

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

A420/15

High Court reference number: 210/15

Case number: 234/15

Magistrate's serial number: 11/15

In the matter between:

25/6/2015

THE STATE

and

GILBERT FERNANDO CHIRINDZE

REVIEW JUDGMENT

Baqwa J

- [1] This matter has been brought by way of special review in terms of Section 302 of The Criminal Procedure Act 51 of 1997 after it was discovered that the accused was incorrectly sentenced after being convicted.
- [2] The office of the Director of Prosecutions has been requested to comment and I have received and taken note of their comments regarding the matter.

- [3] The accused was convicted in the Magistrate's Court, Barberton for contravention of Section 2 (1) of Act 37 of 1997 (the Act). He was sentenced as follows:

"Accused is fined R6 600.00 (six thousand six hundred rand) or 6 (six) months imprisonment and a further R6 600.00 (six thousand six hundred rand) or 6 (six) months imprisonment which is wholly suspended for a period of 5 (five) years on condition that the accused is not convicted of contravening Section 2 (2) of Act 37 of 1997 committed during the period of suspension. Under Section 20 (1) of Act 37 of 1997 the 19 DVD's and the CD's are forfeited to the State."

- [4] On the J4 sheet the conviction is captured as follows:

"Convicted of the offence of contravening the provisions of Section 2 (1) read with Sections 1, 2 (2), 10, 19 and 20 of the Counterfeit Goods Act 37 of 1997 and read with the Trade Marks Act 194 of 1993 and the Copyright Act 98 of 1978" which is also how the charge sheet is framed.

- [5] The fact of the matter, however, is that the offence of dealing in counterfeit goods is created by Sections 2 (1) and 2 (2) of the Act.
- [6] Upon reading the charge sheet and conviction it would therefore seem that the trial court erred in convicting the accused in the manner referred to above.
- [7] It would however appear from the reading of the Section 112 plea (Act 51 1977) of the accused that he did intend to plead guilty to the offence provided for in Section 2 of Act 37 of 1997 read with the additional identified sections of the Act and the provisions of Act 98 of 1978.

[8] Bearing in mind that the essence of review proceedings is the consideration of whether real and substantial prejudice has been visited upon an accused person, it would appear that **in casu**, despite the apparent error of the magistrate, such error is only of a technical nature.

See **S v Hlongwa 2002 (2) SACR 37 (T)** at para 63.

[9] The magistrate correctly stated that all the elements of the offence had been admitted by the accused. In the circumstances, the conviction was correct.

[10] The penalty clause in the Act as contained in Section 19 provides that:

“(1) Any person convicted of an offence referred to in Section 2 (2), will be punishable –

(a) In the case of a first conviction, with a fine, in respect of each article or item involved in the particular act of dealing in counterfeit goods to which the offence relates, that may not exceed R5 000.00 per article or item, or with imprisonment for a period that may not exceed three years, or with both such a fine and such term of imprisonment....”

[11] What is apparent from the Section 112 statement of the accused is that the CD's and DVD's were possessed for purposes of sale. The trial court therefore correctly determined that the appropriate sentence was a term of imprisonment coupled with the option of a fine.

[12] What is not clear from the record is why a fine in the amount of R6 600.00 was imposed. Whatever the reasoning was, what is patently clear is that considering that the common cause value of the goods found in possession of the accused was R220.00, the fine was inappropriate.

[13] The personal circumstances of the accused are as follows:

He does odd jobs and has no steady source of income. His approximate earnings are R1000.00 per month. He is a first offender. He has two minor children that he maintains. His legal representative indicated that the accused could afford to pay a fine not exceeding R500.00 or a suspended sentence.

[14] The circumstances of the accused are such that the trial court ought to have considered the accused's ability to pay the fine in instalments.

See **S v Gqobozi 2005 (1) SACR 589**.

[15] Further, the trial court ought to have considered a fine that was within the reach of the accused. In **S v Sithole and Another 1972 (2) SA 67 (AD)** at G – H the following was said:

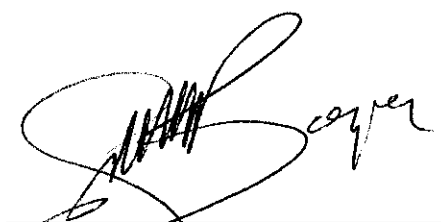
"When a court has decided that a convicted person ought to be afforded the opportunity of staying out of jail by giving him the option of paying a fine, it should not impose a fine which to its knowledge or belief is utterly beyond the means of such person to pay. When it has been decided to give the convicted person the option of paying a fine, there should be some purposeful enquiry into his means in order to enable the court to make a proper assessment of what an appropriate fine, in the circumstances, would be"

[16] **In casu**, it would appear that the trial court misdirected itself by not properly weighing the well-known triad, namely, the crime, the criminal and the interests of society.

See **S v Zinn 1969 (2) SA 537 (A)**.

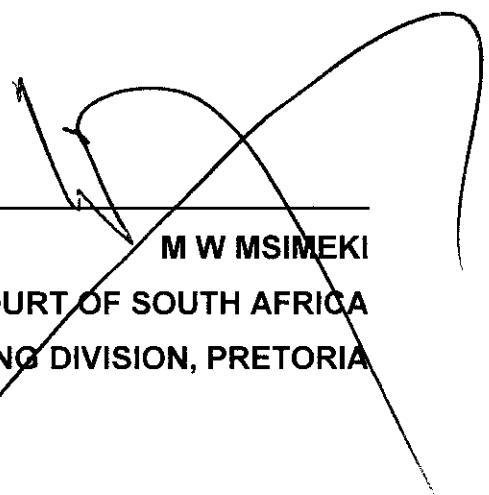
[17] In the result I propose that the following order be made:

- 17.1 The sentence of the Magistrate, Barberton is set aside and substituted with the following:
- 17.2 The accused is sentenced to pay a fine of R3 000.00 or undergo a term of 3 months imprisonment which is wholly suspended for 5 years on condition that the accused is not convicted of contravening Section 2 (2) of Act 37 of 1997 committed during the period of suspension.



S A M BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



M W MSIMEKI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA