

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 30/2015

In the review between:-

STATE

And

KENNY ROY PYLMAN

Accused

CORAM:

G.J.M. WRIGHT *et* S.J. REINDERS, AJJ

JUDGMENT:

G.J.M. WRIGHT, AJ

DELIVERED ON:

26 MARCH 2015

REVIEW JUDGMENT

- [1] The Accused was convicted of theft in the District Court, Ficksburg. He was sentenced to 24 months imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

[2] After the Accused pleaded guilty, the trial magistrate proceeded to question him to ensure that he admits all the elements of the offence charged. The Accused explained that he went to the Caltex Garage to buy cigarettes. He noticed cash lying around and grabbed some R 100,00 notes. He admitted that he took R 3 900,00. The Accused himself worked near the garage, operating a car wash business.

[3] The prosecutor accepted the plea (and by implication the explanation provided during questioning) and the Accused was found guilty accordingly. This provided the factual matrix on the strength of which the sentence should have been considered and imposed. Compare: **S v Thole** 2012 (2) SACR 306 (FB) at 308 h – 309 a. In **S v Van der Merwe** 2011 (2) SACR 509 (FB) at 518 f it was worded as follows:

“The plea, once accepted, defines the *lis* between the prosecution and the defence. Once the parameters of the playing fields are so demarcated, it become [sic] foul play to canvass issues beyond. The rules of fair play have to be strictly enforced.”

[4] The Accused did not testify in mitigation of sentence. He presented certain personal information from the dock in the form of an address to court. It is during this address that the magistrate decided to question the Accused regarding his *modus operandi* on the day that he stole the money. The magistrate went as far as intimating that he does not believe the Accused’s story regarding the cigarettes.

- [5] The magistrate's tone during this series of questions was accusatory and even hostile. The following may be quoted as an example of this attitude of intolerance towards the Accused:

"COURT: Now, as you leave your car wash you are going to Caltex the picture I have in my mind is that you are going for no reason but knowing that there is cash you can steal there? Right?

ACCUSED: Every day, your worship when it is late after closing time I normally buy cigarette at that shop.

COURT: But you did not buy the cigarette this time around?

ACCUSED: Yes, your worship.

COURT: Yes, you did not buy it now, this is why I am saying the thought that comes to my mind is that you went there for nothing but you went there to steal under the guise of buying a cigarette, which you did not buy anyway?"

- [6] During his questioning of the Accused, the trial magistrate indicated a preference for restorative justice in the form of compensation to the complainant. This in itself is a lofty ideal, but the magistrate's demeanour in dealing with the issue leaves much to be desired. Instead of properly questioning the Accused to gather sufficient details regarding his financial situation, the magistrate bombarded the Accused with comments, illustrating his personal view of the matter. The following is quoted as examples:

"COURT: That Pylman Car Wash let it take the money back to Caltex business. Then I will be satisfied. If you do not want to do that say to me now. I want that R 2 000 – 00 you make from your business, you will pay back Caltex Garage R 3 900 – 00. From Pylman Car Wash to Caltex Garage and you do not go to Caltex Garage. You are going to steal when you go there."

And then later:

"ACCUSED: I can do it if I am outside.

COURT: Yes, yes, yes I know that. I know that but you do not go and steal people's money. Money made from Pylman's Car Wash cash. You bring it here, Friday you bring it here and then the next month you pay off the rest and thereafter stop stealing. How about that?

ACCUSED: I will be able to bring half of that amount by next month your worship.

COURT: No, no, no this Friday? This Friday is the end of the month 29 August. I am in a hurry that Caltex get their money, because what they are going to do they are going to increase the petrol and other oil products they have, in order to get their money back that you stole. And then those who buy petrol there like myself will be charged more for your theft."

- [7] The information given by the Accused during this questioning by the magistrate did indicate the following information relevant to the possibility of compensating the complainant:

- (i) The Accused is self-employed.
- (ii) He earns between R 2 000,00 and R 3 000,00 per month.
- (iii) He is married and he has three daughters aged seven years, six years and nine months respectively.

[8] The interaction between the magistrate and the Accused took place on 25 August 2014. The Accused was in custody since his arrest on 8 August 2014. It follows logically that the Accused were unable to earn an income for most of August. Yet the magistrate expected him to have R 2 000,00 ready within the next four days (before 29 August 2014). This attitude of the magistrate paid scant regard to any measure of fairness towards the Accused and made a mockery of any real attempt at compensation.

[9] Restorative justice attempts to restore the relationship between an offender and the complainant (as representative of the community at large). Instead of merely depriving an accused person of his freedom through imprisonment, restorative justice aims at giving an opportunity for a different version of punishment, such as compensating a victim of a crime through financial means. Either section 300 (compensation) or section 297(1)(b) (suspension on condition of compensation) can be used.

[10] In the end the magistrate did not follow through on his intentions, and neither section 300 or section 297(1)(b) was utilized.

[11] The Accused's answers to the magistrate's questions were not under oath. Yet the magistrate used the information provided in considering sentence. A cardinal factual allegation made at the

sentencing phase of a trial should be proved under oath. See: **S v Van Neel**; **S v Rooi** 1980 (1) SA 363 (C). It must never be allowed that an accused is prejudiced by informality. The procedure followed by the court must largely be determined by considerations of fairness to the accused. See: **S v Jabavu** 1969 (2) SA 466 (A) at 472 E.

