

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A45/09

In the matter between:

J M

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* MOLEMELA, J

JUDGMENT BY:

MOLEMELA, J

DELIVERED ON:

04 February 2010

[1] This is an appeal against conviction and sentence. The appellant, who was 16 years old at the time of commission of the offence, was charged with theft of four Cadbury chocolates valued at R31,00. The appellant was not legally represented at the time of the proceedings. She was, however, duly assisted by her guardian as contemplated in the provisions of section 73(3) of the Criminal Procedure Act, 51 of 1977 (“the Criminal Procedure Act”). She pleaded guilty to the charge and was,

after questioning in terms of the provisions of section 112(1)(b) of the Criminal Procedure Act, found guilty and sentenced to a fine of R300,00 (three hundred rand) or 80 (eighty) days imprisonment, half of which was conditionally suspended for 5 (five) years. The effective sentence was thus R150,00 (one hundred and fifty rand) or 40 (forty) days imprisonment, with payment of the fine being deferred to the 13th June 2008. When the deadline for payment passed, the appellant was arrested and brought before court. The effective imprisonment sentence of 40 (forty) days imprisonment was then put into operation. The fine was paid after the appellant had already spent 1 (one) night in custody, on which night she was unfortunately allegedly raped in the police cells. Subsequent to her release from custody, the appellant applied for and was duly granted leave to appeal against both the conviction and sentence.

- [2] Counsel for the appellant submitted that the court *a quo* erred in failing to adequately explain the appellant's rights to legal representation and legal aid to both herself and her guardian. He contended that the court *a quo* erred in failing to postpone

the proceedings until such time as a representative of the Legal Aid Board would have been available to conduct the appellant's defence. He further argued that the explanation of rights to legal representation was cryptic and inadequate, especially as it did not record exactly which rights were explained to the applicant and/or her guardian and whether the appellant was granted an opportunity of discussing this aspect with her guardian or not. Counsel for the appellant emphasized that the court *a quo* had failed to actively encourage the appellant and/or her guardian to obtain legal representation, thus failing to meet the standards set out in the cases of **S v MOOS** 1998 (1) SACR 372 (C) at 381 d – i; **MGCINA v REGIONAL MAGISTRATE, LENASIA AND ANOTHER** 1997 (2) SACR 711 (W) at 719 – 720 and **S v PIENAAR** 2000 (2) SACR 143 (NC) at 148 d – e.

- [3] It needs to be pointed out that even though the proceedings were mechanically recorded, a transcript of the proceedings was not available, as a result of which the court *a quo* availed its notes to serve as a reconstructed record of the proceedings.

With regards to the issue of legal representation, the reconstructed record reads as follows:

“Beskuldigde se regte verduidelik ten opsigte van regshulp en regsverteenvoordiging. Beskuldigde verstaan en gaan maar saak self behartig.”

[4] In the court *a quo*’s reasons for judgment, it *inter alia* stated as follows with regards to the explanation of the right to legal representation:

“Hierdie volledige verduideliking is nie woord-vir-woord so afgeskryf nie. Dit sou so op die meganiese notule voorgekom het as die saak meganies opgeneem was. Dat die appellant se regte wel verduidelik is is toegegee deur die advokaat van die appellant by aansoek om verlof tot appèl.

Die appellant se regte ten opsigte van regshulp en regsverteenvoordiging is aan haar verduidelik. Sy kan aansoek doen om regshulp en as haar aansoek goedgekeur word dan verskaf die Staat aan haar ‘n regsverteenvoordiger en dit kos haar niks. As sy egter ‘n verteenwoordiger van haar eie keuse wil aanstel, is sy self vir die persoon se vergoeding verantwoordelik. Die derde opsie is dat sy haar eie verdediging kan waarneem.”

[5] The court *a quo* further explained in its reasons for judgment that the reason why its notes were cryptic was due to the fact that, during the proceedings, it had laboured under the impression that the proceedings were being mechanically recorded due to the presence of the recording machine's operator throughout the proceedings.

[6] I think it is to be expected that a reconstructed record will not be as detailed as a manual recording. In its reasons for judgment, the court *a quo* further stated that after the appellant's rights in respect of Legal Aid and legal representation had been explained, she and her father decided that she would conduct her own defence. Both the appellant and her father subsequently deposed to an affidavit in support of the appellant's application for condonation for late filing of an appeal. They thus had an opportunity to deny the court *a quo*'s averments if they were not true. They did not do so. I therefore accept the court *a quo*'s re-assurance that the rights in respect of legal aid and legal representation were adequately explained to the appellant even though the record is cryptic on that point.

By parity of reasoning, I would equally not expect any encouragement for the exercise of such rights to be evident from the reconstructed record. As authority for my view, I would rely on the case of **S v MABUZA & OTHERS** 2009 (2) SACR 435(SCA), where the court had an opportunity to criticise the reasoning of the court in **S v SIBIYA** 2004 (2) SACR 82 (W) whose facts are similar to those of **MGCINA v REGIONAL MAGISTRATE, LENASIA AND ANOTHER**, *supra* and also to comment on the cases of **S V RADEBE ;S MBONANI** 1988(1) SA 191 (T). At p. 439d of the judgment in **S v MABUZA** (*supra*), Cachalia J A had the following to say:

“Our courts have indeed established guidelines dealing with what Goldstone J described in *S v Radebe*, *S v Mbonani* as the in general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

He went on to say that:

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why

the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice – I should make it clear that I am not suggesting that the absence of legal representation *per se* or the absence of the suggested advice to an accused person *per se* will necessarily result in such an irregularity or an unfair trial and the failure of justice. Such case will depend upon its own facts and peculiar circumstances.”

