IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A401/2007

DATE: 23 MAY 2008

In the matter between:

ABDUL MALGAS Appellant

and

THE STATE Respondent

J U D G M E N T

ZONDI, J:

[1] The appellant appeared at the Oudtshoorn Magistrate's Court on 31 January 2007 on a charge of theft of R850 cash. He pleaded guilty to the charge in terms of section 112 of the Criminal Procedure Act 51 of 1977. He was convicted on his own plea and was sentenced to three years' imprisonment. He was not legally represented. With the leave of the Court *a quo* he now appeals to this Court against sentence only.

[2] Upon a perusal of the record of the proceedings in the court *a quo* the offence appears to have been committed

under the following circumstances. The appellant stole money from the complainant who happens to be his sister. He removed cash in the sum of R300 from her handbag. The appellant also stole a further sum of R550 cash from the complainant's bank account. He used the complainant's bank card to withdraw cash from her bank account.

[3] Ms Fitzpatrick appears for the appellant and Mr Banderker for the State. Ms Fitzpatrick attacked the sentence on three grounds. She argued that the Court *a quo* erred in over-emphasising the seriousness of the offence at the expense of the appellant's personal circumstances; by not taking into account the effect which a long term prison sentence will have on a young man; and finally that a sentence of three years' imprisonment is so startlingly inappropriate that no reasonable court would have imposed it. She submitted that the appellant was a suitable candidate for correctional supervision in the light of his age.

[4] I agree with counsel for the State, Mr Banderker, that the imposition of a sentence and the infliction of punishment is pre-eminently a matter for the discretion of a trial court and that the appeal court will only interfere with the

sentence where such discretion was not reasonably and properly exercised. The test is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate. (See in this regard S v Rabie 1975(4) SA 855 AD)

[5] However, not every misdirection warrants interference with the sentence imposed by the trial court. It has to be a material one, that is, which according to the dictates of justice engenders a clear conviction that an error of such a nature, degree or seriousness has been committed that it shows directly or indirectly that a trial court failed to properly or reasonably exercise its discretion with regard to sentence. (See S v Cupido 1998(2) SACR 213 (SCA) at 216H-J)

[6] The question before this Court is whether the magistrate in sentencing the appellant to three years' imprisonment for theft of R850 committed a misdirection which justifies this Court's interference with the exercise of that discretion. Upon a perusal of the record of the proceedings in the court *a quo* it appears that the appellant at the time of the commission of the offence *in casu* had five previous convictions all relating to the taking of property. It also appears that when he

committed the present offence on 30 January 2007, he had just finished serving a jail term of 634 days due to his having violated parole conditions. The nature of the offence is, however, not indicated on the record. He committed these offences when he was younger than 18 years old.

[7] It is the existence of previous convictions which influenced the magistrate's mind in deciding to sentence the appellant to three years' imprisonment for the theft of R850 cash. The mere fact that the appellant has previous convictions does not justify the sentence imposed. He had to be sentenced for the offence he committed and not for his previous convictions. However, having said that, one cannot say that an amount of R850 is minimal or so small to the extent that three years' imprisonment is not justifiable.

[8] In S v Beja 2003(1) SACR 168 (EC) at 170a-b the Court warned against the danger of punishing the accused for his previous record instead for the offence charged. It is clear that according to S v Beja case, there must be a relation between the punishment and the offence. An accused cannot be punished for his past offences. In my view, a term of imprisonment is unavoidable but the

period should be much less than three years because it is disproportionate to the nature of the offence. Secondly, when the appellant committed the present offence the period of suspension of the sentence previously imposed had not yet expired. The magistrate did not make a reference to this fact when he sentenced the appellant to three years' imprisonment.

[9] A court which has to impose a sentence in any criminal case has to consider the possibility or probability in terms of section 280(2) of the Criminal Procedure Act of a suspended sentence being put into operation (see S v Breytenbach 1988(4) SA 286 (C)). In this case the magistrate did not refer to the fact that there was a possibility that an unexpired suspended sentence might be put into operation and had he taken that fact into account he might have come to a different conclusion with regard to the sentence to be imposed. In my view, the magistrate misdirected himself in not taking this fact into account. Taking all these factors into consideration, I would impose a sentence of 24 months' imprisonment.

[10] In the result the appeal against sentence succeeds. The sentence is set aside and is substituted with the following:

"The accused is sentenced to undergo a period of 24 months' imprisonment. The sentence is antedated to 31 January 2007".

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ZONDI, J

VAN REENEN, J: I agree. It is so ordered.

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VAN REENEN, J