THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Ref No: 192/21

Case No: E830/20

Magistrate's Serial No: 1/21

In the matter of: **[REPORTABLE]**

THE STATE

and

ZENOBIA JACOBS

Coram: Kusevitsky J & Myburgh AJ

Delivered: 31 March 2021

REVIEW JUDGMENT

Kusevitsky J (Myburgh AJ concurring):

[1] This case comes before us on automatic review. The accused was charged with theft of 1 x Infacare baby milk and 1 item of ladies clothing from the Checkers Hyper, Parow Centre. The crime was alleged to have been committed on 16 July 2020 and the accused was arrested that same day. The matter was placed on the court roll on 20 October 2020 for the first appearance. The accused was absent and a warrant of arrest was summarily issued. The accused appeared on the following date, being 5 November 2020 on the warrant of arrest. On the same day, the accused, representing herself, pleaded guilty. After addressing the court in mitigation of sentence, the matter was postponed for pre-sentence reports. The accused was remanded in custody without bail.

[2] The accused has a long list of previous convictions. During 2009, she was arrested for being in possession of drugs and fined R 600 or 30 days imprisonment. Thereafter, she was charged and sentenced for theft on no less than eight occasions from 2012 to 2019. She was either fined or received wholly suspended sentences. In respect of the last offence in 2019, she received a caution and was discharged.

[3] In her *ex parte* statement on mitigation of sentence, and upon the questioning by the Court in respect of her long list of previous convictions for theft, she testified that she was 32 years old, and a single mother of 4 children. The father of her children had been a gangster and was killed. Her children are 13, 9, 7 and 3 years old respectively. She lived in a Wendy-house with her children until it burned down and all of her children's documentation were destroyed. She and her children now live with her mother who is wheelchair-bound.

[4] She stated that sometimes she would get assistance from family members, but it was not a lot. She admitted that if there was nothing in the

house, or if her child needed something, then she would just go to the shop and steal it. She says that she would be caught every time, but if the children needed something again, then she just go and steal again. When asked if she had a problem that she kept committing this offence, she replied; " *I do not know. It is just if I need something, I just do not know if I have a stealing problem or something. But if I need something then I just go to the shop and I take it and then I get caught every time, but every time I try –I try*." She stated that she did not have a drug problem – at least not anymore since she was caught. She said that she left the drugs with her second child and then went to rehab. This was between 2011 and 2012.

[5] The court requested a correctional supervision and probation officers report. Due to the Covid-19 pandemic, the accused, who was still in custody, was not in court when the matter next served before the magistrate on 10 December 2020. All of the inmates had been requested to return to prison due to a Covid-19 outbreak in the police cells. At that time the correctional report was in any event not yet to hand and the matter was postponed to 21 January 2021. The matter was again postponed to the dates of 9 February 2021, 23 March 2021 and 19 April 2021 for the said reports to be furnished. The magistrate indicated that the latter date would be the final postponement for the pre-sentencing reports. Curiously, on the 23 March 2020, a letter written by the probation officer remarkably indicated that their office had only received a request for a pre-trial report some 2 weeks earlier, that would have been at the beginning of March 2021, despite the State having ostensibly requested same in November 2020. Be that as it may, as a result of the short notice, the probation officer stated that the report would not be available on the requested date of 23 March 2021.

[6] On 19 April 2021, the pre-sentencing reports were ready, however the docket was not before court. The court issued a subpoena for the investigation officers to appear in court on 23 April 2021 and for the finalization of the matter. On 23 April 2021, the docket was still not before court. The matter was yet again postponed to 4 May 2021. By this time, the accused had been in custody awaiting sentencing for a period of some six months.

[7] On 4 May 2021, the pre-sentence was submitted to court. It reflected that the accused came from a relatively stable home . Her parents divorced when she was 8 years old; her mother worked as a nurse and worked long hours; her mother remarried when she was 16 years old and her step-father had a good relationship with the children. The accused was an average learner and passed all of her grades. When she started High School, the accused began associating herself with a negative peer group and soon started using drugs. She eventually lost interest in school and left whilst still in grade 9. Thereafter she worked at Hungry Lion, a local fastfood restaurant for 3 years until she fell pregnant . She also worked at a clothing store for a period of 4 years, however it was reported that she left this job due to her drug addiction.

