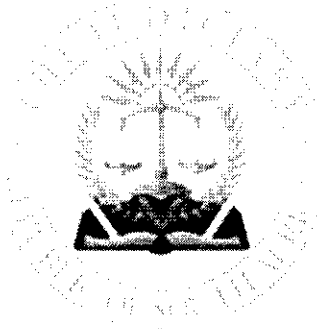


REPUBLIC OF SOUTH AFRICA



A 436/16

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Magistrates Serial No: 02/2012
High Court Ref No: 384

In the matter between:

The State

And

Vusiwe Harrison Msibi

30/6/2016

Accused

REVIEW JUDGMENT

Maumela J.

1. This matter came before court as a special review. Before the magistrates court for the district of Piet Retief, sitting in Piet Retief, (the court *a quo*), the accused; Vusiwe Harrison Msibi, who was legally represented, was charged with theft.

BACKGROUND.

2. On the 22nd of January 2013, before the court *a quo* the accused pleaded guilty. He was convicted of theft as charged. He was sentenced to pay a fine of R 1 800-00 or to

undergo 6 months imprisonment. The whole sentence was suspended for 5 years on condition that the accused is not found guilty of theft, committed during the period of suspension.

3. The conviction of the accused was singularly on the strength of his plea in terms of section 112 (1) (a) of the Criminal Procedure Act Number 51 of 1977. The theft in issue involved 31 wattle poles. Each pole is 3 meters in length. The poles were property belonging to Mkhondo Municipality. They were valued at R 2000-00.
4. The reason cited for referring the case for special review is that the sentence meted out to the accused by the court *a quo* is incompetent. The reviewing judge sought reasons from the acting additional magistrate on:
 - Why the additional magistrate, apparently acting *mero motu*, regarded the offence..... as one that, without the assistance of the prosecutor, does not merit a sentence exceeding a fine of R 1 500-00.
5. The transcript relating to this case was riddled with "inaudible" recordings. Reconstruction of the record was successfully done. The additional magistrate submitted that whereas conviction was in order, the sentence warrants to be corrected.

THE LAW.

6. It is trite that where common law offences are concerned, the sentence meted out pursuant to a guilty plea in terms of section 112 (1) (a) of the Criminal Procedure Act, has to conform to the provisions of that section. See *S v Kholoane*¹.

RE CONVICTION AND SENTENCE.

7. The court finds the conviction of the accused before the

¹ . 2012 (1) SACR 8 (FB), at paragraph [6].

court *a quo* to be in accordance with the law. It is trite that where an accused pleads guilty in terms of section 112 (1) (a) of the Criminal Procedure Act, the sentence meted out has to comply with the provisions of that section.

8. In that regard the sentence may not exceed imprisonment for a period of 3 months. The alternative fine payable is a fine the amount of which does not exceed an amount determined by the Minister by notice in the *Gazette* from time to time. At the time the accused appeared before the court *a quo*, the maximum fine alternatively payable as a fine in lieu of 3 months of imprisonment was R 1 500-00.
9. In the "Commentary on the Criminal Procedure Act" by Du Toit et al; at page 17 – 3; under the heading "Determination of amount for purposes of section 112 (1) (a) and (b)", the maximum amount of fine payable as an alternative to imprisonment is indicated.

THE ISSUE.

10. In imposing a sentence of 6 months imprisonment and a payment of R 1 800-00 as an alternative fine, the court *a quo* exceeded both the maximum period of imprisonment and the maximum fine payable as determined in section 112 (1) (a) of the Criminal Procedure Act. The court is to determine whether or not the sentence meted out to the accused as it is, is in accordance with the law. Should the sentence not be in accordance with the law, it has to be set aside.
11. On the 30th of January 2013, through a Government Notice 62, published in Government Gazette 36111 the Minister determined that where an accused person pleads guilty in terms of section 112 (1) (a) of the Criminal Procedure Act, the maximum period of imprisonment to be imposed shall be 6 months and the maximum amount alternatively payable as a fine shall be R5 000-00. According to the reading of the

charge sheet in this case, the theft of which the accused was convicted was allegedly committed on the 23rd of November 2010.

12. At the time the accused appeared before the court *a quo* the maximum period of imprisonment the court could impose was 3 months whereas the amount to be imposed as an alternative fine in terms of section 112 (1) (a) of the Criminal Procedure Act, was R 1 500-00. It is clear that in imposing a fine of R 1 800-00 upon the accused, failure of which the accused was to serve a period of imprisonment over 6 months, the court *a quo* exceeded the maximum sentence it was entitled to impose as determined in terms of section 112 (1) (a) of the Criminal Procedure Act.
13. The latest determination by the Minister through the Government notice is dated the 30th of January 2013. This was after the date of the commission of the offence. For those reasons the sentence meted out to the accused by the court *a quo* is not in accordance with the law.
14. Nothing is wrong with the conviction of the accused. However by virtue of its failure to comply with the provisions of section 112 (1) (a) of the Criminal Procedure Act, the sentence meted out to the accused as it stands is not compliant with the provisions of the relevant section. For that reason, taking into consideration the mitigating and aggravating factors prevailing, the sentence meted out to the accused by the court *a quo* stands to be set aside.
15. In the result the following order is made:

ORDER.

(1). The conviction by the court *a quo* is upheld.

(2). The sentence meted out to the accused by the court *a*

quo is set aside and is substituted by the following:

2.1. The accused is sentenced to undergo 3 months of imprisonment or to pay a fine of R 1 500-00. The whole sentence is suspended for a period of 3 years on condition that the accused is not found guilty of a similar offence, committed during the period of suspension.



T. A. Maumela.

Judge of the High Court of South Africa.

I agree.



S. P. Mothle

Judge of the High Court of South Africa.