



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
JUDGMENT

NOT REPORTABLE
CASE NO: AR211/2016

In the matter between:

PAUL NCWANE

APPELLANT

and

THE STATE

RESPONDENT

Coram : Seegobin J et Radebe J

Heard : 23 August 2016

Delivered : 01 September 2016

ORDER

On appeal from the Magistrates Court, Scottburgh, (sitting as a court of first instance):

- (a) The appeal against sentence is upheld.
- (b) The sentence imposed by the court *a quo* is set aside and is replaced with the following:

“The accused is sentenced to nine months imprisonment or a fine of R3000,00, half of which is suspended for a period of five years on condition that he is not convicted of theft or a contravention of section 36 or 37 of the General Law Amendment Act No.62 of 1955 (possession of

stolen property or receiving stolen property) or any other offence involving an element of dishonesty committed during the period of suspension.

JUDGMENT

SEEGOBIN J (Radebe J concurring):

[1] The appellant, a 26 year old male, pleaded guilty in the Magistrates Court, Scottburgh, on 18 February 2016 to one count of theft of alcohol to the value of R800,00 and was duly convicted. He was sentenced to a period of nine months' imprisonment without an option of a fine. The present appeal, with leave of the court *a quo*, is against sentence only.

[2] The offence in question was committed on 17 July 2015 when the appellant visited the bar of the Orissa Inn at Umzinto. When he noticed that the barman's attention was diverted away from him, he stole five bottles of whiskey to the value of R800,00, which he later sold.

[3] The record reveals that the appellant has one previous conviction for the possession of dagga which offence was committed in 2008 and in respect of which the appellant paid a fine of R100,00. For purposes of the present offence the appellant was considered to be a first offender. Despite this and the other personal circumstances of the appellant which were placed before the court, the learned magistrate imposed a sentence of direct imprisonment for nine months.

[4] The personal circumstances of the appellant were that he was 26 years old, he was single but supported his sister's child from a salary of R3500,00 which

he was earning from doing his internship at Sappi Saicor. The appellant pleaded guilty to the offence and showed a measure of remorse for his conduct. The circumstances surrounding the commission of the offence as pleaded to by the appellant indicated that it was not pre-planned but was committed on the spur of the moment and rather opportunistically.

[5] An examination of the learned magistrate's reasons for sentencing the appellant as he did indicates, in my view, that he over-emphasized the gravity of the offence and paid very little attention to the appellant's personal circumstances as set out above. Additionally, he failed to consider any alternative forms of sentence which would not only cause the appellant to suffer some hardship but would also provide him with an opportunity to rehabilitate himself. In this regard the learned magistrate has erred and accordingly the sentence imposed warrants interference by this court.

[6] In my view, an appropriate sentence should be a period of imprisonment with the option of a fine with a portion thereof to be suspended for a period on certain conditions. It follows that the appeal against sentence must succeed.

ORDER

[7] In all the circumstances, the order I make is the following:

- (a) The appeal against sentence is upheld.
- (b) The sentence imposed by the court *a quo* is set aside and is replaced with the following:
“The accused is sentenced to nine months imprisonment or a fine of R3000,00, half of which is suspended for a period of five years on condition that he is not convicted of theft or a contravention of section 36 or 37 of the General Law Amendment Act No.62 of

1955 (possession of stolen property or receiving stolen property) or any other offence involving an element of dishonesty committed during the period of suspension.

_____ I agree

RADEBE J

Date of Hearing	:	23 August 2016
Date of Judgment	:	01 September 2016
Counsel for Appellant	:	P.M. Mkumbuzi
Instructed by	:	Durban Justice Centre
Counsel for Respondent	:	M.E. Mthembu
Instructed by	:	Director of Public Prosecutions Pietermaritzburg