[8] In her early twenties, she started using crystal meth. She said that she never received drug treatment but claimed to have stopped during 2015. The report commented that the accused has been struggling with drug addiction for years. According to the accused, she shoplifts in order to support her children, but according to family members, her drug addiction is the cause of these criminal activities. The report stated that there was no evidence that the accused had stopped using illicit substances; that she commits acts of theft to sustain her dependency of illicit substances and that as a result of substance addiction and her destructive lifestyle, she has relinquished her parental responsibility to the detriment of her children who are meant to be dependant

on her for their livelihood. Being a prolific shoplifter is an indicator of her being a drug user.

[9] In weighing up the sentencing options, the probation Officer indicated that a sentence of direct imprisonment would not address the root cause of the accused offending behaviour. Furthermore, in assessing correctional supervision, the probation officer was of the opinion that a sentence that reflected a punitive measure, together with correctional supervision which would act as a rehabilitative element would be deemed suitable, but was also not recommended as it would not holistically address the accused's addiction to illicit substances. Instead, she was of the view that, since the accused was subjected to different sentencing measures, this did not have the desired effect. I may also point out that it most certainly did not have a deterring effect, which is another indicator of the substance addiction. The probation officer was of the view that it would be in the best interest of the accused as well as her family and community, that the accused undergo in-patient drug treatment. Her recommendation was thus the following:

> "*For the accused, Ms Zenobia Jacobs, to be admitted to a drug treatment centre in terms of section 296 of the Criminal procedure Act, (Act 51 of 1977), read with the provisions of the Prevention and Treatment for Substance Act, 2008 (Act 70 of 2008). Pending admission to a drug treatment centre for the accused to remain in custody at Pollsmoor prison*."

[10] Whilst handing down sentence the magistrate indicated that the court was aware of her personal circumstances but that it also had to take into consideration the fact that the accused was not a first time offender. It stated that of the nine previous convictions, the accused had been sentenced to

suspended sentences or fines. The accused was never given correctional supervision or direct imprisonment.

[11] The court also acknowledged that the accused had been awaiting trial for five months[1], given that on her very first appearance, she was released on warning and warned to appear on the 20th October 2020. She failed to appear which resulted in the subsequent issuing of the warrant of arrest and her remittance to custody. Although she indicated that the accused had been in custody for '*long'*, it does not appear that she evaluated this factor in her consideration of the sentence which she imposed, especially given the fact that she had pleaded guilty very soon after her arrest; had no legal representation; and the delays were not of her making but seemingly due to the tardiness of the administrative court process.

[12] The court then went on to deal with the seriousness of the offence. She indicated the economic loss suffered by business as a result of theft and stated that if offenders kept on stealing from shops, that employees lose their employment due to *selfish* people. She stated that the accused had been offered a lot of opportunities to mend her ways, but " *here she is before this Court'*. Not once did the court specifically deal with the accused's personal circumstances and alarmingly, seemed to have totally ignored or simply disregarded the probation officers report in respect of the accused's drug addiction despite saying that she had. What the court simply did was to read out the recommendation of the probation officer's report and added that because the recommendation did not indicate a drug treatment centre for the accused to receive treatment, that she could not simply sentence the accused indefinitely until a treatment facility became available.

[1] At the time of sentencing

[13] The accused was thereafter sentenced to six months' imprisonment. Thereafter the state requested a further remand for 14 days in order to obtain the J14, which would initiate the process of putting the previous suspended sentences, wholly into operation. This means that the sentences imposed on 8 August 2019, where a sentence of 10 months imprisonment[2] was imposed; 90 days imposed on 15 May 2019[3]; 30 days imposed on 30 April 2018[4]; 4 months imposed on 17 May 2017[5] would all be resuscitated and would have to be served out. In effect, the consequences of the sentence means that 18 more months would be added to the 6 months direct imprisonment imposed on the accused (over an above the 6 months awaiting sentencing). This means that, inclusive of her time spent in custody ,that she would have to serve an effective 30 month sentence, or 2 ½ year sentence for the current offense.