(my own underlining for emphasis).

[7] On p. 441 c at paragraph [14], the learned judge, making reference to an alleged failure of the magistrate to bring the

minimum sentences to the accused's attention, had the following to say:

"The fact that the cryptic notes contain no reference to the magistrate informing the appellants of the prescribed sentences does not necessarily imply that he did not do so. And a court will not set aside proceedings on the mere supposition that he might not have done so... Even if I were to assume, in the appellants' favour, that the magistrate did not alert them to the Act's penalties, there is still no basis to set aside the conviction. The notes reveal, albeit in cryptic form, that the appellants were informed that they were facing serious charges."

[8] Another criticism levelled at the court *a quo*'s judgment is as regards the style employed by that court during its questioning of the appellant in terms of section 112(b) of the Criminal Procedure Act. I deem it appropriate to quote from the record, where it is recorded as follows:

"V: Het u op die 5/06/08 te Multi Save 4 sjokolades @ R31.00
gesteel.

A: Ja.

- V: Hoe gebeur dit.
- A: Ek het die lekkers onder my blad onder my T-hemp gehou en uitgegaan. By Pep Stores kom vang hulle my.
- V: Het u geld gehad om daarvoor te betaal.
- A: Nee.
- V: Het u enige reg om die lekkers te vat sonder om daarvoor te baal.
- A: Nee.
- V: Het u geweet wat u doen is verkeerd.
- A: Ja.”

[9] It was argued on behalf of the appellant that the aforementioned questioning commenced with a leading question. This was conceded by the magistrate as well as in the respondent's heads of argument. However, during the appeal hearing, the respondent's counsel argued that the question concerned was not a leading question, insofar as it did not suggest a particular answer. There is a plethora of case-law on the manner in which the section 112(1)(b) questioning should be carried out. I am of the view that the first question may be criticised only for being inelegantly couched in that it makes reference to a legal conclusion (stealing), rather than a

fact from which it could be concluded that she had stolen something. Inelegantly phrased as it may be, it does not, in my view, constitute a leading question. Even if I were wrong in this conclusion, in that the question is in fact a leading question, this question ought not to be viewed in isolation but vis-à-vis the rest of the questions.

- [10] I would agree with the respondent's counsel that immediately after asking that question, the court then allowed the appellant to freely relate what transpired on the day in question. In her own account of the events, the appellant concedes to (1) hiding the chocolates under her arm-pit and (2) having no money to pay for them. She further admitted that she had no right to take the aforesaid chocolates and knew that what she was doing was wrong. It was therefore correctly argued, on behalf of the respondent, that it could be inferred from the appellant's responses that she had the intention to steal. The appellant's counsel, relying on the case of **S v NAIDOO** 1989 (2) SA 114 (A), submitted that as the responses made by an accused

persons to the section 112(1)(b) questioning do not constitute evidence, no inference can be drawn from them.

- [11] In my view the present case is distinguishable from that of **S v NAIDOO** (*supra*). In that case it was held that the facts disclosed by the accused person in response to the questions posed as contemplated in section 112(1)(b) had not established that the accused had rendered himself guilty of dealing in drugs, seeing that the same facts permitted a conclusion that the accused person only acted as an intermediary between the seller and the buyer. In *casu*, the facts disclosed by the accused do not, in my view, permit any other finding other than that of the appellant stealing the chocolates as stipulated in the charge-sheet. With regards to the ownership of the items stolen, i.e. the chocolates, it is quite clear from the first question, leading as it may be presumed to be, that the chocolates concerned were in the lawful possession of Multisave and were removed from its control when the appellant, after concealing them, went beyond the pay-points. Not only did the appellant go beyond the pay-points of

Multisave, but she went to a different store altogether. The intention to permanently deprive the owner or lawful possessor of the chocolates was thus clearly established. I accordingly find that as all the elements of the offence of theft were proven, the conviction of the court *a quo* was therefore proper.

[12] With regards to sentence, the respondent conceded that the sentence imposed by the court *a quo* could not be supported. That concession was, in my view, correctly made, as that sentence does not reflect that the appellant's mitigating circumstances were taken into account. In my view, the sentence imposed was not appropriate for a 16 year old first-offender who was a mother of an infant. The court *a quo* over-emphasised the prevalence of the offence over the appellant's personal circumstances. This failure to consider the triad of sentence in a balanced fashion constitutes a misdirection which warrants interference with the sentence imposed.

[13] Counsel for the respondent submitted that the appropriate sentence would be one reflecting the pettiness of the offence

committed. He proposed that the appellant be cautioned and discharged. Counsel for the appellant proposed an unconditional postponement of sentence for a period of five years. If the accused is not ordered to appear at court again for sentence to be imposed, then the effect of that sentence on the appellant would be that she was cautioned and discharged. In essence, the appellant and the respondent both have the same sentence in mind. I am satisfied that this sentence is the most appropriate one under the circumstances, especially considering the appellant's age at date of commission of the offence, her status as a mother and the pettiness of the offence.

[14] I would accordingly grant the following order:

- 1. The appeal against conviction fails and the conviction is thus confirmed.**
- 2. The appeal against sentence succeeds.**
- 3. The sentence imposed by the court *a quo* is set aside and replaced with the following:**
Sentencing of the accused is unconditionally postponed for a period of 5 (five) years.

M.B. MOLEMELA, J

I concur.

C. VAN ZYL, J

On behalf of appellant:

Adv. M. Miller
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. R. Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

MBM/sp