- [12] It is not in accordance with the fairness and impartiality which the bench should always maintain, for a presiding officer to make a special effort to get the accused to disclose aggravating factors. See: **S v Kiewiets** 1977 (3) SA 882 (EC) at 883 F – G. This appear to have been the intention of the magistrate in enquiring after the specific reason for the Accused' presence at the Caltex Garage on the day in question.
- [13] The guidelines of questioning by a presiding officer were stated as follows in **S v Rall** 1982 (1) SA 828 (A) at 831 A to 833 B:
- (i) The court must not conduct its questioning in such a manner that its impartiality and fairness can be doubted.
 - (ii) The court must not take part in the case to such an extent that the court obscures the points in issue. See: **S v Maseko** 1990 (1) SACR 107 (A); **S v Du Plessis** 2012 (2) SACR 247 (GSJ) at 254 h – i.
 - (iii) The court must not intimidate or upset a witness or the accused to such an extent that the answers are weakened or credibility degraded.
- [14] It is irregular for the questioning by a presiding officer to amount to cross-examination of an accused person. **S v Mathabathe** 2003

(2) SACR 28 (T). These general principles are equally applicable to questioning of an accused in respect of evidence relating to sentence. See: **S v Aspeling** 1998 (1) SACR 561 (C).

[15] Judicial fairness and dignity should be the hallmark of judicial proceedings. See: **S v Tyebela** 1989 (2) SA 22 (AD) at 29 G – 30 E. The magistrate failed miserably in this regard. In the present matter the Accused was treated with disrespect.

[16] I will accept in the trial magistrate's favour that he or she was well aware of a presiding officer's duty to conduct an enquiry as to the existence of all factors and information relevant to the sentencing discretion. It is however the manner in which the magistrate proceeded to elicit the information that causes concern. The inquisitorial role of a court in the process of gathering information must of necessity be limited to procedures which are fair.

[17] The magistrate acted in a manner that justifies an inference that he or she was not open-minded, impartial or inclined to fairness towards the Accused.

[18] The record shows a plethora of postponements. During all of this, the Accused lost his business and with that his only source of income. It therefore became impossible for him to comply with the magistrate's idea of restorative justice. And by the time that the sentencing judgment was finally handed down, restorative justice was not even mentioned.

- [19] This begs the question as to whether the magistrate made an actual order of compensation. The magistrate indicated to the Accused that he expects of him to compensate Caltex for the full amount that has been stolen (R 3 900,00). These comments were made during the Accused's address on sentence and were never formulated in the form of a suspensive condition or actual order. I will except in favour of the Accused that it did not amount to an actual order which he then failed to comply with.
- [20] The Accused pleaded guilty on 25 August 2014. At that time the prosecutor requested the trial court to finalise the matter without SAP69's, thus without any previous convictions proved against the Accused. The matter was thereafter postponed several times. On 18 February 2015 the State was given a second opportunity to address the court on sentence. The prosecutor was then armed with SAP69's and proceeded to prove several previous convictions against the Accused.
- [21] It is important to keep in mind that at this time the Accused already had his opportunity to either present evidence in mitigation or to address the court. As already stated, the Accused elected to address the court. After his previous convictions had been proven, the Accused was again invited to address the court. Unfortunately the magistrate did not find it necessary to explain to the Accused to what extent his previous convictions may be used in aggravation of sentence. It therefore came as no surprise that the Accused did not put any further submissions forward.

[22] Section 271(1) of the Criminal Procedure Act provides that –

“The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions against the accused.” [own emphasis]

[23] The various postponements provided an opportunity for the State to get its house in order and obtain the necessary documentation regarding the Accused’s previous convictions. It does not appear from the short judgment on sentence to what extent, if at all, the Accused’s previous convictions were found to be an aggravating factor. The sentence that was eventually imposed is such that it may be assumed that the previous convictions did play a role.

[24] That being said, the nature and form of the sentencing judgment itself deserves criticism.

[25] In deciding on an appropriate sentence, a presiding officer has to make a value judgment in an objective manner so that it explains the sentence. See: **S v Vries** 1996 (2) SACR 638 (Nm) at 640 g – h. The judicial officer imposing the sentence should therefore provide an explanation for the sentence that he or she decides upon.

[26] The magistrate failed to adhere to this most basic principle of his or her function as judicial officer. This in itself was unfair to the Accused in that no reasons was provided as to why the specific sentence was imposed. The magistrate in almost telegram style

ran through the basic principles traditionally considered when imposing a sentence (the so-called **ZINN** triad). The judgment does not in any way explain what factors were pertinently taken into account or what weight was afforded to each factor and circumstance.

[27] Fortunately for the magistrate (and maybe unfortunately for the Accused) the sentence is appropriate in the circumstances, especially taking into account his previous convictions. The Accused namely has three previous convictions for theft and two previous convictions for housebreaking with the intent to steal and theft. His other previous convictions are not relevant to the present crime as they are for assault and malicious damage to property.

[28] Despite the irregular and unjudicial conduct of the magistrate, the sentence should stand.

ORDER

In the result the following order is made:

1. The Accused's conviction and sentence are confirmed.

G.J.M. WRIGHT, AJ

I agree.

S.J. REINDERS, AJ