[14] If one has regard to this, then it is abundantly clear that the sentencing court did not apply its mind to the effect of the sentence that it imposed, which had the result of effectively increasing the accused's incarceration. It is trite that a review court has an obligation to ensure, that where an accused pleads guilty in a lower court, to ensure that the proceedings so conducted are in accordance with justice. I am of the view that there were at least two mis-directions in this matter. This first pertains to the harshness of the sentence and the court a *quo's* disregard for the six months that the accused had already spent awaiting her sentencing and the disregard of the probation officer's report as to the root of the offences committed and secondly, the failure to engage the necessary legislative framework designed to deal with sentenced persons in the position of the accused.

[2] wholly suspended for 5 years on condition that she not be found guilty of theft…
[3] wholly suspended for 3 years
[4] suspended for a period of 4 years
[5] suspended for 5 years

[15] With regard to the harshness of the sentence, I refer to a review judgment penned by Rogers J (and in which I concurred). In *S v Neethling*[6], an accused was charged with theft of clothing from a motor vehicle on 11 December 2019. He was arrested on the same day. He had a long list of previous convictions. He told the magistrate that he stole because of drugs and truthfully declared that he would by lying if he told the court that he would not re-offend. The court requested a correctional supervision report but 8 months later, the report was still outstanding. The accused, acting in person, demanded that his case be finalised. The magistrate obliged, sentencing him to three years imprisonment.

[16] Rogers J reiterated that our courts have often emphasised that there is a limit to the aggravating effect of previous convictions. The punishment must still be proportionate to the offence. The accused was convicted of stealing two items of apparel from an unlocked motor vehicle. The value of these items were not established, but concluded that second-hand clothing generally has a modest value. The items were recovered. He stated that this was close to being a case of petty theft, similar to someone caught shortly after exiting a shop with pilfered items of modest value, which is what we have in *casu*.

[17] No correctional supervision report was forthcoming and the accused in that matter insisted that his case be finalised. He had already been in custody for eight months. When the accused said on 30 July 2020 that he wanted his case finalised, it did not appear that the magistrate sought to elicit further information from him about the nature and extent of his drug use and the steps if any which he had taken towards rehabilitation. The magistrate had plainly been concerned that the accused was resorting to a life of crime because of a drug habit.

[6] Review No. 351/20 18 August 2020

[18] The court held that even if the accused had not already spent eight months in custody, the sentence of three years' imprisonment was inappropriately harsh. It induced a sense of shock and what exacerbated one's sense of injustice was the that this sentence was imposed on someone who had already spent eight months in custody awaiting trial and sentencing. It did not seem that this was taken into account, unless the magistrate thought that, but for the time spent in custody, the crime would have warranted a sentence of nearly four years or more.

[19] In *casu*, the value of the stolen items is R504.98. R 205.00 of that amount was for baby milk formula. Taking into account all of the evidence before the sentencing court, it should have sentenced the accused to 6 months direct imprisonment, but ante-dated it to when she pleaded guilty. The lower court should also have addressed the impact that the order of direct imprisonment imposed would have on the resurrection of the suspended sentences and the cumulative effect of the sentence imposed.

[20] On this basis alone, I am of the view that the proceedings were not in accordance with justice and that the sentence imposed should be set aside.

[21] Secondly, the lower court also did not appreciate the powers that it has with regard to an accused sentenced person to whom it has been recommended they attend a treatment facility, in *lieu* of prison. The court also, in my view, merely paid lip service to the recommendation of the probation officer's report, stating that it was unable to let the accused serve an indeterminate sentence without knowing what treatment facility to send her to. This approach was simply incorrect in law.

[22] In the matter of *S v Van der Merwe*[7], I dealt with the ways in which the legislature dealt with the committal of persons to a treatment centre. In that matter, the magistrate had postponed the sentence of an accused who had pleaded guilty for theft in terms of section 112 (2) of the Criminal Procedure, in order for him to submit himself to treatment at the in-patient drug rehabilitation program at de Novo rehabilitation centre.

