the appellant with regard to section 297 (1) (b) of the Act, it is helpful to set down clearly what is common cause. The pertinent facts are that the appellant was not charged with the theft of the personal property in the boot, despite his being in possession of the car roughly for a month, and his having come into possession of the key through deceptively impersonating a police officer. He claimed not to have taken the goods, and was not proved to have taken them. In partial support, Detective Sergeant Mamaramba, who found the vehicle, testified that though the boot was open, items of golf clothing and a suitcase, though not the golf clubs were in the boot. On the other hand it is also common cause that the appellant testified that he was prepared to accept responsibility for the loss of the goods as he conceded that the loss was directly effected by his theft of the car; and he accepted, in addition, that the value of the goods was at least R10 000.

In imposing the suspended sentence, Van Schalkwyk

J said the following:

> *'The evidence before the court does not establish beyond a reasonable doubt that the appellant himself had stolen the golf clubs and other personal items from the vehicle. However, it clearly emerges that these items were missing from the vehicle at the time when it was recovered by the complainant and the complainant has himself said that the value of these items was in excess of R10 000. Although the court cannot find that the appellant stole these items and he was not convicted of that offence, nevertheless, for the purposes of sentence, the court is entitled to have regard to this loss. It would be appropriate, in my view, that the court should order that he compensate the value of these missing items to the complainant, not on the basis that he is responsible for the theft thereof, but upon the basis that he was the immediate cause of that loss.'*

In this Court counsel for the State argued that the order made in the first paragraph of the sentence was a competent and proper sentence.

The relevant parts of section 297 of the Act read as follows:

'(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion -

(a) ...

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order.'

One of the conditions referred to in paragraph (a) (i) of the section under discussion is that of compensation.

Implicit in these provisions is that the imposition of the obligation of repayment of an amount as a condition for suspension of the whole or a part of the sentence of imprisonment must be causally connected to the crime for which the accused had been convicted. In the present case, so it was argued on behalf of the appellant, the compensatory order imposed clearly relates to the loss of the complainant's personal

effects but that, as the appellant was not charged with the theft thereof, the order is ill-advised.

In my view the portion of the sentence now under discussion (i.e. the compensatory part) was not improperly imposed: section 297 of the Criminal Procedure Act merely requires conviction of any offence before a compensatory order may be made. The section does not spell out any further *nexus* between the offence and the compensatory order. Logic and equity, however, indicate that there must be a rational and causal connection between the offence and the damage in respect of which the compensatory order is made. Any further or more stringent legal requirement would unduly restrict the use of the salutary sentencing option of a compensatory order. Whether there exists a rational and causal connection between the offence and the damage to be compensated is a question of fact. In the present case it was neither argued, nor could it fairly be argued, that such connection did not exist. Had it not been for the theft of the vehicle, the golf clubs and personal effects in the boot would not have gone missing. Accordingly, in my view it was competent to make the compensatory order under discussion.

But it was also argued on behalf of the appellant that the sentence imposed by the court a quo was

incompetent for yet another reason. The argument ran as follows. The sentence imposed constituted a splitting into two components which had the effect of punishing the appellant for the theft of the motor vehicle, of which offence he had been convicted, and the theft of the golf clubs and personal items being the contents of the motor vehicle, of which he had neither been charged, nor convicted. In effect, it was argued, the court *a quo*, having come to the conclusion that paragraph 2 of the order (i.e. imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act) was a proper sentence for the offence, then 'added on' paragraph 1 of the order in respect of the missing items.

It has long been standard and healthy sentencing policy and practice for a court to impose a term of imprisonment and then to suspend a part or parts of such sentence on various specified conditions. Legislative recognition of this policy and practice is to be found in section 297 of the Criminal Procedure Act. The main aims of the legislature in providing for the suspension of sentences appear to be as follows, according to Du Toit and Others, Commentary on the Criminal Procedure Act 28 - 45:

> *'(a) compensation of the victim of the offence; restoration of the status quo (ss*

297(1)(a)(i)(aa)-(bb));

(b) *the rendering of service to the community (s297(1)(a)(i)(cc));*

(c) *rehabilitation or improvement of the accused by subjecting him to persons or authorities (s297(1)(a)(i)(dd)-(ff));*

(d) *obtaining good behaviour from the accused (s297(1)(a)(i)(gg))*

(e) *a free discretion for the court in relation to sentencing and the conditional suspension of sentence (s297(1)(a)(i)(hh); Du Toit 376-6).'*

In particular, sight must not be lost of the principle, so clearly laid down by this Court in S v Charlie 1976 (2) SA 596 (A), that it is competent and proper for the court to impose a sentence of imprisonment of which part is suspended on the usual conditions and in addition upon condition that a compensatory order be complied with (see especially at 599 A-G).

