IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A319/2007

DATE: 11 APRIL 2008

In the matter between:

SIASTO HESS Appellant

and

THE STATE Respondent

JUDGMENT

ZONDI, J:

[1] The appellant, who was legally represented, appeared in the Oudtshoorn Magistrate's Court on 4 December 2006 on a charge of theft. It is alleged in the charge sheet that on 29 November 2006 he stole from a shop six packets of biltong worth R60. The appellant pleaded guilty and was convicted on his plea. He was sentenced three years' imprisonment. With the leave of the Court *a quo* the appellant now appeals against sentence only.

[2] The appellant's counsel in deference to the firmly established principle that the imposition of sentence is

pre-eminently a matter falling within the discretion of a trial court and that court of appeal will only interfere with such discretion if it was not properly or judiciously exercised, attacked the sentence imposed on the basis of various factors which he submitted individually and cumulatively constitute a misdirection which permits the reassessment of the sentence imposed by the trial Court.

[3] However, not every misdirection warrants interference with the sentence imposed by the trial Court. It has to be a material misdirection, that is to say it must be of such a nature or degree that it shows directly or indirectly that the trial Court failed to properly or reasonably exercise its discretion with regard to sentencing. It appears to be trite that a misdirection is material if the court has misconstrued the facts, has failed to take cognisance of the factors it should have taken into account or it has over or under-accentuated an accused's personal circumstances in relation to other relevant factors.

[4] The question before this Court is whether the magistrate, in sentencing the appellant to three years' imprisonment, committed a misdirection which justifies this Court's interference with the exercise of its discretion. Upon a

perusal of the record it appears that the accused at the time of the commission of the offence had eight previous convictions relating to theft and one to robbery. Those are the ones that are relevant for purposes of this appeal, the last offence having been committed on 24 May 2003 for which he was sentenced to 18 months' imprisonment. The accused was released on 4 October 2006. It is this long list of previous convictions which appears to have influenced the magistrate in deciding on sentencing the accused to three years' imprisonment.

[5] However, the mere fact that the appellant had previous convictions does not in itself justify the imposition of the sentence imposed by the trial Court. It does, however, appear that the appellant may be an habitual criminal but no investigation was done in this regard and it is irrelevant. In S v Beja 2003(1) SACR (SCA) at 168-170a-b warned against the danger of punishing the accused for his previous record instead for the offence charged:

> "In a case such as this it is necessary to be aware of three considerations:
>
> (a) The accused should be sentenced for the offence charged with and not for his previous record;

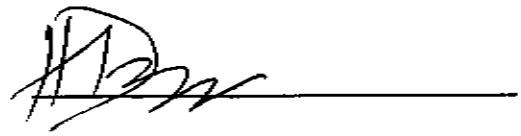
(b) the public interest is harmed rather than served by sentences that are out of proportion to the gravity of the offence;

(c) while it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences can be increased. Therefore, if a thief steals a loaf of bread he should not have to go to jail for 10 years because he stole a number of loaves of bread, one at a time, in the past. His sentence should never escalate with the passage of time from a few weeks for initial offences to a few months and eventually to years and then to many years. The offence remains petty no matter how often it is repeated. Punishment should always fit the crime. When it comes to petty theft, although the offender's previous record makes imprisonment imperative, the period thereof must always remain proportional to the seriousness of the petty nature of the offence".

[6] Applying the test which was formulated in S v Beja, in my view, the magistrate clearly misdirected himself in imposing a sentence of three years' imprisonment for this type of offence. A term of three years' imprisonment seems to be extremely excessive in the circumstances and does instil a sense of shock. There must be a relation between punishment and the offence. An accused person cannot be punished for his past record. In my view, a term of imprisonment is unavoidable but the period should be much less than three years because it is so disproportionate to the seriousness of the crime. Taking all these factors into consideration, I would impose a sentence of 16 months' imprisonment.

[7] In the result, the appeal against sentence succeeds and the sentence is set aside and substituted with the following:

> "The accused is sentenced to undergo a period of 16 months' imprisonment.
>
> The sentence is ante-dated to 21 December 2006".



ZONDI, J

LOUW, J: I agree. It is so ordered.

LOUW, J