

A276/09

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Review Case No B930/08

High Court Ref No 263

Magistrate Serial No 2/09

The State

V

Linah Annah Nkuna

31/3/09

NOT REPORTABLE

JUDGEMENT

SERITI J

1. This matter came before me on automatic review pursuant to the provisions of section 302 of the Criminal Procedure Act 51 of 1977.
2. The accused was arraigned in the magistrate's court, Lydenburg, on a charge of theft. She appeared unrepresented. She pleaded guilty to the charge and the magistrate proceeded in terms of section 112 (1) (b) of Act 51 of 1977. After questioning the accused the magistrate was satisfied that the accused is guilty of the offence of theft as charged.
3. The accused was convicted on the 6 February 2009. She was sentenced on the same day to 36 (thirty six) months imprisonment and in terms of section 103 Act 60 of 2000 no order was made.

4. No query was sent to the magistrate. The matter was referred to the office of the Director of Public Prosecutions for their comment. Advocate B E. Maoke commented that the magistrate correctly convicted the accused. He also indicated that the accused was given an opportunity to address the court from the dock and although she did not tender an argument this irregularity is not one that vitiates proceedings. He is of the view that because the stolen items were recovered, the sentence of 36 (thirty six) months imprisonment is shockingly inappropriate and that there is justification to interfere with the sentence imposed by the trial court. He indicated further that the matter should not be referred back to the magistrate for reconsideration of sentence as that would be prejudicial to the accused. He further commented that accused stole Nestle Powder Milk to the value of R89-95 that shows accused stole primarily to fulfil a need, namely to obtain food and he referred to the following cases
- (i) S v Baartman 1997 (1) SACR 304 at 305 e f,
 - (ii) S v Makgaba 1990 (1) SACR 224 (T),
 - (iii) S v Witbooi 1990 (1) SACR 461 (K)
 - (iv) S v Beja 2003 (1) SACR 168 (SE)
 - (v) S v Stenge 2008 (2) SACR 27 ©
5. In the present case the accused stole Nan Nestle Powder Milk valued at R89-95. Accused pleaded guilty to the charge and that alone shows that she was remorseful of what she did.
6. I agree with Advocate Maoke that accused stole to fulfil a need, namely to obtain food. This is obvious from her personal circumstances.
7. The record shows that she has 16 (sixteen) previous convictions of theft committed between 1991 and 2006 of which 6 of them are more than 10 (ten)

years old. In 1992 she committed in the same year two more offences of theft even though she was given a suspended sentence with certain conditions. She received different types of sentences ranging from a sentence with an option of a fine, wholly suspended sentence, imprisonment without an option of a fine, sentence with alternative of imprisonment portion of the sentence suspended on certain conditions, sentence in terms of section 276 (1) (h) of the Criminal Procedure Act 51 of 1977 and community service. On 29 July 1992 she was sentenced to 8 (eight) months imprisonment for an offence of theft committed on the 09 July 1992 and 12 (twelve) months imprisonment for the same offence committed on the 20 July 1992.

8. Between 1992 and 2000 she did not commit any offences of theft. However she started her recidivist career of crime in 2001 when she was again convicted of theft followed by 12 (twelve) other convictions for the same offence. Her last conviction was in 2006.
9. In mitigation of sentence she advised the court that she has 5 (five) children aged 20 (twenty), 15 (fifteen), 14 (fourteen), 10 (ten), 9 (nine) and 1 (one) grandchild age unknown. She is unmarried and worked for a contractor at a school in Pienaar as a labourer and she earned R800-00 per month. She gets a child support grant for the last three of her kids. She lives with her kids and the father of the last three kids. It is not noted on the record whether the father of her last three children is working or not. She has no formal training and she attended school up to standard 4 (four).
10. It is trite that the question of sentence falls within the discretion of the trial court and this court will only interfere with the sentence imposed by the trial

court if the trial court failed to exercise its discretion properly, misdirected itself or if the sentence imposed is shockingly inappropriate.

11. The personal circumstances of the accused when considered with the offence that she committed, suggest that the sentence imposed by the magistrate is shockingly inappropriate. The accused should not be sentenced for her previous convictions but for the offence charged.

12. In *S v BAARTMAN* 1997 (1) SACR 304 (ECD) Jones J held:

"In the case such as this it is necessary to be aware of 3 considerations:

- a. The accused should be sentenced for the offence charged and not for his previous record;*
- b. The public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and*
- c. While it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased. "*

13. The magistrate over emphasised the seriousness of the offence and the previous convictions without considering the accused personal circumstances. This court is therefore is entitled to interfere with the sentence imposed by the trial court.

14. Advocate Moake recommended that the sentence be altered to something in the region of 2 (two) years imprisonment and half of the sentence be

suspended for a period unspecified on suitable conditions. In the circumstances

15. I am of the view that a sentence of 12 (twelve) months imprisonment half of which is suspended for 3 (three) years on condition that accused is not convicted of theft or attempted theft committed during the period of suspension, is appropriate in this case.

16. I therefore make the following order;

16.1 Conviction of accused is confirmed.

16.2 Sentence imposed on the accused is set aside and is substituted with the following *is substituted for it*;

16.3 12 (twelve) months imprisonment half of which is suspended for 3 (three) years on condition that accused is not convicted of theft or attempted theft committed during the period of suspension.

16.4 The sentence is antedated to the date on which the accused was sentenced by the trial court, namely 6 February 2009.


W. L. SERITI
JUDGE OF THE HIGH COURT.

I agree.


F. M. LEGODI
JUDGE OF THE HIGH COURT.