A662/12

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT,PRETORIA)

20/9/12

Case No: B132/2012

High Court Ref No: 763

Magistrate serial no: 44/2012

In the matter between:

THE STATE

VERSUS

THABO HEZEKIEL MASHILOANE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

2012-09-17 .....

DATE SIGNATURE

REVIEW JUDGMENT

MAVUNDLA J:.

[1] This matter came by way of on automatic review in terms of section 302 of Act 51 of 1977 of the judgment of the Magistrate Court of Lydenburg delivered on 23 April 2012.

[2] On 23 April 2012 the accused, a 24 year old male, who acted in person, pleaded guilty to a charge of theft of 3 packs of

Melrose full cream valued at R49.97 from Shoprite Lydenburg in the district of Lydenburg on or about 21 April 2012.

[3] The accused, responding to the Magistrate's questions in terms of s112(1)(b) of the Criminal Procedure Act 51 of 1977, conceded having taken the 3 (three) packs of Melrose cheese, packs of Melrose full cream valued at R49.97 from Shoprite Lydenburg, and that he had no right and or permission to do so and that he did not intend to pay therefore. He further stated that he intended to eat the cheese and did not have sufficient money to pay towards same.

[4] The plea of the accused was quite correctly admitted and he was then duly convicted as charged.

[5] In mitigation, the accused stated that he worked at Steelwork and earned R900.00 per fortnight. He has a child that he is maintaining although the child is not his. He is not married. Nothing was done to canvass further details regarding this child. The accused was a first offender.

[6] The magistrate had regard to the seriousness of the theft out of supermarkets and the increase of such offence as well as the ramifications thereof. The magistrate then sentenced the accused to R3000, 00 or six months imprisonment wholly suspended for a period of 5 (five) years on condition that he is not convicted of theft or attempted theft committed during the period of suspension. In terms of section 103 of the Firearms Control Act the accused was declared not unfit to possess a firearm.

[7] The above mentioned fine of R3000, 00, as reflected on the record of proceedings, was however on the J4 reflected as R2000. 00. Because of this discrepancy, I sent a query to the magistrate to for clarification.

[8] I also inquired from the magistrate whether, regard being had to the value of the items stolen, the sentence imposed was not rather inappropriately harsh. In this regard I referred the learned magistrate to the fines imposed in the following matters:

S v Matseletsele 1991 (1) SACR 340 (E)
S v Bhembe 1993 (1) SACR 164 (T)

[9] The response of the magistrate pointed out that the correct fine was the amount of R3000. 00 and apologised for the erroneous recording in the J4. He further stated that the sentence was intended to deter others and the sentence was appropriate because such offence entails, *inter alia,* the shop owners having to hire security personnel in response to profit losses. He further concluded that the sentence imposed was appropriate.

[10] I forwarded the magistrate's response to the office of the Director of Public Prosecutions and invited them to provide me with their opinion. The State Advocate Y Ndzalela, Deputy Director of Public Prosecutions, North Gauteng Pretoria, Adv E Leornard concurring, has gladly opined that the sentence is shockingly inappropriate and that sentence of R1500, 00 or six months imprisonment with further condition would be appropriate.

[11] In the case of *S v Mgwenya* 2003 JOL 11519 (T) Bosielo J, (as he then was), stated the following:

"The fact that theft is generally on the increase is well known. The serious loss suffered by the business community, particularly self-service, stores is also well known. Obviously theft from business premises has far-reaching consequences on the broader economy and unfortunately the consumers themselves. Clearly the business community deserves the protection of the law. However, it is a serious misdirection for a sentencing officer to overemphasize the prevalence and seriousness of an offence and the interests of the community at the expense of the interest of an accused. Clearly it is wring to sacrifice an accused on the altar of general deterrence. Quite correctly the accused had to be punished for the offence he committed. However considerations of fairness and justice demand that there must be reasonable proportion between the offence for which an accused is convicted and the sentence he receives. Where the sentence imposed is startlingly disproportionate to the offence committed, this amounts to an irregularity."