As long as a court adheres to the practice and legislative enactment mentioned above, the form of the sentence, and whether it is expressed in one, two or more paragraphs matters not. It is the substance, not the form, that is important. It is not clear what the court in S v Labuschagne and 19

other cases, *supra* at 314j to 315a, had in mind when warning against 'adding on' a suspended sentence to the one imposed for the offence in question, because one has to look at the whole, composite sentence imposed in order to ascertain whether it was just and appropriate.

The question of principle arising in the present case is whether a term of imprisonment suspended on condition that compensation is paid to the complainant can be combined with a sentence of correctional supervision in terms of section 276 (1) (h) or with a sentence of imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act.

In the case of correctional supervision (section 276 (1) (h)) such combination is specifically allowed for by section 276 (3) (a) of the said Act. This principle was recognized and applied in S v Somers 1994 (2) SACR 401 (T), where it was also held that where a suspended period of imprisonment is imposed in addition to a sentence of correctional supervision, such sentence should not be imposed as a condition of the correctional supervision as it was an independent component of the sentence.

In the case of a sentence of imprisonment in terms of section 276 (1) (i) there is no legislative

provision similar to section 276 (3) (a). But this was not necessary, seeing that such sentence, being a sentence of imprisonment, can in any event be suspended on suitable conditions including the payment of compensation by virtue of section 297 (1) (b). The suspended period of imprisonment should form an integral part of the total period of imprisonment.

What has to be guarded against in cases such as the present one is infringing the statutory requirements

(i) that the total period of imprisonment does not exceed five years as laid down in sec 276 (1) (i) (see also S v Randell 1995 (1) SACR 395 (NC) at 404 b-d) and

(ii) that the combined effect of the sentence does not interfere with the exercise of the discretion of the Commissioner of Correctional Services under sec 276 (1) (i).

It remains simply to consider whether the composite sentence imposed by the court *a quo* was an appropriate one. This Court can interfere only if it is shown that the sentence clearly was inappropriate.

The appellant, who was at the time of the trial 24 years of age, is an Irish citizen. He obtained a BSc

degree in agriculture and came to South Africa in 1989 in response to an offer of work. He worked for six months on a stud farm in the Mooi River area, but was compelled to return home when his work permit expired. In 1990 he returned to South Africa and worked as a manager on the farm of Mr Gary Player in the Colesberg district. He was later appointed to a very senior position as operations manager with the Thoroughbred Breeders' Association with head office at Gosforth Park.

While so employed, he committed the theft of the BMW. The vehicle was valued at R120 000 by its owner. The appellant hired a mobile jack and towed the BMW away to a shed which was under his control. His evidence was that he committed the crime on the spur of the moment, only hiring the jack on the very evening of the theft. Nevertheless, he kept the vehicle secreted away for a month. He then fraudulently obtained the keys from the owner, telephonically pretending to be a police officer who required the keys to ascertain whether they fitted a BMW which was one of a number of stolen vehicles found by the police near Phalaborwa. Even after the owner had become suspicious, he persisted in spinning a web of lies, until finally confronted by the police.

The personal circumstances of the appellant were put

before the trial court by Professor Dave Beyers, the head of the Department of Psychology at the Rand Afrikaans University, Mrs Van Zyl, a social worker employed by Nicro, Mr H C Labuschagne, a manager at the Thoroughbred Breeders' Association, and by the appellant himself.

It appears that the appellant is not only a first offender, but a diligent and conscientious worker who was described by the witnesses as a workaholic. He has received a glowing testimonial from Mr Gary Player.

He was brought up in a very conservative Roman Catholic Irish home. His parents dominated his life to a certain extent and were opposed to his living in South Africa. In 1991 the appellant's non-Catholic girlfriend became pregnant and a daughter was born to them in June of that year. In November 1991 the couple became engaged and the wedding date was set for 11 July 1992. The appellant's parents were invited to attend the ceremony. On 7 May 1992, two months before the wedding, he stole the BMW.

