

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A383/2014

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	.....
DATE	SIGNATURE

In the matter between:

**MKHIZE ZWELI**

Appellant

And

**THE STATE**

Respondent

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**J U D G M E N T**

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**SWARTZ, AJ:**

[1] The appellant appeared in the District Court, Germiston, where he pleaded guilty to one count of theft of cosmetics valued at R 751.28, the property of or in the lawful possession of Checkers Hyper Eastgate and/or Gale Mathebula.

[2] In terms of Section 114(1)(b) of the Criminal Procedure act 51 of 1977 the matter was referred to the Regional Court for sentencing purposes. On 15 November 2011 he was sentenced to 9 (nine) years imprisonment. Leave to appeal against sentence was granted. On behalf of the appellant it was argued that the sentence was harsh and inappropriate because over-emphasis was placed on the seriousness of the offence and the previous convictions of the appellant. On behalf of the respondent it was submitted that the sentence imposed by the court *a quo* was appropriate because, considering the circumstances of this case, the sentence does not induce a sense of shock.

[3] It is trite law that when a court considers an appropriate sentence the seriousness of the offence, the interests of the accused as well as the interests of society ought to be taken into account. *S v Zinn* 1969 (2) SA 537 (A).

[4] After the criminal record of the appellant was presented to the District Court, the matter was transferred to the Regional Court for the imposition of sentence. During his plea the appellant admitted having stolen the cosmetics; that he concealed the items in his pockets and passed the till point without paying for the items; the security officer of the shop called him when he was already outside the shop in order to search him when the stolen items were discovered. The trial court similarly considered the mitigating factors being that the appellant has four young children and he was the breadwinner in his family. The aggravating factors were the seriousness and prevalence of the

offence and, importantly, the 9 previous convictions, a total of 8 for theft and 1 for fraud.

[5] All the previous convictions of the appellant involve the element of dishonesty. His criminal record reflects that he was sentenced for a period of 6 years imprisonment in February 2009. In light of the fraud conviction of May 2011, it appears that he at most served 2 years imprisonment for those offences.

[6] It was submitted on behalf of the appellant that the magistrate erred in only taking into account the fact that the appellant has a host of previous convictions without considering the respective sentences that was handed down. The magistrate sentenced the appellant to a lengthy period of imprisonment without taking into consideration, so the argument went, that the appellant was not previously sentenced to a lengthy period of direct imprisonment. The majority of the previous sentences were either suspended or it was short periods of imprisonment, coupled with the option of a fine.

[7] It is trite law that sentencing is pre-eminently the task of the trial court. A court of Appeal will only interfere with this discretion if the trial court misdirected itself, or did not exercise its discretion judicially and properly, or if the sentence is startlingly inappropriate or that the interests of justice require it. *S v Anderson* 1964 (3) SA 494 (A) at 495 B-G; *S v Salzwedel* 2000 (1) SA 786 (SCA) at 790 B-F.

[8] In terms of Section 271 A of the Criminal Procedure Act 51 of 1977, the sentencing court is obliged to consider the previous convictions of a convicted person. The court has a discretion on the degree and extent it places on these previous convictions. *S v Makhaye* 2011 (2) SACR 173 (KZD) at 176 E-F:

*“although s271 (4) requires the sentencing court to take previous convictions into account when determining the appropriate sentence, it does not take away the discretion of the sentencing court. The court is enjoined to exercise its discretion judicially when taking into consideration previous convictions.*

*In the exercise of its discretion, the sentencing court is required to have regard to the nature, the number and the extent of similar previous convictions and the passage of time between them and the present offence. The relevance and importance of those convictions depend upon the element they have in common with the offence in question...*

...

*The degree of emphasis to be placed upon previous convictions is a matter which is within the discretion of the trial court. Where the degree of emphasis is disturbingly inappropriate, in that it cannot be said that the sentencing court exercised its discretion judicially, the court of appeal will interfere.”*

[9] On behalf of the respondent it was contended that the appellant failed to show this court that the court *a quo* erred and misdirected itself when it imposed the sentence of 9 years imprisonment and that the appeal on sentence should be refused.

[10] In my view the magistrate was correct in sentencing the appellant to direct imprisonment because of his previous convictions. However, the period of 9 years direct imprisonment is harsh under the circumstances of the present case. A lesser period of imprisonment will probably still have the

desired effect of punishment of the appellant for his illegal act, make him realise the blameworthiness of his actions but also provide him with the opportunity to rehabilitated.

[11] I propose the following:

- The appeal is upheld. The sentence of 9 years direct imprisonment is set aside. In its place, the appellant is sentenced to 9 years imprisonment, of which 3 years is suspended for a period of 5 years on condition that the appellant is not convicted of a similar offence within the period of suspension.

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**E SWARTZ**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree and it is so ordered.

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**B MASHILE**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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DATE OF HEARING	16 APRIL 2015
DATE OF JUDGMENT	24 APRIL 2015