



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)  
(Coram: Samela, J et Henney, J)**

***[Reportable]***

**High Court Ref No: 474/20**

**Magistrate's Serial No: 04/20**

**Case No: 586/20**

In the matter between:

**THE STATE**

VS

**SERGIO BARON**

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**JUDGMENT: 16 OCTOBER 2020**

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**HENNEY, J**

Introduction

[1] This matter came before this court by way of a review in terms of section 302 of the Criminal Procedure Act 51 of 1977 ("the CPA"). This was after the accused who appeared before the Magistrate's Court in Ceres, was convicted on 28

September 2020 on one count of theft of 8 chocolates to the value of R71,92 which was committed on 29 April 2020 at Shoprite, Ceres. After his rights to legal representation were explained to the accused, he elected to conduct his own defence and pleaded guilty to the charge of theft.

[2] He was questioned by the Magistrate in terms of the provisions of section 112 (1) (b) of the CPA. The Magistrate after having been satisfied that the accused admitted all the elements of the offence, proceeded to convict him. Where after the state proved previous convictions. He was sentenced to a period of 12 months' imprisonment.

[3] In anticipation that this court might request reasons for sentence, the Magistrate when the matter was transmitted for review, attached her reasons for the sentence she imposed on the appellant. Which I must say I welcomed, because it prevented an unnecessary delay in the review of these proceedings. She said the following: "... *Honorable Judge*

*This matter is before you for Review. I would like to give my reasons as to why I sentenced the accused to twelve (12) months imprisonment for theft. Besides the fact that he has relevant previous convictions, he committed this offence when the whole country was placed in the Lockdown Level 5. He left premises on the day of the incident even though he was not an essential worker. He went to Shoprite not to buy essential needs like groceries, as per Lockdown Regulations, but to steal luxury items-chocolates. He had no regard for the Regulations put in place in order to curb the spread of (sic) Corona Virus, hence, I sentenced him as mentioned above."*

[4] The Magistrate it seems was concerned that the accused in addition to committing the crime of theft also contravened section 11B (1) (a) of the regulations issued under section 3 of the Disaster Management Act 57 of 2002, published in the Government Gazette number 11062 dated 25 March 2020, which existed and was issued at that time under the Level 5 of the regulations. The specific regulation at that time provided that for the period of lockdown every person is confined to his or her place of residence unless strictly for the purposes of performing an essential service, obtaining an essential good or service, social grant and seeking emergency life-saving or chronic medical attention. Under regulation 11G it was stated that every person who contravenes regulation 11B shall be guilty of an offence and on conviction liable to a fine or imprisonment. It clearly seems that the accused at that time allegedly committed a different offence, for which he was not charged or convicted and under the Constitution presumed to be innocent.

[5] The Magistrate took into consideration as an aggravating factor that the accused failed to adhere to the lockdown regulations, and had committed an offence for which he was not charged or convicted. Whilst the Magistrate it seems had good intentions by expressing her displeasure about the conduct of the accused she could not have taken it into consideration as an aggravating factor. Under circumstances where the accused was not charged and convicted of an offence of contravening regulation 11B read with 11G of the regulations. This in my view was an irrelevant circumstance and amounted to a misdirection where it had a direct bearing on the sentence imposed on the accused.

[6] What however can be regarded as a relevant circumstance in considering an appropriate sentence was the previous convictions of the accused. From SAP 69's of

the accused it seemed that he has a long list of previous convictions since 2007. His first conviction though of theft was in 2008 when he paid an admission of guilt fine of R200,00; the second conviction for theft was on 9 June 2010 when the court imposed a fine of R100 or 10 days imprisonment; his third conviction for theft was on 12 February 2014, when he once again paid an admission of guilt fine of R100; his fourth conviction of theft was on 3 May 2016 where he was sentenced to a fine of R1000 or 30 days imprisonment that was suspended for a period of 5 years on condition that the accused is not convicted on any offence of which dishonesty is an element and which is committed during the period of suspension; his fifth conviction of theft was on 16 May 2019 and he was once again convicted on 2 charges of theft where after he was sentenced to 6 months imprisonment after the court took both counts together for the purposes of sentence.

