SOUTH GAUTENG HIGH COURT, JOHANNSESBURG

High Court Ref. No. 109/2009
Magistrate's Ref. No. 09/2009
Review Case No. DH 712/2009

THE STATE

versus

RIKA MADELYN VILLET Accused

REVIEW JUDGMENT

MEYER, J.

[1] This is a review in the ordinary course. The learned magistrate was, in terms of section 304 (2) (a) of the Criminal Procedure Act 51 of 1977, required to furnish a statement in respect of this matter. A detailed response was received. The matter was referred to the Director of Public Prosecutions for comment. A detailed review opinion was received from Adv. Dakana S.C. and Adv. Mothibe, S.C. for which I express my gratitude. They referred to a number of decided cases that support my conclusion that the trial court has not exercised the discretion bestowed upon it in imposing sentence on the accused in this matter properly and reasonably.

[2] The accused, a 42 year old woman, was charged in the Magistrates' Court, Roodepoort, with the crime of theft of one pair of shoes from a shop in Roodepoort. The pair of shoes was valued at R59.00. The accused was not legally represented. She was rightly convicted on her plea of guilty. She was sentenced to a fine in the sum of R2000.00 or six months imprisonment. A further twelve months' imprisonment was imposed and suspended for a period of 5 years on condition that she is not convicted of theft or attempted theft during the period of suspension.

[3] I commence by referring to the oft quoted passage in the judgment of Holmes J.A. in *S v Rabie* 1975 (4) SA 855 (A), at p 862G – H:

> 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.'

[4] With reference to the ingredient of mercy, Holmes, J.A. said this, at p 862 D – F of the judgment:

> '(i) It is a balanced and humane state of thought.
> (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
> (iii) It has nothing in common with maudlin sympathy for the accused.
> (iv) It recognises that fair punishment may sometimes have to be robust.
> (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
> (vi) The measure of the scope of mercy depends upon the circumstances of each case.'

[5] The accused was a first offender. She was 42 years of age at the time that sentence was imposed upon her. She is an assistant to a day mother and earns an income of R1 900.00 per month, which is less than the fine portion of her sentence. She has three children. Two of them, aged 19 and 15, live with her. The pair of shoes that she stole was meant for her own personal use. She pleaded guilty and expressed remorse when she was questioned by the learned magistrate.

[6] Shoplifting of an item to the value of R59.00 is a petty offence when it is compared to murder, rape, robbery, and a long list of other common law crimes and statutory offences. I accordingly disagree with the following finding made by the learned magistrate in her judgment on sentence after she referred to the prevalence of shoplifting:

> 'So geen persoon, nie die Hooggeregshof, geen ander persoon moet kom sê dat deesdae winkeldiefstal is 'n "petty offence".'

[7] In this finding, the learned magistrate misdirected herself in two further respects: Firstly, precedents of the High Court are binding on her. There are decided cases of the High Court in which it was held that shoplifting of items of relative little value is a petty offence. The learned magistrate referred to some of them in her statement. I only need to add what was said by Snyders J (as she then was), my brother Van Oosten, J concurring, in *S v David Hlosu* (review case no. DH 346/2003 WLD unreported) concerning a sentence that was imposed upon an accused in the Magistrates' Court, Roodepoort pursuant to a conviction of theft of a T-shirt valued at R50.00:

> 'This case is the typical one of an indigent accused and his first brush with the law through a petty offence.'

Secondly, the prevalence of a petty offence does not change it into a serious crime. Its prevalance is rather a circumstance, and it may be a weighty one depending on all the circumstances of a particular matter, that should be taken into account in considering an appropriate sentence for a particular accused.

[8] It is clear from the learned magistrate's judgment on sentence that shoplifting is prevalent in the area of jurisdiction of the Roodepoort Magistrates' Court, as well as other areas in Gauteng. The losses incurred as a result thereof undoubtedly have adverse economic impacts that percolate from the owners of affected businesses to all South Africans who are faced with rising prices for daily needs. This is undoubtedly a factor that ought to have been and that was rightly taken into account in considering an appropriate sentence for the accused. But the prevalence of shoplifting and its adverse consequences were, regrettably, over-emphasised.

[9] Of particular concern to me is an example given by the learned magistrate in her judgment on sentence of a woman who had compelled the learned magistrate and witnesses to go through a trial before she eventually made admissions. I requested the learned magistrate to explain this example with reference to an accused person's constitutional right to remain silent and the *onus* upon the State to prove a person's guilt beyond reasonable doubt. The learned magistrate responded that 'the point was that she showed no remorse, even with the overwhelming evidence against her.'

[10] The example was in the first instance not pertinent to the consideration of an appropriate sentence for the accused. I have already mentioned that the accused pleaded guilty and expressed remorse when she was questioned by the learned magistrate before she was sentenced. I realise that pleas of guilty have frequently been taken into account by sentencing courts as a mitigating factor, either for the reason that an accused has 'not wasted the time of the court' or because it was considered to be an expression of remorse. Tendering a plea of guilty is, however, not necessarily indicative of sincere remorse, but may simply mean that a particular accused is realistic for reasons such as that he or she perceives the case against him or her to be overwhelming and uncontestable. See: *S v M* 2007 (2) SACR 60 (WLD), paras [70] – [80]. Secondly, a court's time cannot be considered 'wasted' by an accused person who elects not to tender a plea of guilty. S. 35(3)(h) of the Constitution affords every accused person the right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings. I hasten to add that these are not new rights.

[11] The sentence imposed by the learned magistrate is, in my judgement, disproportionate to the crime, the interests of society, and the personal circumstances of and the mitigating factors in favour of the accused. I do not detect any mercy. The sentence is, in my judgment, disturbingly inappropriate and the result of several misdirections.

[12] The fact that part of the sentence was suspended does not render it appropriate. Having reviewed a number of judgments on sentence in shoplifting cases in *S v Ndlovu* (review case No. 5/5227/2001 WLD unreported), my sisters Mailula, J and Khampepe, J concurring, concluded as follows:

> 'It is clear from the aforegoing that the principle propounded in these matters is that in shoplifting cases it is inappropriate to add to any initial sentence of a fine with imprisonment as an alternative a further suspended sentence of imprisonment without the option of a fine.'

[13] An appropriate sentence in all the circumstances is, in my judgment, a fine of R600.00 or imprisonment for three months, wholly suspended for three years on condition that the accused is not convicted of theft or attempted theft committed during the period of suspension.

[14] In the result the conviction is confirmed and the sentence imposed by the learned magistrate is set aside and replaced by the following:

The accused is sentenced to a fine of R600.00 or to three months' imprisonment, wholly suspended for three years on condition that the accused is not convicted of theft or attempted theft committed during the period of suspension.

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P.A. MEYER
JUDGE OF THE HIGH COURT

I agree.

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R.S. MATHOPO
JUDGE OF THE HIGH COURT

14 October 2009.