[23] Persons can enter a registered rehabilitation centre either as a voluntary service user in terms of section 32 of the Prevention and Treatment of Substance Abuse Act, 70 of 2008 ('Substance Abuse Act") , or an involuntary service user under section 35 of the Substance Abuse Act. An admission to a public treatment centre by either a voluntary or involuntary service user can only occur in terms of this Act.[8]

[24] Section 36 of the Substance Abuse Act deals with the committal of a person to a treatment centre after they have been convicted. It provides as follows:

> "A court convicting a person of any offence may in addition or *in lieu* of any sentence in respect of such offence order that such person be committed to a treatment centre if the court is satisfied that such person is a person contemplated in section 33(1) and such order, for the purposes of this Act, must be regarded as having been made in terms of section 35".

[25] Section 33(1) of the Substance Abuse Act deals with the admission of the involuntary service user to a treatment centre and thereafter lists the requirements of such an admission. It provides the following:

> **Admission of involuntary service user to treatment centre**

[7] Review Judgment 63/2017
[8] S v Van Der Merwe, Review judgment WCHC 63/2017 at para 6

> **33.** (1) An involuntary service user, except those referred to in sections 36 and 40, 10 may not be provided with treatment, rehabilitation and skills development at a treatment centre unless a sworn statement is submitted to a public prosecutor by a social worker, community leader or person closely associated with such a person, alleging that the involuntary service user is within the area of jurisdiction of the magistrate's court to which such prosecutor is attached and is a person who is dependent on substances and—
>
> *(a)* is a danger to himself or herself or to the immediate environment or causes a major public health risk;
>
> *(b)* in any other manner does harm to his or her own welfare or the welfare of his or her family and others; or
>
> *(c)* commits a criminal act to sustain his or her dependence on substances. ("Own emphasis")

[26] In *casu*, the sentencing court had at its disposal, a probation officers report which indicated that the accused committed criminal acts to sustain her dependence on substances, i.e. the report satisfied the requirement in terms of section 33 (1)(c); and that after having satisfied itself that the accused was in fact such a person as contemplated, was obliged to impose the provisions of section 36(1) of the Substance Abuse Act. In such an instance, an enquiry in terms of section 35 (1) is not necessary.

[27] But this was not the only option available to the lower court. If the court did not feel comfortable granting the order in terms of section of 33(1), it also had the option of instituting an enquiry in term of section 35 of the Substance Abuse Act. Section 35 deals with committal of persons to a treatment centre after an enquiry is held by a magistrate. This enquiry is to satisfy itself that the accused is in fact such a person as contemplated in section 33(1). Here witnesses may be called, or evidence presented to show cause why an order must not be made in terms of subsection (7). The contents of any report submitted in terms of subsection (5), must be made available to the accused and they have the opportunity of either refuting the allegations of the report, or abiding thereby. Once a court is satisfied that after the enquiry, on consideration of the evidence and of any report submitted in terms of

subsection (5), that the person concerned is a person contemplated in section 33(1)[9]; that such person requires and is likely to benefit from treatment and skills development provided in a treatment centre[10]; or it would be in such a person's interest or in the interest of his or her dependants, if any or in the interest of the community that he or she be admitted to a treatment centre[11]; that the magistrate may order that the person concerned be admitted to a treatment centre designated by the Director– General for a period not exceeding 12 months.

[28] A magistrate who makes an order in terms of subsection (7) that a person be admitted to a treatment centre, may in addition, order that such a person be admitted in custody as provided for in section 36, or released on bail or warning until such time as effect can be given to the order of the court.[12] In other words, until a probation officer or the Director General has specified exactly which treatment facility is able to accommodate the accused.

[29] The magistrate in *casu*, failed to declare and commit the accused as an involuntary service user despite all of the evidence indicating that the accused was indeed such a person as contemplated in section 33(1), or *alternatively* should have conducted an enquiry in terms of section 33 (5) to ascertain whether the accused was in fact such a person as contemplated – and ordered that she be admitted to a treatment centre.

