IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A1029/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

10 October 2014 _____

DATE SIGNATURE

10/10/2014

In the matter between:

SELLO WILLIAM SEMENYA — APPELLANT

and

THE STATE — RESPONDENT

Coram: J W LOUW J et HUGHES J

JUDGMENT

Delivered on: 10 October 2014

Heard on: 6 October 2014

HUGHES J

[1] The appellant was charged with housebreaking with the intent to steal and theft. On 27 July 2012, he pleaded guilty to possession of suspected stolen property to the value of R1 049.00. He was accordingly found guilty and sentenced to five (5) years imprisonment in terms of section 276(1) (H) (I) of the Criminal Procedure Act

51 of 1977 and in terms of section 103 of the Firearms Control Act 60 of 2000 he was declared unfit to possess a firearm.

[2] During the duration of the entire court proceedings, the appellant was legally represented. On 1 August 2012 he applied for leave to appeal in respect of sentence and leave was granted with bail set at R1 000.00 pending the outcome of the appeal.

[3] Briefly, the incident took place on 18 August 2011 at a school in the Matlala area. The items stolen were stationary and educational instruments to the value of R1 049.00. On the very same day, the appellant was found in possession of the said items with no explanation as to how he came to be in possession of these items.

[4] The appellant's representative argued that the personal circumstances of the appellant, the value of the items all of which were recovered are grounds that the trial court did not take cognisance of. The appellant did not have any previous convictions and was a first offender. Further, the appellant was still a youth as he was 20 years old at the commission of the offence and only 21 years old at the time of sentencing. In addition, he had pleaded guilty from the onset illustrating his remorse and the value of the goods was R1 049.00. These factors indicate, the appellant can be rehabilitated with the imposition of a non-custodial sentence. The appellant seeks that this court replace custodial sentence with a wholly suspended sentence.

[5] Beside the factors mentioned above the state added that a further mitigating factor was the fact that the appellant was attending grade 12. The aggravating factor advanced by the state in its heads of argument was that the items removed were from a school and as such, depriving the scholars the use thereof. The school would have to incur the costs of the repairs for the damages caused by gaining entry into the premises.

[6] It is trite that the principles set out in *S v Rabie 1975 (4) SA 855 (A) at 857d-f, S v Zinn 1969 (2) SA 537 (A)* and those mentioned in *S v Vilakazi 2008 JDR 1082 (SCA) para 58* are applicable and adhered to when considering sentencing.

[7] In considering sentence, the trial court should take into account the crime, the criminal and the interest of society the one not outweighing the other. The appeal court on the other hand should ensure that it not interfere in the discretion that the trial court possesses, only if the trial courts discretion was not judicially and properly exercised and the sentence imposed is disturbingly inappropriate, an irregularity or a misdirection having occurred.

[8] Adv. Chetty, for the state, rightly conceded that the sentence imposed by the court below was not an appropriate sentence in the circumstances.

[9] When I consider the mitigating factors as opposed to the aggravating factors, the former far outweigh the latter. These factors to my mind were not properly and judicially in the categories of the crime, the criminal and society weighed up against each other. If these principles were followed, cognisance would have been taken of the fact that, the appellant was a youthful first offender in grade 12 having pleaded guilty to being in possession of goods to the value of R 1049.00 that had been recovered.

[10] I am not convinced that the lower court exercised its discretion judicially and properly, as such I am of the view that the sentence imposed is harsh and shockingly inappropriate in the circumstances.

[11] In the circumstances, the appeal against sentence must succeed.

[12] I turn to deal with what would be the appropriate sentence in these circumstances. In argument, both counsel for the state and the appellant agreed that the appropriate sentence that this court impose in the instance would be one of a fine coupled with a suspended sentence. The sentence would serve as a deterrent for the appellant and would emphasise the seriousness of the offence.

[13] In *S v Baartman* 1997 (1) SACR 304 (E), Jones J sets out the proper approach to sentencing in cases of petty theft as follows (at 305g-h):

'It all comes down to the basic principle that the punishment should fit the crime. Where the crime is petty theft, and the offender's previous record makes imprisonment rather than some alternative form of punishment imperative, the period must still be in proportion to the petty nature of the crime. There is a limit beyond which a sentence is no longer a proportionate or reasonable sentence. The upper limit is probably somewhere between four months' and six months' imprisonment. Anything above that should usually be reserved for offences, which are not petty. In my view, a sentence of nine months' imprisonment is a substantial sentence. In rare and exceptional circumstances it might be appropriate for a petty offence. This case is neither rare nor exceptional.'

Also, see *Smith v S 2007 JOL 19544 (SCA)* and *S v Lukhele 2004 JOL 123423*

[14] Taking inspiration from the above judgment the value of the goods was not substantial in the current case and the goods were recovered. The appellant was a first offender and pleaded guilty from the onset. This is one of those cases were direct imprisonment was not warranted.

[15] I have considered the case law mentioned above, taken into account all the evidence and factors relevant to sentencing and I am of the view that an appropriate sentence in the circumstances would be a fine of one thousand five hundred (R1 500.00) or six (6) months imprisonment wholly suspended for a period of five (5) years on condition that the appellant is not convicted of theft, attempted theft or possession of stolen property in contravention of section 36 of Act 62 of 1955, committed during the period of suspension.

[16] In the result the following order is made:

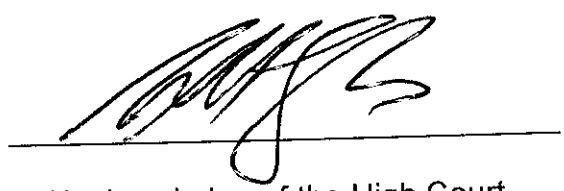
[16.1] the appeal against sentence is upheld;

[16.2] the sentence imposed by the trial court is set aside and substituted by the following sentence:

"the accused is sentenced to a fine of one thousand five hundred (R1 500.00) or six (6) months imprisonment wholly suspended for a period of five (5) years on condition that he is not convicted of theft, attempted theft or possession of stolen property in contravention of section 36 of Act 62 of 1955, committed during the period of suspension."

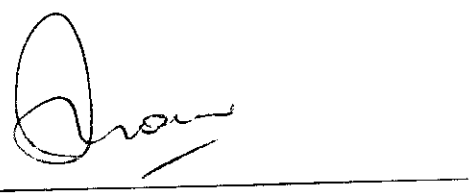
[16.3] in terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentence is antedated to 29 July 2012

[16.4] the declaration that the accused, in terms of Section 103(1) of Act 60 of 2000, is unfit to possess a firearm remains intact.



W. Hughes Judge of the High Court

I agree and it is so ordered,



J. W. Louw Judge of the High Court

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