[7] The accused's personal circumstances are the following: He is 31 years of age and the father of two children, 6 years and 4 years old respectively. He is not married but stays with the mother of his children. He worked as a packer/general worker it seems at a fruit farm earning a salary of R500 per week. At that stage, he did not work and he was not able to pay a fine. The Magistrate in imposing a sentence took into consideration the seriousness of the offence and the prevalence thereof. She also in particular took into consideration that the accused did not steal necessary items like food but luxury items like chocolates. The Magistrate further took into consideration the interests of society and said that the community expects the court impose a suitable sentence to deter not only the accused but others from committing these kind of offences.

[8] The Magistrate furthermore also took into account that the accused had 6 previous convictions for theft and that none of the sentences had the desired effect to rehabilitate the accused. And the Magistrate found that the accused who had stolen the luxury items does not deserve any mercy from the court.

[9] In my view, the Magistrate misdirected herself in imposing a sentence of 12 months' direct imprisonment on the accused. For the reasons as already stated and furthermore, that the sentence imposed was disproportionate. The Magistrate clearly overemphasised the seriousness of the offence as well as the interests of society. In my view to sentence a person to 12 months' imprisonment for stealing 8 chocolates to the value of R71,92 is excessive. The question that needs to be considered is whether stealing 8 chocolates is so serious to justify the accused's removal from society, when clearly on the facts he did not pose a danger to society.

[10] The accused can at best be described as a petty thief, who is rather a nuisance than a danger to society to warrant his removal therefrom. Although the accused had been previously sentenced to a custodial sentence of six months' imprisonment and to non-custodial sentences like a fine and a suspended sentence it does not mean that every sentence thereafter imposed upon him should be heavier than the previous one. The circumstances and the seriousness of the offence for which he is presently before the court in my view plays a very important role in considering the effect which the previous convictions would have in the imposition of an appropriate sentence.

[11] It is a well-established principle that although the previous convictions of an accused play an important role in the imposition of sentence, it should not be overemphasised at the expense of the other factors and aims of punishment. See In

this regard **S v Kalane**<sup>1</sup>. This court in **S v Muggel**<sup>2</sup> applied the oft quoted dictum in **S v Rabie**<sup>3</sup> of Corbet JA and held even though an accused person may have previous convictions the court in considering an appropriate sentence must bear in mind 'that punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy.'

[12] The Magistrate in my view, should have imposed a less stringent sentence given the fact that the appellant was the father of 2 young children where under the circumstances he stole 8 chocolates to the value of R71,92. The sentence in my view is excessive and it is not in accordance with justice. The Magistrate should have investigated the possibility of imposing a sentence of correctional supervision in terms of section 276 (1) h of the CPA. Given the fact that the appellant has been sentenced to a period of imprisonment and has served a portion thereof, it would be appropriate rather to set aside the sentence of direct imprisonment in terms of section 276 (1) (b) of the CPA and replace it with a sentence of imprisonment in terms of section 276 (1) (i) which can be converted into a sentence of correctional supervision after the accused have served a portion of the sentence of imprisonment which can be almost done immediately depending on an obligation by the Department of Correctional Services.

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<sup>1</sup> 1988 (2) SA 206 (O)

<sup>2</sup> 1998 (2) SACR 414 (CPD)

<sup>3</sup> 1975 (4) SA 855 (A) at 862G

[13] In the result therefore, I would make the following order:

That the sentence of twelve (12) months imprisonment is set aside and replaced with the following sentence: Nine (9) months imprisonment in terms of the provisions of section 276 (1) (i) of the Criminal Procedure Act 51 of 1977.

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**R.C.A. HENNEY**

Judge of the High Court

I agree.

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**M.I. SAMELA**

Judge of the High Court