

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Review No. : 28/09

In the review between:

THE STATE

versus

PATRICK MLENZE

CORAM: MOCUMIE, J *et* MOLOI, AJ

JUDGMENT BY: MOLOI, AJ

DELIVERED ON: 26 MARCH 2009

[1] This matter came before me on automatic review in terms of section 302(1) of the Criminal Procedure Act No. 51 of 1977 (the CPA). The accused had been convicted in the magistrate's court on a charge of housebreaking and theft and sentenced to a term of imprisonment for a period of twenty four (24) months. He had pleaded guilty to the charge and pursuant to the questioning under section 112(1) (b) of the CPA, the magistrate correctly convicted him of the charge he pleaded guilty to.

- [2] When the matter first served before me, an enquiry was sent to the magistrate relating to the appropriateness of the sentence imposed. The magistrate's reply thereto was as follows:

"Reasons for sentence:

When the court imposed sentence on accused it took into consideration the personal circumstances of the accused viz he is 28 years of age, first offender, he pleaded guilty from the onset. In this regards the court had to consider what was said in *S v Sebata* 1994 (2) SACR 319 (c) 'There is however, a dark side of the picture. The accused committed the offence for monetary reward.

The court also took into account the fact that housebreaking is a serious offence and in some cases the perpetrators would turn to injure or rape and murder people whom they found in the house in order to hide their identities. In this particular case it was premeditated, committed for personal gain, it is accordingly one of the offences in respect of which deterrence will operate with the maximum effect. See *S v Price* 1974 (2) SA 532(c) at 533A.

References is hereby made to the case of *S v Standard* 1997 (2) SACR 669 (CPA) where Judge van Deventer said that short term of imprisonment should be avoided particular to first offenders except in serious cases."

- [3] The facts of the case as glimpsed from the questioning by the presiding officer in terms of section 112 of the CPA were as follows: On 16 November 2008 the accused forced open a door of his brother-in-law's house and entered the house. He knew his brother-in-law kept money in his wardrobe. He went straight to the wardrobe and removed therefrom a cash amount of R360,00. He left the house and started purchasing goods with the money, among others, he bought himself cigarettes. His brother-in-law (the complainant in the matter) accosted the accused in the street later and questioned him about the incident. The accused was arrested.
- [4] The accused asked for forgiveness and tendered back to the complainant an amount of R170,00 which the complainant accepted. Four days thereafter he appeared in court and according to the magistrate the accused "pleaded guilty from the onset". The magistrate has asked this court to confirm the sentence imposed.
- [5] The accused is a 28-year old first offender. In his uncontroverted evidence in mitigation of sentence he stated the following:

“... Your Worship, I do not think there is much I can say. I will just inform the Court that I should be pardoned for this offence I had committed... Your Worship, I further promise the Court that I will never again appear before Court... I do not know what caused me to ultimately commit this offence, Your Worship... Your Worship, because I am not one of those silly people or people who commit crimes and I do not associate with them.”

He is separated from his wife and has no children. He is employed and earns R275,00 per week. He supports his mother and his two siblings. He advanced to standard 7 at school. The mother also testified in mitigation and said:

“... The accused is being of assistance to me and the other two younger children who are attending school... Your Worship, seeing that accused is not now at work I know and feel that we will be having difficulty pertaining to food in the house... Your Worship, I know and realise the accused has committed a serious offence. We will request this Court to punish him in a manner that he will realise he has been punished, he must not repeat this again and he must work for whatever he likes to have... Your Worship, I would like, the Court to grant accused opportunity to can return to work.”

She had talked to the complainant regarding the refund of the shortfall of the money taken.

- [6] In considering the appropriate sentence the magistrate referred to the abovementioned mitigating circumstances, referred to the seriousness and the prevalence of the offence of which the accused was convicted. He found that the accused had pre-planned the commission of the offence based on his knowledge that the complainant kept the money in the wardrobe as submitted by the prosecutor without much ado. He referred to authorities relating to fairness of the sentence to the community and the requirement of mercy and moderation in sentencing. (**S v RABIE** 1975 (4) SA 855 (AD) and **S v ZINN** 1969 (2) SA 537 (AD)). He also found, as suggested by the prosecutor, that the accused had been greedy to acquire the money the way he did but had not inquired why the accused did so. The record does not show, however, that there was a balancing process between the accused's personal circumstances, the seriousness of the crime and the interests of the community in the assessment of an appropriate sentence to be imposed.

