

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 241/2012

In the review between:

THE STATE

and

SELLO MHLAPHO

CORAM: LEKALE, J *et* MTHEMBU, AJ

JUDGEMENT: MTHEMBU, AJ

DELIVERED ON: 13 SEPTEMBER 2012

[1] This is a special review in terms of section 304(4) of the Criminal Procedure Act, no 51 of 1977.

[2] On 14 June 2012 the accused, who was unrepresented, was charged in the Bloemfontein District Court with theft in that upon or about 7 June 2012 and at or near Jet Clothing Store, Maitland Street, he did wrongfully and intentionally steal six (6) pairs of Buccaneers shoes, one (1) double bed comforter and one (1) brown travelling bag. The total value of these items was R1 609,22.

- [3] The accused pleaded guilty to the aforementioned charge and the magistrate found him guilty. The trial court, thereupon, imposed the following sentence *ex facie* the record:

“A fine of one thousand five hundred rand (R1 500,00) or six (6) months imprisonment wholly suspended on condition that you don’t commit any or the same offence in the period of three years.”

Whereas on the J15 the sentence imposed is reflected as:

“R1 500,00 fine or imprisonment, wholly suspended for three years on condition that no offence is committed during the suspension.”

- [4] The foregoing discrepancies caught the attention of the control magistrate who referred the matter for special review and noted that:

- 4.1 The term of imprisonment has been omitted on the J15 and the condition of suspension to wit “no offence (offence) is committed” is too broad;
- 4.2 If the magistrate applied section 112(1)(a) of the

Criminal Procedure Act 51 of 1977, then the sentence imposed is incompetent as it is in excess of three (3) months and contrary to the provisions of this section;

4.3 On the other hand if the magistrate applied the provisions of section 112(1)(b) then *ex facie* the record the judicial questioning of the accused falls short of the requirements of this section and therefore a guilty verdict cannot follow;

4.4 Further hereto the sentence imposed by the acting magistrate is subject to automatic review as he has been on the bench for less than seven (7) years. The magistrate omitted to explain review rights to the accused or submit the record of proceedings for review as required in terms of section 302 of Act 51 of 1977.

[5] The learned control magistrate concludes that the proceedings are not in accordance with justice and requests that same be set aside *in toto* and the record be remitted for a trial *de novo*.

- [6] I am in respectful agreement with the learned magistrate that the proceedings were not in accordance with justice. This court will not hesitate to use its power of review when the interests of justice clearly demand its intervention. Compare **S v MAFU** 1966 (2) SA 240 (EC); **S v ELI** 1978 (1) SA 451 (EC).

ORDER:

- [7] In the light of the above the entire proceedings inclusive of the sentence imposed by the acting magistrate are set aside.
- [8] The record is remitted for a trial *de novo* before another magistrate.

J. B. MTHEMBU, AJ

I concur.

L. J. LEKALE, J

/eb