REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
LOCAL DIVISION JOHANNESBURG

CASE NO: A77/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

14 August 2014 **Signed**

In the matter between

EDWARD DA SILVA **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

RATSHIBVUMO AJ:

1. The appellant was convicted in the Germiston Magistrate Court following a guilty plea on a charge of theft. Upon realising that the appellant had a long list of previous convictions, the learned magistrate stopped the

proceedings and committed the appellant for sentence by the Regional Court in Germiston. He was subsequently sentenced to six years imprisonment on 06 August 2013. He was also declared unfit to possess a firearm. The appeal is against sentence only and is with leave of the court *a quo*.

2. Upon questioning by the court in terms of section 112 (1) (b) of Act 51 of 1977, the appellant admitted to having stolen a tool box valued at R399.99 from Checkers Hyper in Eastgate. The said property retrieved from him and restored to the owner.

3. The appellant was 51 years old at the time of sentencing, divorced and unemployed. He was diabetic and was dependant in insulin. He had two children who were still dependant on him. The appellant's list of previous convictions entails four of fraud, two of theft, one of possession of suspected stolen property and two traffic offences. Out of all these, the only time that he was sentenced to a term of imprisonment without a fine was in 2004 when he was sentenced to 12 months imprisonment, half of which was conditionally suspended. In all the other sentences, he would be sentenced to a fine or the sentence would be wholly suspended.

4. The regional magistrate held that the appellant did not learn from his past convictions and the sentences imposed hence he sentenced him to 6 years imprisonment.

5. It was submitted by counsel for the appellant that the sentence imposed was shocking and was disproportionate to the crime he was convicted of. It was further submitted on his behalf that the sentence of three years

imprisonment would have been appropriate given his previous convictions.

6. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See *S v Snyder* 1982 (2) SA 694 (A)

7. Counsel for the State conceded that the sentence imposed appears to have been meant to punish the appellant for the past convictions. It would appear that in sentencing the appellant, sight was lost of the fact that he served his sentences for all the previous convictions and that this time around, he had to be sentenced for the current theft. In *S v Beja* 2003 (1) SACR 168 SE (at p. 170) Pillay J held,

> "The magistrate clearly, in my view, misdirected himself in overemphasising the prevalence of the crime, the impact of the list of previous convictions of the accused and seemed to be misguided in reasoning that the accused could not be rehabilitated without a long term of imprisonment and thereby disguising the sentence so as to give the impression that it is in the interest of the accused. It is trite that the sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of a similar nature, while it may be an important factor, *could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished*. A period of imprisonment must always be reasonable in relation to the seriousness of the offence." [*own emphasis*]

8. The learned judge quoted with approval the passage in *S v Baartman* 1997 (1) SACR 304 E (at 305) where Jones J held,

> "In a case such as this it is necessary to be aware of three considerations:

> (a) the accused should be sentenced for the offence charged and not for his previous record;
>
> (b) the public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
>
> (c) while it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased.
>
> Thus, a thief who steals a loaf of bread should not have to go to gaol for 10 years because he has stolen countless loaves of bread, one at a time, in the past. His sentence should never escalate with the passage of time from a few weeks for initial offences, to a few months, eventually to years, and then to many years; the offence remains a petty offence no matter how often it is repeated."

9. The appellant must be punished for the offence he was convicted of and not for other crimes committed in the past. Undoubtedly, previous convictions are relevant to sentence, but only in so far as they reflect upon the character of the accused. A person with a record such as that of the appellant is obviously less deserving of mercy than is a first offender; he is also probably less amenable to rehabilitation. It is obvious that the only suitable sentence given this history is one of direct imprisonment, but which cannot be taken too far. It would appear the court a quo sentenced the appellant as a preventative measure that he would not be able to steal because he would be in prison. As rightly put by Erusmus J in *S v Smith* [2000] JOL 7026 (E), "Preventive imprisonment is not part of our law. Sentences therefore cannot escalate indefinitely beyond the point where they are out of proportion to the crime. Prevalence of the offence is a consideration when it comes to sentences, but care must be taken not to punish an accused for the crimes of others."

10. A sentence of six years' imprisonment for stealing a tool box in circumstances where there was no actual loss since the item was restored to the owner, strikes me as unduly harsh. Such sentence moreover, in my view, is disproportionate to the crime of which the appellant has been convicted (*S v Vilakazi* 2009 (1) SACR 552 (SCA) para [54]).

11. In the light of what I have stated above I am of the view that this court is entitled to intervene and to substitute the sentence imposed by the court *a quo*. In my view having regard to the totality of the circumstances, the proposed sentence of three years' imprisonment is appropriate and fair.

12. In the result I would make the following order:

1. The appeal against sentence is upheld to the extent that the sentence imposed is set aside and substituted with the following sentence: Accused is sentenced to 3 (three) years imprisonment.
2. No order is made in terms of section 103 (1) Act 60 of 2000 (accused is unfit to possess a firearm).
3. The commencement of the sentence is antedated to 06 August 2013.

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TV RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M VICTOR

JUDGE OF THE HIGH COURT

FOR THE APPELLANT	**: ADV M BOTHA**
INSTRUCTED BY	**: JOHANNESBURG JUSTICE CENTRE** **JOHANNESBURG**
FOR THE RESPONDENT	**: ADV P FUTSHANE**
INTRUSCTED BY	**: DIRECTOR OF PUBLIC PROSECUTIONS** **JOHANNESBURG**
DATE HEARD	**: 11 AUGUST 2014**
JUDGMENT DELIVERED	**: 14 AUGUST 2014**