



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: A172/2015

In the appeal between:

KAMOHELO TYS MAKWA

Appellant

And

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* BOKWA, AJ

JUDGMENT BY:

VAN ZYL, J

DELIVERED ON:

25 AUGUST 2016

- [1] The appellant was convicted on a charge of theft and sentenced to 24 months' imprisonment. The appeal is directed against the sentence only with the leave of the court *a quo*. The appellant was released on bail pending the outcome of the appeal.
- [2] The appellant had been found guilty on the basis that he had stolen two bottles of Jagermeister liquor, worth R400,00 from Checkers, Welkom. He was legally represented during the trial.

He pleaded not guilty and did not give any plea explanation. The state called one Mr Polaki as a witness. He is a security officer who was on duty on 19 December 2014 when the incident occurred. He testified that he saw the appellant entering the shop whilst carrying a small bag. He went to certain shelves and from there to a fridge, from which fridge he took a pack of six Windhoek beers. The appellant then proceeded to the tills and paid for the beers. As he was about to leave the shop, Mr Polaki noticed that the bag which the appellant had been carrying, had a bigger appearance than when he entered the shop. He requested to search the bag and found two bottles of Jagermeister liquor. The appellant was unable to produce a slip for the said liquor. He explained that he had bought the liquor at a Chinese shop before he came to Checkers. The appellant however then admitted to Mr Polaki that he had stolen the two bottles of liquor from Checkers. When asked where the tags were which were attached to the bottles, the appellant walked back to shelves where he had earlier left the tags which he removed from the bottles. After cross-examination of Mr Polaki, the legal representative of the appellant indicated that the appellant wishes to make certain formal admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977. It was then admitted that the appellant had taken the two bottles of liquor, worth R400,00 from Checkers without any permission and with the intension to deprive Checkers of its ownership, whilst knowing that it was wrong to do so. The appellant was consequently convicted on the aforesaid basis.

[3] In terms of the notice of appeal the sentence is shockingly harsh and inappropriate as the result of the following:

1. The court ignored the rehabilitation and reformative elements of punishment.
2. The court overemphasised the previous convictions of the appellant.
3. The court overemphasised the seriousness of the offence.
4. The court failed to give proper consideration to the personal circumstances of the appellant.
5. The court failed to take into consideration the “remorseful acceptance of the responsibility of the offence that the applicant took, which became tantamount to a plea of guilty in terms of section 112 of the Criminal Procedure Act, 51 of 1977”.

[4] It is trite law that a court of appeal will not lightly interfere with an imposed sentence. See **S v Kibido** 1998 (2) SACR 213 (SCA) at 216 G – H; **S v Sadler** 2000 (1) SACR 331 (SCA) at 334D – 335 A.

[5] It is evident from the judgment on the sentence that the following personal circumstances had indeed been taken into consideration by the court *a quo* in favour of the appellant:

1. The appellant was 27 years old at the time of sentencing.
2. The appellant was working as a consultant at Visual Homes where he was earning commission of between R700,00 and R1 500,00 per month.

3. He was not married, but lived with his life partner who at the time was pregnant with his child. His life partner was unemployed with the result that the appellant was the sole breadwinner.
4. His highest standard of education is grade 12.

[6] The appellant's legal representative submitted during his argument in mitigation of sentence in the court *a quo* that the admissions in terms of section 220 of the Criminal Procedure Act tantamount to a plea of guilty, which expedited the proceedings and which is also indicative of the appellant's remorsefulness. As indicated earlier, this aspect was also referred to in the appellant's notice of appeal. However, in my view the court *a quo* cannot be faulted for not having taken it into consideration as an alleged mitigating factor. Had the appellant truly been remorseful, one would have expected him to have pleaded guilty from the outset as an indication that he accepts responsibility for his deed, which is the first step towards potential rehabilitation. Instead the appellant waited until the finalisation of the evidence and cross-examination of the state's main witness and only then did he decide to make the section 220 admissions, probably because he realised that the state has a very strong case against him. Such conduct is not indicative of true remorse. The following *dictum* stated in **S v Matyityi** 2011 (1) SACR 40 (SCA) at par [13] is very applicable in this regard:

"[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the

crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him, and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

- [7] When considering the aggravating factors, I have to agree with the contention on behalf of the appellant that the court *a quo* overemphasised the seriousness of the offence in the particular circumstances by exaggerating the negative impact of theft on the community in general and on the tax-payers' money in the absence of any evidence in this regard and by, *inter alia*, referring to evidence on financial losses suffered due to shoplifting which had previously been led in court in a completely different matter.

[8] However, theft still remains a very serious offence and moreover so in the particular circumstances of this matter. The appellant had enough money to pay for the beers, but he wanted even more liquor. The particular items were not stolen in circumstances of destitution, but apparently solely for the sake of socialising and having an enjoyable time.

[9] The previous convictions of the appellant have a severe impact as an aggravating factor in this matter. The appellant has been living a life of dishonesty. The appellant's previous convictions consist of the following;

1. On 2 July 2009 he was convicted of fraud and sentenced to R2 000.00 or 8 months' imprisonment, and a further 4 months' imprisonment wholly suspended on certain conditions.
2. On 13 April 2010 he was convicted of theft and sentenced to 3 years' imprisonment in terms of section 276(1)(i) of Act 51 of 1997. That crime was committed on 3 October 2008.
3. On 25 June 2010 he was convicted of housebreaking with the intent to steal and theft, which was committed on 11 August 2008, and for which he was sentenced to 5 years' imprisonment in terms of section 276(1)(i) of Act 51 of 1977.

Although he has previously been imprisoned, it did not deter him from committing the current offence. It is evident from the record that the appellant was released on parole during August 2013.

The current offence was committed on 19 December 2014, just over a year after having been released on parole and whilst still serving parole. The appellant has clearly not been rehabilitated to the extent that he is able to mend his ways by living a life free of crime.

- [10] Although a sentence of 24 months' imprisonment is not a light sentence for a conviction of theft of products to the value of R400,00, the circumstances of this particular matter, especially the appellant's previous convictions, places this conviction in a more serious category which necessitates a heavier sentence.
- [11] In the circumstances there is no basis upon which we can interfere with the imposed sentence. Even if I was to consider the sentence completely afresh, I would still have imposed a similar sentence. Mr Van der Merwe, who drafted the heads of argument on behalf of the appellant, in my view correctly indicated in the said heads of argument that his instructions are that the appeal should succeed, but that he cannot make any responsible submissions in support thereof. Mr Gumbi, who appeared on behalf of the appellant during the hearing of the appeal, also conceded accordingly.
- [12] The appellant's appeal against the imposed sentence, is consequently dismissed.

C. VAN ZYL, J

I concur.

I.R.O. BOKWA, AJ

On behalf of the appellant: Mr Gumbi
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. L. Zweni
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

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