

A116/13

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 21/2/2013

THE WHICHEVER IS NOT APPLICABLE	
PORTABLE. YES/NO.	☒
INTEREST TO OTHER JUDGES: YES/NO	☒
REVISED.	
18/02/2013	<i>[Signature]</i>
DATE	

CASE NO : B438/2011
HIGH COURT REF NO : 444
MAGISTRATE's SERIAL NUMBER : 15/2012

In the matter between:

THE STATE

Vs

MATHINGO SIMBARASH and MASENYANI R CHAUKE

REVIEW JUDGMENT

TOLMAY, J

- [1] This matter came before me by way of a review application in terms of sec. 304 of the Criminal Procedure Act, Act no 51 of 1977, as amended. The two

accused in this matter were found guilty of stock theft. Accused one was sentenced to 3 years imprisonment and accused 2 to a term of 5 years imprisonment.

- [2] On 8 May 2012 I sent a query to the learned magistrate as the record was incomplete. Despite the incompleteness of the record I also asked the learned magistrate whether he did not improperly enter the arena. I sent the query despite incompleteness of the record to try and ensure that the matter be dealt with expeditiously. The magistrate did comment and denied entering the arena. I accept the learned magistrate's explanation and this aspect does not require any further consideration.
- [3] Pertaining to the incomplete record, the learned magistrate apologised for the shortcomings and stated that the record was now however complete. Despite this assurance the evidence of the one witness, Mr Shirinda was still not in the record. The record was sent back again to rectify this. After the record was rectified it was again placed before me.
- [4] Due to the aforesaid there was an inordinate delay in the finalisation of this matter. Magistrates should take care that incomplete records are not sent for review as this results in unacceptable delays¹ which may lead to injustice. This

¹ See *S v Nyaumbeka* 2012(2) SACR [ECG]

problem occurs on a regular basis in this division and magistrate's should ensure that records are in order before it is sent for review.

[5] After a perusal of the new complete record the following queries were raised by me on 28 August 2012:

- "1. Was the learned magistrate entitled to impose a sentence of 5 years on Mr Masenyani? (Accused 2)
2. Was the learned magistrate not limited to a sentence of 3 years in the light of the provisions of the Act?
3. Was the sentence of 3 years imprisonment not excessive in the light of the fact that Mr Simbarash (accused 1) is a first offender?"

[6] The magistrate furnished his reasons, which I then sent to the DPP for their consideration. When the record was returned to me the magistrate's comments were not in the court file and could not be found by the Registrar or the DPP. The Registrar stated this must have been mislaid at the DPP's office. Both the Registrar and the personnel of the DPP should ensure that documents are not mislaid as it may hamper the administration of justice. The gist of it however was that he deemed the sentences to be appropriate.

[7] The DPP submitted that:

1. Although accused no 1 was a first offender, stock theft is a very serious offence and therefore the sentence of 3 years imprisonment is not inappropriate. The DPP's memorandum dealt with the general principles pertaining to sentencing and was not of any assistance pertaining to the sentence imposed on accused 1.
2. The learned magistrate could not have imposed a 5 year sentence on accused 2 and that the matter should be referred back to the magistrate for proper sentencing procedures to be followed. This means that he must be referred to the Regional Court for sentencing.

[8] I will first deal with the position of accused 1. A first offender is not as of right entitled to a suspended sentence². The court should however take into consideration all the circumstances of the case and the adage, punishment should fit the criminal as well as the crime, be fair to the accused and to the society and be blended with a measure of mercy³. Although stock theft is a serious crime and direct imprisonment maybe imperative⁴, the possibility of suspending part of the sentence should have been considered,

[9] Accused no 2 was sentenced to 5 years' imprisonment because he has previous convictions of a similar offence. Section 92(1) of the Magistrates' Court Act 32 of 1944 stipulates that a Magistrate Court, which is not a

² S v Victor 1970(1) SA 427 (A)

S v Viljoen 1971(3) SA 483 (H)

S v Holder 1979(2) SA 70 (D)

³ S v V 1972(3) SA 611(A) at 614

⁴ S v Oosthuisen en 'n Ander 1996(1) 475 (O) SACR

Regional Court, may impose a sentence of imprisonment, not exceeding 3 years.

[10] Section 14 (a) of the Stock Theft Act 57 of 1959 reads as follows:

"14. Jurisdiction of magistrates' courts in respect of sentence. –

Notwithstanding anything to the contrary in any law, any magistrate's court may, in respect of an offence under this Act –

(a) where the court is not a court of a regional division, impose a fine or imprisonment for a period not exceeding three years; or"

[11] In the light of the aforesaid the learned magistrate acted *ultra vires* by sentencing accused 2 to 5 years imprisonment. Accused 2 should have been referred back to the Regional Court for sentencing purposes, if the magistrate considered a sentence exceeding 3 years to be appropriate in the light of the accused's previous convictions

[12] In the light of the aforesaid the following order is made:

12.1 The convictions of accused 1 and 2 is confirmed;

12.2 The sentences are set aside and the following order is made:

12.2.1 Accused 1 is sentenced to 3 years imprisonment of which 18 months is suspended for a period of 5 years under the condition that he is not found guilty of the same offence during the period of suspension.

12.3 Accused 2 is referred back to the Regional Court for sentencing.



R G TOLMAY

JUDGE OF THE HIGH COURT



E JORDAAN

JUDGE OF THE HIGH COURT