IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

REVIEW NO:20180024
CASE NO: CA&R:45/2018
DATE DELIVERED: 22/02/2018

In the matter between

THE STATE

and

SINAZO EDIPUTE

SPECIAL REVIEW JUDGMENT

ROBERSON J:-

[1] On 15 February 2018 I ordered the immediate release of the accused from custody and indicated that the reasons therefor would follow. These are the reasons, together with the full order.

[2] The accused was convicted in the Magistrate's Court, East London, after pleading guilty, of theft. She was sentenced to a fine of R1 500.00 or two months' imprisonment. This is not an automatically reviewable sentence but the matter was sent on special review because the magistrate wrongly convicted and sentenced the accused at an earlier hearing for failing to appear after release on bail. The accused was granted bail at her first appearance in court and thereafter failed to appear on a

date to which the proceedings had been postponed. Her bail was provisionally cancelled and forfeited to the State and a warrant for her arrest was issued. She failed to appear within the 14 days provided for in s 67 (2) of the Criminal Procedure Act 51 of 1977 (the CPA) and her bail was finally cancelled and forfeited.

[3] She appeared in court on 24 January 2018, having been arrested, and the magistrate held a summary enquiry into her failure to appear in court while on bail. This he was not entitled to do. Such a procedure is not provided for in s 67 of the CPA. (See *S v Williams* 2012 (2) SACR 158 WCC.) Section 67A of the CPA provides for criminal liability of a person who fails to appear while on bail, or who fails to comply with a condition of bail. If this section is invoked, a formal trial must be held. (See du Toit *et al Commentary on the Criminal Procedure Act* 9-107 – 9-108.)

[4] The conviction and sentence for failing to appear while on bail must therefore be set aside.

[5] The matter was postponed to 25 January 2018 and the accused remained in custody. As already mentioned she pleaded guilty to the charge of theft and I am satisfied that the conviction for theft was in order. The State proved two previous convictions, one for theft and one for fraud, both committed on 22 August 2011. These counts were taken as one for the purpose of sentence and the accused was sentenced to 18 months' correctional supervision in terms of s 276 (1) (i) of the CPA.

[6] The order to release the accused arose from my concern about the sentence proceedings and the sentence which was imposed, in the light of the accused's

address to the court in mitigation of sentence. She told the court that her husband had died and that she had two daughters age seven and eight years respectively, who were alone at home. She said she did not work (I think meaning she was not employed), was a street trader (as a hairdresser), and received a social grant for the children. She also said that she suffered from diabetes.

[7] In sentencing the accused the magistrate took into account the prevalence of theft and the rippling effect of increased prices. He referred to the accused's previous convictions and warned her that as her convictions increased, so would the fines and sentences. He imposed the sentence referred to above. The accused asked for a deferred fine because she was not employed. The magistrate did not accede to the request and referred to the fact that the accused had failed to appear after being released on bail and had to be tracked down. He did refer her to the prisoner's friend.

[8] *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) is the seminal judgment concerning what is required of courts when sentencing the primary caregiver of young children, in the light of s 28 (2) of the Constitution[1]. At paragraphs [35] and [36] the following was stated:

> "[35] Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.

[1] This subsection provides: "A child's best interests are of paramount importance in every matter concerning the child."

> [36] There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.
>
> (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
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> (b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
>
> (c) If on the Zinn-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
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> (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
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> (e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."

[9] The importance of adherence to the principles laid down in *S v M* has been emphasised in subsequent cases. See for example *De Villiers v S* [2015] ZASCA 119, *S v Mbonde* [2015] ZAECGHC 93, and *S v Londe* 2011 (1) SACR 377 (ECG).

[10] In the present matter it was clear from what the accused said that she was the primary caregiver of her children. This was not challenged. The magistrate did not even refer to the children in his judgment on sentence. The fact that the accused, who was in custody, said that the children were alone at home seems to have made no impression at all. The magistrate had no information, and did not ask for

information, about the effect on the children or their care if their mother was incarcerated. The prosecutor made no contribution in relation to the interests of the children. She merely submitted that even though the accused was the mother of two children, direct imprisonment was the only appropriate sentence, in order to deter the accused from repeating the offence. It is so that the magistrate gave the accused the option of a fine, but the possibility remained that the accused could not pay the fine and would have to go to prison. This much emerged from what she told the magistrate. In my view a failure of justice occurred as a result of the failure of the magistrate to have regard to the interests of the accused's children.

[11] When the matter was placed before me, the J4 form indicated that the accused had not paid the fine and had not been released. I made enquiries through the Registrar about whether or not the accused had since paid the fine. I was informed that she had not and was incarcerated.

[12] In my view little purpose would be served by remitting the matter to the magistrate to obtain the requisite information in order properly to consider the interests of the children and to reconsider sentence. The accused was sentenced on 25 January 2018 and at the time of her release had served 22 days of a two month sentence. I propose rather to fashion a sentence which will take into account the time served.

[13] The following order will issue:

[13.1] The conviction and sentence of R300.00 or 20 days' imprisonment for failing to appear in court while on bail are set aside.

[13.2] The conviction for theft is confirmed.

[13.3] The sentence of R1 500.00 or two months' imprisonment is set aside and substituted with the following sentence:

"The accused is sentenced to two months' imprisonment, 37 days of which are suspended for five years, on condition that the accused is not convicted of theft or attempted theft committed during the period of suspension."

[13.4] The sentence is antedated to 25 January 2018.

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J M ROBERSON
JUDGE OF THE HIGH COURT

SMITH J:-

I agree

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J E SMITH
JUDGE OF THE HIGH COURT