[7] The record does not show either that the objectives of sentencing, *viz* deterrence, prevention, reformation and retribution as set out in **S v KHUMALO AND OTHERS** 1984 (3) SA 327 (A) at 330 D-E were considered and themselves balanced against the seriousness of the crime, the personal circumstances of the accused to arrive at an appropriate sentence. In **S v MALGAS** 2001 (1) SACR 469 (SCA) at 477 g-h a guideline was set in the following words:

“... while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined import may be considerable.”

The magistrate referred to the object of deterrence in his reply to my query as quoted above and cited **S v PRICE** 1974 (2) SA 532 (CPD) at 533 (A) without stating on what basis he would prefer deterrence over rehabilitation of the accused, for instance. He further stated that housebreakers would not hesitate to injure or rape or even murder people found in the house broken into to hide their identities. This goes against his finding that the accused broke into his brother-in-law's house with premeditation and full knowledge of where the money was kept. Furthermore, the magistrate,

with reference to **S v SEBATA** 1994 (2) SACR 319 (C) submitted that the sentence is appropriate because the offence was committed for monetary reward. In **SEBATA's**-case, *supra*, the offence in issue was dealing in prohibited high risk drugs which suggest the objective to make a lot of money as drugs are expensive. There can be no synergy between housebreaking and theft of cash for personal use and dealing in drugs as a business. Each case must be considered on its own merits.

- [8] Lastly, it does not seem the magistrate considered other sentencing options provided for in section 278(1)(c), (f), (h) or (i) of the CPA. It would appear, on the contrary, that he would avoid short term imprisonment and impose a reasonably long period of imprisonment as evidenced by his reference to **S v STANDAARD** 1997 (2) SACR 669 (C) without distinguishing between the facts of the cases. A fine coupled with a term of imprisonment especially where an accused is employed would be most reasonable so as not to deprive all the dependants of the income the accused generates. In principle in cases of this nature it is most appropriate to give the accused especially a first offender the

opportunity to pay a fine. This is also not to deprive such an accused the possibility that family or friends can help to keep him out of prison in the event that he cannot raise the fine imposed. See **S v SEOELA** 1996 (2) SACR 616 (O) at 622 a-e; **S v MAKOE** 1997 (2) SACR 705 (O) at 709b. The actual loss suffered by the complainant in this case is, in real terms, R190,00 only. The accused must now forfeit for two years the weekly income of R275,00 upon which his mother and his two siblings depend and be incapacitated to refund the complainant. This cannot be in the interest of the community nor justice.

- [9] It is settled law that the sentencing function must be left in the hands of the trial court - **S v MAPHUMULO AND OTHERS** 1920 AD 56; **S v RABIE** 1975 (4) SA 855 (A) and that the court of review or appeal can only interfere if the discretion is not judicially and properly exercised or where the sentence is out of proportion with the offence committed and is inordinately harsh: **S v BARNARD** 2004 (1) SACR 191 (SCA). In this case there are more than sufficient reasons to interfere with the sentence imposed by the

magistrate. The accused was committed to imprisonment on 20 November 2008.

[10] The following order is consequently made:

(a) The conviction on a charge of housebreaking and theft is confirmed.

(b) The sentence of twenty four months imprisonment is set aside and is substituted by the following:

“R2 000,00 (two thousand rand) or 24 (twenty four) months imprisonment of which R1 500,00 (one thousand five hundred rand) or 18 (eighteen) months imprisonment is suspended on condition that the accused is not convicted of housebreaking with intent to steal and theft committed during the period of suspension.”

(c) The sentence in (b) above should be considered as having been imposed on 20 November 2008.

K.J. MOLOI, AJ

I concur.

B.C. MOCUMIE, J