

A942/13

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

DATE:21/11/2013

HIGH COURT REF. NO.: 599
MAGISTRATE's SERIAL NO: 01/2013
CASE NUMBER: A08/2013

In the matter between:

THE STATE

Vs

FRANS SIBUSISO NKOSI

REVIEW JUDGMENT

TOLMAY, J:

- [1] This matter came before me by way of review in terms of sec 304 of the Criminal Procedure Act, 51 of 1977.

[2] The accused, a 20 year old male, was convicted in the Waterval-Boven Magistrate's Court on a charge of housebreaking with intent to steal and theft. He was sentenced to 24 months direct imprisonment, half of which was suspended for 3 years on condition that he is not again convicted of housebreaking with intent to steal and theft during the period of suspension. He was declared unfit to possess a firearm. The accused elected to conduct his own defence during the proceedings in the court *a quo*.

[3] After perusing the record I asked the learned magistrate to comment on the following:

3.1 "In the light of the fact that the state chose to proceed without proving previous convictions could the court, when sentencing the accused, take into consideration previous convictions?

3.2 Was the probation officer's suggestions that the accused be held in a Youth Care Facility a viable option in the light of the fact that the accused was older than 18 years when he committed the crime?

3.3 Should the learned magistrate not have indicated during sentence why the recommendation of the probation officer was not followed?"

[4] The magistrate replied and stated that he did not take the previous convictions of the accused into account, that despite the fact that he

referred to the accused's previous convictions during sentencing. He went further to state that the accused has a propensity to commit crime and had appeared before him on two counts of housebreaking. He stated pertaining to the second question that the probation officer's report was not convincing. He conceded that he should have dealt with the recommendation of the probation officer.

- [5] The DPP was approached to comment. The DPP is of the view that:
- (a) the magistrate erred in taking into consideration previous convictions;
 - (b) that the accused should have been dealt with as an adult, seeing that he was older than 18 years when he committed the crime; and
 - (c) that the magistrate should have dealt with the reasons why he deviated from the probation officer's report.

PREVIOUS CONVICTIONS

- [6] The state proved no previous convictions. Despite that the fact that the magistrate states as follows during sentencing: "*and lastly the court will also take cognisance that you are not a first offender before the court although it was not read out your SAP69 and it does not reflect during this ... (indistinct) the report of the correctional supervision*". (p 12 rule 7 – 10 of the record).

- [7] When the State decides to proceed with sentencing proceedings in a case without proving the previous convictions the trial court cannot take into account the previous convictions, which it clearly did in this instance.
- [8] In the event that a trial court becomes aware of the existence of previous convictions through a prepared report for purposes of sentence, the court may, if it deems it to be in the interest of justice, request the state that the records of previous convictions must be made available to it, before an appropriate sentence can be imposed. This was not done in this instance.
- [9] In the light of all the facts the magistrate erred in taking into consideration the previous convictions and also erred in taking into consideration crimes that were committed by the accused after this incident.

THE AGE OF THE ACCUSED

- [10] At the time when the accused committed this crime he was 20 years old. He was, because of his age, and for the purpose of a distinction between an adult and a child offender, no longer considered to be a child. If the accused was at the time when he committed this offence, not older than 18 years, specific considerations would apply when dealing with his sentence. The provisions of the Child Justice Act 75 of 2008 would then be applicable.

- [11] Due to the accused's age the recommendations of the probation officer that the accused be held in a youth care facility was not a viable option. The court was dealing with an adult and the legislation applicable to children could not be applied.

REASONS FOR DEVIATION FROM THE PROBATIONS OFFICER'S REPORT

- [12] Due to the fact that the accused was an adult, this aspect becomes irrelevant, but for the sake of completeness I deal with the issue.
- [13] The provisions of section 71(4) of the Child Justice Act 75 of 2008, enjoins a presiding officer who imposes a sentence other than that recommended by the probation officer to enter the reasons for the imposition of the different sentence on the record. This was not done in this instance.

CONCLUSION

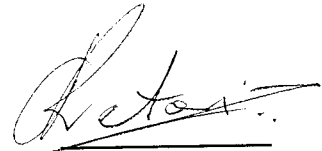
- [14] The accused must be treated as a first offender and alternative sentencing options should have been considered rather than direct imprisonment. The DPP recommends that the sentence be set aside and a suspended sentence be imposed. I agree with this point of view.
- [15] In the light of all the circumstances the sentence cannot stand.

[16] The following order is made:

1. The conviction is confirmed, and
2. The sentence is set aside and replaced with the following:
“The accused is sentenced to six (6) months imprisonment wholly suspended for three (3) years on condition that the accused is not found guilty of a crime of which dishonesty is an element during the period of suspension.”

I agree:


R G TOLMAY
JUDGE OF THE HIGH COURT


C PRETORIUS
JUDGE OF THE HIGH COURT