IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A493/2011

DATE: 25 NOVEMBER 2011

In the matter between:

JACOB KAMEEL Appellant

and

THE STATE Respondent

J U D G M E N T

MANTAME, AJ:

This is an application for leave to appeal by appellant against conviction and sentence. The appellant was sentenced to 36 months imprisonment by Magistrate Nel at the Robertson Regional Court on 18 August 2010. Appellant was represented by Mr Theunissen and the respondent by Ms Allchin.

It is common cause that appellant was charged with one count of theft and alternatively, contravention of section 36 of Act 62 of 1955 (possession of presumably stolen goods). Appellant pleaded not guilty to both the main and the alternative count on 11 May 2010.

In summary:

On 5 January 2009, appellant was at Mr Spuri-Curelli's house where he was tasked to do some repair duties in the said house. He was assisted by one Sirel Pretorius. On the same day Ms Van As happened to be a visitor in the said house. At some stage, she took off her rings as she was washing the dishes and put them off in the kitchen counter.

At around five o'clock in the afternoon, the complainant's friend wanted to pay the appellant and he did not have a change. The complainant went to get change from the café. On her return back, she met the appellant along the road and she gave him the money. It is when the complainant arrived back at her friend's house she visited, that she discovered that her rings went missing. Immediately the appellant was the first suspect, as he was the only person who went inside the house with Mr Spuri-Currelli.

Amongst the witnesses that were called, the state called the evidence of Sirel Pretorius, who worked with the appellant on that particular day and Arthur Temmers, who is the person that the rings were first offered to. Mr Pretorius confirmed that the appellant indeed stole the rings from the house that they were working in and thereafter went to sell them. They stopped to sell them to Arthur Temmers. Temmers was not interested and

they were ultimately sold to Magan and that was where the rings were ultimately recovered.

Appellant and his witnesses did not really take their case anywhere as the evidence was very strong against him. Appellant applied for leave to appeal on the following basis:

1. That the court *a quo* did not afford him the opportunity to trace further witnesses. He wanted to call one Samuel Snyman to testify on his behalf.

2. That he was intimidated by both his legal counsel and state prosecutor.

3. That there was a conspiracy to make him a thief, after Sirel Pretorius pleaded guilty and received a lighter sentence.

4. That the evidence of Pretorius should have been treated with caution.

5. Although the appellant was present when the record was constructed, it seems he never confirmed under oath that indeed the record was constructed correctly. It is, therefore, disputed that he is guilty of theft. The

respondent did not prove its case beyond reasonable doubt. Appellant was, therefore erroneously convicted and requested this court to set aside the conviction.

On sentence it was appellant's argument that his personal circumstances were not taken into consideration by the court *a quo*. He had a wife and three children that he was taking care of. There was no food in the house and his wife was pregnant at the time. He should have been afforded an opportunity to go and take care of his family. Further it was appellant's submission that the court *a quo* overemphasised his previous convictions, as well as the seriousness of the offence, together with the interests of society. The court did not show any mercy as such, the sentence stands to be set aside and be replaced with a more appropriate sentence.

The respondent on the other hand submitted that the court *a quo* set out and explained to the appellant the status and why it had to reconstruct the record, as well as how it would do so. The appellant was asked if he was happy to have the notes of the magistrate read into the record. At all material times he was requested to confirm the record and he confirmed that he was happy with the record, though it was not under oath. In light of the decisions taken in this division, the matter before this appeal court was properly reconstructed. See S v Gora

2010 (1) SACR 159 (WCD), where the useful guidelines and requirements were set out as to how the record should be reconstructed.

It was argued further that though the evidence of Sirel Pretorius was that of a single witness, it was corroborated by the evidence of Temmers. Further, the court found the state's case to be very strong against the appellant. Furthermore, appellant's own witnesses did not take his case any further. It was the respondent's submission that after the court *a quo* evaluated all the evidence, the only reasonable inference is that the appellant took the rings.

Respondent argued that sentencing is an exercise of discretion and each case is decided on its own merits. When sentencing the appellant, the court *a quo* had to take into account the previous convictions of the appellant and the majority being for similar offences.

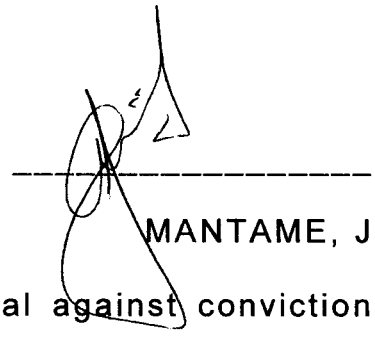
The court *a quo* had to take into account the value of the goods that were stolen. Appellant abused a trust relationship and has shown no remorse throughout the trial. Having been convicted of so many offences, it is doubtful that he is interested to be rehabilitated. There has been no misdirection by the court *a quo*. The sentence that was ordered, was very

much appropriated. The appeal should, therefore, be dismissed and the conviction and the sentence be upheld.

During appellant's application for leave to appeal, it was discovered that some of the portions of the record were missing and the record of the proceedings had to be reconstructed. This court is, therefore, satisfied that the record before this appeal court is properly reconstructed. It is so that the court has the duty to evaluate all the evidence before it when it comes to a process of passing a verdict. After careful consideration of the evidence that was led by the state, I am not at all persuaded that there were misdirections from the court *a quo*. The magistrate's reasoning in the analysis of evidence, was very much articulate and I cannot find fault in his judgment.

The fact that appellant alleged that he was not given a chance to call his witness, was denied as untruthful by the magistrate and that was addressed in his judgment. In my opinion appellant was correctly convicted, more especially taking into account the evidence of Sirel Pretorius, who was at all times with the appellant. That testimony was very much honest and direct to the point and one cannot infer any conspiracy formed against the appellant.

I have as well taken note of the fact that sentencing is the exercise of discretion. The state has proved 9 previous convictions against the appellant and the appellant confirmed all those previous convictions, although most of them were very old. I have also taken into account that this offence took place during the period of appellant's suspended sentence. They almost reflect the same or similar offence that is theft. In sentencing the appellant, I would imagine that the court *a quo* has taken into account the sentencing triad. It follows, therefore, that the appeal court can interfere with the sentence of the court *a quo* when it is unreasonable and shockingly inappropriate. See the S v Pillay 1977 (4) SA 531 (A) at 534H-535G. In this present case I am convinced that this is not the case and consequently I propose the following order: **APPEAL AGAINST CONVICTION AND SENTENCE IS DISMISSED**.



MANTAME, J

I agree and it is so ordered. The appeal against conviction and sentence is dismissed.

GOLIATH, J

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