[30] A magistrate may also, in *lieu* of sentence, or in addition to any sentence, refer a person to a rehabilitation centre by applying section 296 of the Criminal Procedure Act. The provides as follows:

[9] section 35 (7)(a)
[10] section 35 (7)(b)
[11] section 35 (7)(c)
[12] section 35(8)

296 Committal to treatment centre

"(1) A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such offence, order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992, if the court is satisfied from the evidence or from any other information placed before it, which shall in either of the said cases include the report of a probation officer, that such person is a person as is described in section 21(1) of the said Act, and such order shall for the purposes of the said Act be deemed to have been made under section 22 thereof: Provided that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

(2) (a) Where a court has referred a person to a treatment centre under subsection (1) and such person is later found not to be fit for treatment in such treatment centre, such person may be dealt with mutatis mutandis in accordance with the provisions of section 276A (4).

(b) For the purposes of the provisions of paragraph (a) the expression 'a probation officer or the Commissioner' in section 276A (4) shall be construed as the person at the head of the treatment centre or a person authorized by him."

[31] If the magistrate did not want to make use of section 296 of the Criminal Procedure Act, another alternative sentence which allowed for rehabilitation treatment is under section 276 (1)(e) of the Criminal Procedure Act which provides the following:

"**276. Nature of punishments**

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—

(a) ... [S 276(1)(a) rep by s 34 of Act 105 of 1997.]

(b) ….

(c) …;

(d) ;

(e) committal to any institution established by law;"

[32] Thus, there would also have been a mechanism in which the magistrate could have ordered that the accused submit herself for committal in terms of

section 276 (1)(e) to a rehabilitation centre, as designated by the probation officer and surrender herself on a date and place as directed.

[33] It could also have postponed the sentence in terms of section 297 of Act 51 of 1977 and postponed the sentence for a period of three years, subject to the committal to a treatment and rehabilitation centre. Section 297 deals with the conditional or unconditional postponement or suspension of sentence, and caution or reprimand. Subsection (1)(a)(i)(ff) provides that where a court convicts a person of any offense, other than an offence in respect of which any law prescribes a minimum sentence, the court may in its discretion postpone for a period not exceeding five years the passing of sentence and release the person concerned, on one or more conditions, whether as to the compulsory attendance or residence at some specified centre for a specified purpose.

[34] Given all of the options available to the magistrate and evidence to suggest that the accused is in need of committal to a treatment centre, I am of the view that the court should have availed itself to the various options that it had at its disposal, and not have summarily dismissed the evidence as irrelevant considerations. The legislature purposefully intended to include these provisions to deal with vulnerable and compromised accused persons in situations such as these and courts would be failing in its duty by not utilising these provisions for the benefit of the accused, and ultimately society as a whole. Furthermore, utilizing these provisions would also ultimately impact on the case load of a lower court, by reducing the number of cases where repeat offenders appear before court for petty offenses which are motivated by substance use. Thus even though the necessary interrogation was done in *casu*, it was not followed through and as a result, I am of the view that the proceedings were not in accordance with justice and that the sentence imposed should be set aside.

[35] Having regard to the nominal value of the items, I am of the view that a sentence of three months imprisonment would have been appropriate, and antedated to the date of her incarceration. I would also have suspended the sentence and ordered her committal for treatment at a treatment facility as directed by the Director General or probation officer.

[36] I thus make the following order:

The conviction is confirmed but the sentence is set aside and replaced with the following:

ORDER

1. The sentence imposed is set aside.

2. The accused is sentenced to 3 months imprisonment ante – dated to the date of the incarceration, i.e 5 November 2020.

3. The accused is declared to be a person contemplated in section 33 (1) of the Prevention of and Treatment for Substance Abuse Act, 70 of 2008, therefore in terms of section 36(1) of the said Act, it is ordered that the accused is committed to a treatment centre designated by the Director-General to receive the necessary treatment, rehabilitation and skills development for a period not exceeding 12 months calculated from date of admission.

4. The accused is to submit herself to treatment and rehabilitation designated by the director – general as indicated in 5 below.

5. The accused surrenders herself on the date, time and at the place directed by the Probation Officer as provided for in 4 above.

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Kusevitsky J

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Myburgh AJ