[12] In the matter of *S v Banda* and others 1991(2) SA 352(B) at 355B:

"What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offence and his circumstances and the impact of the crime on the community, its welfare and concern."

[13] In the following matters the sentences were as follows:

13.1 In *S v Van Rooyen* 1991 (1) SACR 120 (C) the accused, a first offender was convicted of stealing clothing to the value of R190. 00. The sentence of four months' imprisonment the sentence was altered on review to 34 days' imprisonment.

13.2 In *S v Bhembe* 1993 (1) SACR 164 (T) a 27 year old man, who was married and had two children, earned R350. 00 per month, and a first offender, was convicted of theft of a motor vehicle wheel valued at R300. 00, was sentenced to 9 (nine) months imprisonment. On review, the sentence was set aside and replaced with one of fine of R600. 00 or six months imprisonment.

13.3 In *S v Beja* 2003 (1) SACR 168 (SE), the value of items stolen was R84.99. The accused was a 31 year old

mother of two children and had seven previous convictions. The sentence of 18 months imprisonment on review was set aside and replaced with one of six months' imprisonment.

13.4 In *S v Baartman* 1997 (1) SACR 304 (E) the accused was convicted of theft of food valued at R21.00. His sentence of nine months' imprisonment was on review set aside and replaced with eight months' imprisonment.

13.5 In *S v Matseletsele* 1991 (1) SACR 340 (E) a 34-year-old male having two previous conviction in 1977 for theft and housebreaking and one in 1981 on two counts of housebreaking, was convicted of theft of two packets of yeast, valued at R6.38, from supermarket, on review his sentence of six months' imprisonment, was on review, bearing in mind the value of the stolen goods and the long period since his last conviction, was wholly suspended for five years.

[14] I am of the considered view that, the sentence imposed in *casu*, was shockingly excessive and disproportionate to the a value of the items involved. I am of the view that, in the light of the above authorities, the magistrate misdirected himself in imposing the fine mentioned hereinabove. In the circumstances this Court is at large to interfere with the discretionary fine imposed by the magistrate.

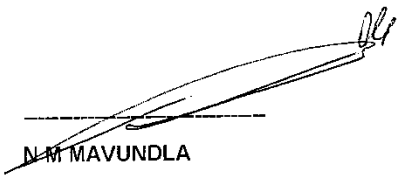
[15] Having regard to the circumstances of this case a fine of R1500 or three (3) months imprisonment wholly suspended for five (5) years on conditions that the accused is not convicted of theft or attempted theft committed in the period of suspension for which direct imprisonment without an option of a fine is imposed, will be appropriate.

[16] In the result, I make the following **Order**:

1. That the conviction of the accused in review number B132/ 12 is confirmed.

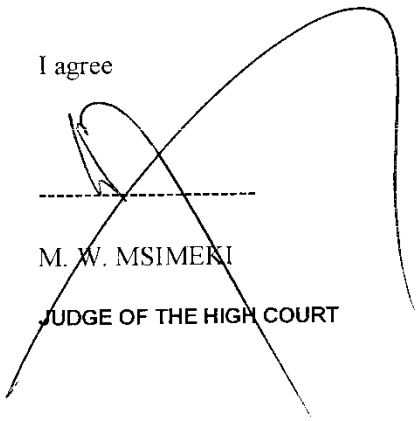
2. That the sentence imposed by the Magistrate in review number B132/ 12 is set aside and substituted with the following:

"The Accused is sentenced to a fine of R1500 or three (3) months imprisonment, wholly suspended for five (5) years on condition that the accused is not convicted of theft or attempted theft committed in the period of suspension for which direct imprisonment without an option of a fine is imposed,"



N M MAVUNDLA
JUDGE OF THE HIGH COURT

I agree



M. W. MSIMEKI
JUDGE OF THE HIGH COURT