

A 221/15

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)



30/3/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES:
YES/NO AS MARCH 2015

(3) REVISED

DATE: 25 April 2015

SIGNATURE: [Signature] an sen

HIGH COURT REFERENCE NO. : 354/2014

MAGISTRATE'S SERIAL NO. : 05/2014

REVIEW CASE NO. : K858/2013

THE STATE v THAPELO TALIWE AND ANOTHER

REVIEW JUDGMENT

JANSEN J

- [1] The two accused, Thapelo Taliwe and Omotemo Monare were convicted of housebreaking with the intent to steal and theft and sentenced to six months imprisonment. The accused were not declared unfit to possess firearms. They were convicted and sentenced by the regional magistrate of the Oberholzer area on 5 March 2014.

- [2] The items that were stolen by the accused were a laptop worth R7 000.00, a Sony camera worth R700.00, a set shaving machine worth R200, a Lumia cellular phone worth R3000.00 and R180 cash.

- [3] Both accused were in custody from October 2013, apparently at the request of their guardians.

- [4] On 20 January 2014 both accused pleaded guilty regarding the charge of theft.

- [5] The usual section 112(2) questions were asked of the two accused and it transpired that they admitted all the elements of the charge of housebreaking and theft in terms of section 112(2) of the Criminal Procedure Act 51 of 1977.

- [6] The two accused openly admitted that Omotemo Monare climbed through a small window of the house of a Mr Poee, upon or about the morning of either the 13th or the 15th of August 2013, who opened a larger window for Thapelo Taliwe to climb through. They took all the items referred to above and had

sold some of the stolen items but which were later recovered. They were arrested on the 30th of September 2013 by the police. They were detained from that date. They expressed their remorse.

[7] No judgment on conviction was delivered. It was simply stated by the magistrate that both accused were guilty as charged.

[8] As a result, question were posed to the magistrate regarding the reasons why the two accused, 15 and 14 years of age, respectively, were given a sentence of direct imprisonment of six months during May 2014. The magistrate indicated that she waited a long time for the record and did not realise that she had to respond to the reviewing judge's questions.

[9] The reasons for the sentence are the prevalence of crime in the area and the value of the goods stolen. The magistrate admitted to sentencing them without pre-sentence reports (because they were not forthcoming) in a juvenile facility. The magistrate alleged because of the high number of juveniles appearing for the offence of theft, an alternative sentence had to be considered other than the normal sentence of section 297(1)(a)(ii) of Act 51 of 1977, but acknowledged that prison should be the last resort for juveniles.

[10] On 5 May 2014 it was ordered by the reviewing judge that the accused be released at once.

[11] The matter was referred to the National Director of Public Prosecutions seeking commentary on the following questions: —

- “1. The reasons provided by the magistrate for giving the accused, two youngsters aged 15 and 14 juvenile detention are, inter alia, his knowledge of the prevalence of the crime in that area. Both are first offenders. There were no proper sentencing procedures and it would seem as though no pre-sentencing reports were obtained.*
- 2. It appears that both youngsters have been in custody since October 2013 (at page 7 with the heading “previous convictions” at the end of the record).*
- 3. It appears to the judge in chambers, Judge Jansen, that the sentence is too harsh. Your input would be appreciated.”*

[12] In paragraph 5 of the report written by the senior state advocate PN Ngcobo and SR Mlombo the deputy director of Public Prosecutions the magistrate was criticised for taking two months to refer the matter for review after sentencing and another two months to answer the reviewing judge’s questions. Reference was made to *S v VC 2013 (2) SACR 146 (KZP)*.

[13] Emphasis was also placed on the fact that the accused are both children as defined by the Child Justice Act 75 of 2008. In terms of this Act, section 71 makes it obligatory for a magistrate to request a pre-sentence report before sentencing a child. The probation officer sought a postponement to prepare a pre-sentence report but the magistrate disregarded her request.

- [14] Reference was made to *S v RS and Others* 2012 (2) SACR 160 (WCC) at page 164 where the following is stated: —

“The sentencing court in respect of a child – the child justice court – is encouraged to adopt a ‘restorative approach’ in order to promote these objectives.”

- [1] Further reference was made to *S v F M* 2013 1 SACR 57 (GNP) where the following is stated: —

“... the choices he made were juvenile choices and the primary purpose of the sentence imposed on the accused must be, not to punish him for those choices, but to facilitate every effort to bring him to understand that the choices he made, which landed him in his present predicament, are the wrong choices, and that the world in which he lives does offer other choices and a way of life other than that in which he grew up.”

[emphasis added]

- [15] It was also pointed out in the report that upon sentencing the two accused the magistrate did not take the provisions of the Child Justice Act 75 of 2008 into account, and that in itself constituted a misdirection.

[16] In *S v VC* 2013 (2) SACR 146 (KZP) Steyn J held: —

“The preamble to the Act emphasis the break with the past, and the Act itself provides for a paradigm shift from the practises of the past to the current procedures when children are in conflict with the law.”

[17] The court further states the following in *S v VC supra*: —

“The sentence imposed is not in the interests of justice; it appears to be excessively retributive; moreover it merely pays lip service to the obligations imposed by the Child Justice Act 75 of 2008.”

[emphasis added]

[18] The factors which should have taken into account are the following: —

[18.1] They are 15 and 14 years of age respectively.

[18.2] They were both scholars.

[18.3] They were both first offenders.

[18.4] They both pleaded guilty.

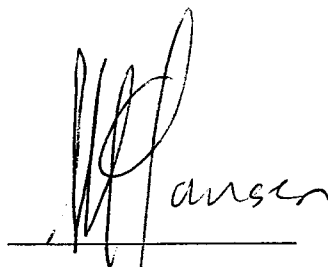
[19] It was submitted in the report that the sentence imposed by the magistrate induces a sense of shock in the circumstances of this case and we recommend that matter be referred back to the magistrate to conduct the sentencing

proceedings according to the prescript of the law as set out in section 71 of the Child Justice Act 75 of 2008. Alternatively that the sentence imposed be substituted by the following: —

“six months correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977.”

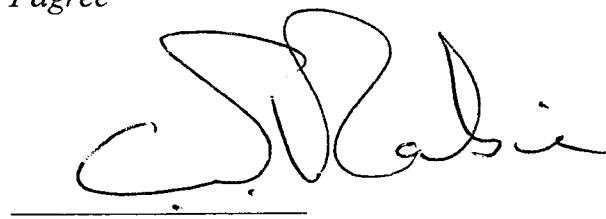
[20] Due to the non-compliance with section 71 of the Child Justice Act 2008 and the fact that the children have effectively served the six months’ prison sentence imposed on them, the following order is made: —

The sentence imposed by the magistrate is hereby set aside.



JANSEN J
JUDGE OF THE HIGH COURT

I agree



RABIE J
JUDGE OF THE HIGH COURT