REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

REVIEW REF NO: 61/11

MAGISTRATES COURT CASE NO: C/DH 381/2011

DATE:18/08/2011

NOT REPORTABLE

In the matter between

THE STATE

and

SHARON JONGA **ACCUSED 1**

HENDRIK MDTHETHE **ACCUSED 2**

Automatic Review in terms of s 304(1) of Criminal Procedure Act 51 of 1977 - Sentence – Shoplifting – Accused pleaded guilty - Sentence of 12 months imprisonment imposed by court a quo – appropriateness of - misdirections – sentence strikingly inappropriate - on review sentence reduced to 14 weeks imprisonment.
Deportation order – made without informing unrepresented accused of the effect thereof - audi alteram partem rule violated - order on review set aside as an irregularity

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J U D G M E N T

VAN OOSTEN J

[1] This matter comes before me on automatic review in terms of s 304 (1) of Act 51 of 1977.

[2] The accused, having pleaded guilty, were convicted in the Magistrates' Court, Roodepoort of theft. They were each sentenced to 12 months imprisonment. The court *a quo* further ordered that "both accused be deported back to Zimbabwe after they served their term of imprisonment and that s 49 (12) of Act 13 of 2002 be applied". They were further declared unfit to possess a firearm in terms of s 103 (1) of Act 60 of 2000.

[3] Having read the record of the proceedings in the court *a quo* a number of disquieting aspects became apparent in respect of which I addressed an enquiry to the Magistrate. The enquiry raised a number of concerns on two aspects, firstly, the appropriateness of the deportation order and secondly, the sentence imposed. The Magistrate furnished supplementary reasons and the office of the NDPP has furnished an opinion on the aspects I have raised.

[4] Both accused are Zimbabwean nationals. During the trial after having been convicted, when it became apparent that the matter would be remanded for the purpose of obtaining the record of the accuseds' previous convictions, accused 1 applied for bail "because back home she has got a child, a 5 year old child". The Magistrate then put the following to her:

> Madam you are illegal in this country. You have no documentation and back home is in Zimbabwe.

Accused 1 then informed the Magistrate that she was in possession of a passport to which the Magistrate responded that she had not seen it. Accused 1 repeated that she was in possession of a passport. The Magistrate, however, simply ignored this and proceeded to deal with the request by informing the accused, with a reference to s 60 of the Criminal Procedure Act, that "bail cannot be entertained".

[5] Having imposed sentence at the resumed hearing of the matter, the Magistrate *mero motu* made the following order:

> The court orders also that the accused be deported back to Zimbabwe after they served their term of imprisonment and that section 49 (12) of Act 13 of 2002 be applied.

[6] The deportation order was made in violation of the *audi alteram partem* rule: neither of the accused were afforded the opportunity to address the court on this aspect, nor were the provisions of s 49 (12) of the Act explained to the accused, who it should be noted were unrepresented.

[7] As rightly conceded by both the Magistrate and the NDPP the proceedings concerning the deportation order were accordingly not in accordance with justice and the deportation order accordingly falls to be set aside on the basis of an irregularity.

[8] I turn now to the sentence that was imposed. In the consideration of sentence the Magistrate took into account the accused's personal circumstances. Those were the following: accused 1 was 28 years old and

accused 2, 38 years old at the time of sentencing. The accused were engaged in a relationship from which 3 children, aged 8, 5 and 19 months were born. Accused 1 earned an income of approximately R1 000,00 a month, and accused 2, R800,00 a month. This to both of them was their first brush with the law.

[9] The further reasoning of the Magistrate in regard to sentence reveals a number of misdirections. Those are the following:

1. The Magistrate remarked that both accused were "illegal in this country" and "have no documents to be here". What was seemingly overlooked was accused 1's statement at the previous hearing to which I have already referred, that she was in possession of a passport. No request was made for her to produce the passport. Accused 2 was not asked at any time whether he was legally in South Africa nor was there any evidence to that effect.
2. The Magistrate took "judicial notice" of the following evidence that presumably had been led before her in another case:

> Irma Pretorius, the loss control manager here at Shoprite Checkers that came and testified. Just for the area of Roodepoort district R6.8m lost in six months, in Sandton it was R9m something. She stated that between R7000,00 and R8000,00 is lost every month, every day due to theft at Shoprite Checkers at Westgate Mall.

Not only was the Magistrate not permitted to take judicial notice of the evidence referred to, the accused were also not afforded the opportunity to address this aspect.

3. The Magistrate then proceeded to remark as follows:

> You came from Zimbabwe. You entered this country illegally. You took up employment illegally, taking employment from South African citizens, abusing the hospitality of the South Africans by walking into our stores to steal. This is how you repay them.

There is no evidential support for any of the remarks made by the Magistrate. Regrettably they seem to have clouded the judicial mind resulting in the absence of a balanced assessment of all relevant factors in the consideration of an appropriate sentence.

4. The Magistrate in her judgment on sentence as well as the supplementary reasons furnished in response to the enquiry I have referred to, placed reliance on a number of cased involving convictions of shop-lifters where sentences of direct imprisonment were confirmed by this Court on review. The mere reference by the Magistrate to the names of these cases and the sentences imposed in each of them, without examining the factors in each case relevant to the sentence that was imposed, is singularly unhelpful. It is well established that sentences ought to be individualised and differentiated (See *S v MN 2011 (1) SACR 286 (ECG) para [6])*.

5. Lastly, the family of the accused, one must assume from the answers given by accused 1 in response to questions posed to her by the Magistrate, offered to assist in paying a fine. This was summarily dismissed by the Magistrate which resulted from a misconception of the nature of the enquiry where payment is considered as a sentencing option. See *S v Van Rooyen en 'n Ander 1994 (2) SACR 823 (A) 827f.*

[10] The sentence of 12 months imprisonment in the circumstances of this case moreover, in my view, is excessive and not in accordance with the sentence I sitting as a court of first instance, would have passed. The offence of, as it is commonly referred to as shoplifting, its seriousness (the total value of the items stolen was R605,94) and alarming prevalence as well as the soaring costs in combating the evil are all factors meriting proper consideration. On the other hand the accused were both first offenders, they pleaded guilty and showed some remorse. Accused 1 when asked by the Magistrate why she had stolen the items, explained, albeit not entirely satisfactory, that had stolen them "to give them to my baby, the milk and the pampers.." This obviously did not include the other item stolen which is mentioned in the charge sheet as "1X Cute D or chocolate to the value of R227,99". Accused 1 moreover is the mother of 3 children, one of them of tender age and wholly dependent on motherly care. Bearing in mind all the above factors, as also the fact that the accused had been in custody since the date of their arrest on 30 January 2011, I consider a sentence of fourteen weeks imprisonment as proper and fitting. Inclusive of the time spent awaiting finalisation of the trial the total period of imprisonment accordingly adds up to five months. In view hereof I, on 29 June 2011, ordered the immediate release of the accused from prison. By then the accused had been incarcerated for a total period of five months.

[13] In the result, I make the following order:

1. The sentence imposed by the court below is set aside and in its stead is substituted with the following sentence:

"The accused are each sentenced to 14 weeks imprisonment."

The effective date of the sentence is 24 March 2011.

2. The deportation order made by the court below is set aside.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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L WINDELL
ACTING JUDGE OF THE HIGH COURT