According to the appellant, he did not steal the BMW with the intention of selling it. He was earning a respectable salary of R6 000 per month. He stated that he was under severe work-related stress. When

pressed as regards the reason for the crime, he said that he had acted without thinking; he had done it in order to impress his parents when they arrived in South Africa, not only with his new home but also with an expensive car. His intention was to abandon the vehicle after having shown it to his parents as his property.

The witnesses on behalf of the appellant agreed that throughout he had been a responsible and honest employee. His conduct in committing the theft was viewed by them as totally inexplicable and out of character. The expert witnesses did not consider a repetition of this sort of conduct as likely. Prof Beyers recommended a suspended sentence and psychotherapy. Mrs Van Zyl's recommendations amounted to a suspended sentence and 200 hours community service over a period of 6 months.

The magistrate took all the circumstances into consideration, as well as the fact that the appellant was a first offender, that he had offered to compensate the complainant for some of the loss suffered by him, and that he had shown sincere distress and remorse. But the magistrate also stated that the theft of motor vehicles is rife in our country and that the public demanded protection; that, furthermore, the offence was a premeditated

one and carefully planned; that the appellant had hidden the vehicle for a month; and that he had obtained the keys to the vehicle by fraudulently and deviously impersonating a police officer and telling lies to the owner. The magistrate held that the appellant had the intention of converting the vehicle for his own benefit and that as far as the alleged motive for the theft is concerned, viz. to impress his parents, no court could accept that as a mitigating factor: a normal well-educated adult like the appellant, who earned a good salary, on the point of marrying and acquainted with respectable people such as Mr Gary Player, could not rely on the alleged motive for mitigation.

In the court *a quo* the appellant's evidence that he had stolen the vehicle to impress his parents was rejected as false. The court held that the event had occurred some three months before his parents were due to arrive in this country and the appellant's evidence why he had not instead rented a luxury car for the duration of the visit was clearly false. The court *a quo* held that there was no rational explanation for the appellant's conduct, but agreed that it was totally out of character. That court also took into account certain aggravating circumstances: the planning in advance of the crime; the later deceitful and fraudulent scheme to obtain the keys.

Nevertheless, the court held that the sentence imposed by the magistrate was excessively harsh, creating the impression, to paraphrase the court's reasoning, that the magistrate punished the offence rather than the offender. Mention was also made of the appellant's offer to partly compensate the complainant by paying the amount of R10 000 to him. In this Court, the latter offer was repeated, and the assurance was given that the amount was available for immediate transfer.

In my view, there is no justification for interfering with the substance of the sentence imposed by the court *a quo*. Having regard to the probabilities, i.e. the appellant's character and background, he is not likely to be imprisoned for more than eight months. After that he will be subjected to correctional supervision. It is true that having to serve any period of imprisonment would be traumatic and would, probably, have a negative effect on the appellant's future career. He is a first offender, a young man with family responsibilities and a conscientious worker. On the other hand, the theft of a motor vehicle is a serious offence. In this case the vehicle was worth R120 000. The appellant committed a premeditated crime. He concealed the theft from the owner in a fraudulent manner, spinning a web of lies. He now says that he

has remorse, but he did not utilize the opportunity to show regret or contrition until he was arrested by the police. Both the magistrate and the court *a quo* paid due consideration to the evidence in mitigation of sentence, and both courts rejected the idea of correctional supervision in terms of sec 276(1)(h) of the Act.

However, in view of my earlier remarks related to the suspension of part of a sentence imposed under section 276 1) (i) and in order to overcome the technical problems mentioned above, the sentence will be reformulated.

The following order is made:

1. The appeal is dismissed.

2. For the sentence of the court *a quo* is substituted the following:

   Four years' imprisonment from which the appellant may be placed under correctional supervision in his discretion by the Commissioner in terms of the provisions of section 276 (1) (i) of the Criminal Procedure Act, and of which a period of one year's imprisonment is suspended for three years on condition that within the period of

suspension the appellant pays compensation to the complainant of R10 000 in terms of the provisions of section 297 of the Criminal Procedure Act.

P J J OLIVIER JA

Concur:

J J F HEFER JA

F H GROSSKOPF JA