



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

Review case number : 21/2008
High court reference number : 505
Date : 08 September 2009

In the matter between:

THE STATE And NOZA MORRIS MALULEKE

JUDGMENT

MOLOPA J

The accused was convicted in the Magistrate's court. Giyane on House Breaking with intent to steal and theft. He was sentenced on 22 August 2008 to three (3) years imprisonment.

The accused was unrepresented throughout the proceedings. On his first appearance the accused indicated that he wanted to plead guilty to the charge and to conduct his own defence. After conviction and sentence the record was transmitted to this court on review.

The first thing that struck me when I read the record was the severity of the sentence imposed by the magistrate. Pursuant to my *prima fade* view I addressed a query to the magistrate pertaining to the severity of the sentence, and sought reasons for the imposition of a 3 (three) year term of imprisonment.

The magistrate duly provided his reasons as follows:

"The dictum in the leading case of RAB1E 1975 (4) 5/1 855 (A) at 861 (d) -862 goes:

'punishment must fit the criminal as well as the crime, he fair to society, and he blended with the measure of mercy according to the circumstances "

House breaking with intent to commit an offence as well as theft are both serious crimes. In certain jurisdictions, these crimes are designated for trial (by the DPP of such divisions) in the regional court for an obvious reason: "the need to impose far more severe sentences beyond the district court jurisdiction "

The crimes of house breaking with intent to commit an offence as well as theft are also very prevalent in our society. It is therefore, high time that the courts make their attitude to offenders and potential offenders alike

These crimes evoke a lot of indignation from the victims as well as ordinary members of society alike, and if appropriate measures are not taken, then there is a real prospect in instances such as these, which may contribute towards a build-up of the erosion of society's confidence in the administration of justice.

In the wake of endemic proportions of the spate of burglaries, courts can no longer afford to sit idle and be seen merely to be paying lip services, or rather be seen to be engaged in on exercise of convenience, dusting under the carpet, matter that in

the eyes of the community amount to outrageous and serious transgressions

Already in our country, research continues to indicate that society's confidence in public institutions, including courts is diminishing. Incident (albeit sporadic) of vigilantism including setting up of (informal) kangaroo courts are gaining ground. Formal institutions such as courts are being labelled lame duck and toothless creatures which are unable to offer solutions to victims of crimes.

In casu, although accused admit to having been under the influence of intoxicating substances when he committed the crime, the possibility of the crime having been premeditated cannot be ruled out. Accused clearly knows and understand his victim's circumstances. Accused seem to have some privilege information surrounding both the set-up as well as the where about of the inmates in this homestead that he targeted for burglary. Either owing to some prior or current relationship with some inmates at complainant's residence, accused became privy to vital information that probably enabled him to commit the crime instead.. "

The office of the National Prosecuting office was also requested to comment, after having been provided with the record of proceedings as well as the magistrate's reasons.

Advocate C A Pillay with whom S Lakhi - Hatia agrees, having

set out both mitigation and aggravating factor, is also of the view that the sentence imposed is severe and suggests that part of the sentence be suspended for a specified period on certain conditions.

The following were as correctly set out by Advocate C A Pillay of the NDPP. the mitigating factors:

" The accused pleaded guilty to the charge against him;

- The accused is a first time offender;*
- The accused is unemployed;*
- The accused is unmarried with one child;*
- The accused has shown some remorse by handing over the stolen properties when asked to. and by apologizing for his actions during the court proceedings;*
- The accused acted in a state of desperation due to his financial status;*
- The accused was intoxicated at the time of commission of the offence. "*

On the other hand, the following were as set out by Advocate Pillay, the aggravating factors:

- The accused abused and exploited the trust bestowed upon him since he knew the layout of the house prior to the incident which he relied on for the commission of this offence.*
- The accused only confessed to the crime after he was pointed out by the sangoma as the perpetrator;*
- The accused intended to sell the stolen items for his monetary gain. "*

On all the circumstances in this case it is clear that the trial court over emphasised the seriousness of the offence and the

interests of the community against the personal circumstances of the accused, and also overlooked the fact that the items stolen by the accused were actually returned to the complainant and the accused, who had pleaded guilty, without wasting the court's time, clearly showed remorse.

The magistrate also failed to take into account that the accused said that he was intoxicated, which aspect the magistrate did not even try to establish to what extent he may have been intoxicated.

I am of the view that the weight of the mitigating factors exceeded the weight of the aggravating factors. The circumstances of the case called for a lighter sentence which would have been appropriate in the present case than the one imposed.

It is indeed misdirection on the part of a trial court to over - emphasise one or more of the three elements usually taken into account when assessing an appropriate sentence.

A judicial officer is expected to balance all three (3) elements including the aggravating and mitigating factors when assessing sentence in order to arrive at a judicially balance sentence. As already pointed out there were several strong mitigating factors in favour of the accused which the presiding officer ought to have taken into account in assessing the sentence.

Advocate C A Pillav, as already stated concedes that the sentence of three (3) years direct imprisonment imposed on the accused is excessive sever, and suggests that the sentence be altered to three years imprisonment one year of which is suspended

for a period of five years on condition that the accused is not found guilty of Housebreaking with intent to steal and theft committed within the period of suspension.

I am of the view that the sentence as suggested by Advocate Pillay of the NDPP is still excessive in the circumstances.

Having considered the matter and taking into account the input b\ the state Advocate, I am of the view that the sentence herein cannot be allowed to stand.

In the result I make the following order:

- 1) The conviction of the accused is confirmed:
- 2) The sentence of three (3) years imprisonment is hereby set aside and replaced with the following:
 - In terms of section 276 (1) (i) of Act 51 of 1977 as amended, the accused is sentenced to two (2) years imprisonment half of which is suspended for five (5) years on condition the accused is not again convicted of housebreaking with intent to steal and theft committed during the period of suspension.
 - * The sentence is antedated to 22 August 2008.
- 3) The accused must be released from prison with immediate effect, and the registrar is directed to immediately convey this order to the prison authorities where the accused is imprisoned.

L M MOLOPA JUDGE OF THE HIGH COURT

I agree

T J RAULINGA JUDGE OF THE HIGH COURT

It is so ordered

