

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 736/07

In the review between:-

THE STATE

versus

GILBERT MALEFANE MAFITOE

CORAM: RAMPAL, J *et* MOCUMIE, AJ

JUDGMENT BY: MOCUMIE, AJ

DELIVERED ON: 13/12/07

[1] This is a review in terms of section 302 read with 304 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The accused was convicted of theft on 19 June 2007 in the district Magistrate court of Botshabelo, Free State. He was sentenced to three years imprisonment, on 19 July 2007.

[2] **Bloem AJ** forwarded a query to the Magistrate requesting reasons for sentence as none were recorded on the court

record. The Magistrate has since given reasons on three pages in which he maintains that the term of imprisonment he imposed was the only appropriate sentence in this case.

[3] The accused was correctly convicted of theft. The issue is whether the Magistrate exercised his discretion judiciously when he sentenced the accused to the aforementioned sentence.

[4] The Magistrate found (*ex-post facto*) that when imposing a sentence in offences such as this, the interests of the society should come forward strongly. He is of the view that it is important for the courts to strive to bring home the message that this is a serious offence not only to the accused but to the community in order to protect the credibility of the justice system.

[5] The Magistrate found that the accused's two similar previous convictions of housebreaking with intent to steal and theft counted against him. In these cases the accused was sentenced to two years imprisonment (housebreaking) and three months imprisonment (theft) between the year 2000 and 2003. He then on this basis found that other

options of sentence including an option of a fine, a suspended sentence or correctional supervision were not appropriate albeit not giving reasons.

[6] The impression one gains from the reasons for sentence is that after the prosecutor indicated during the trial (s)he asked for a heavy sentence as captured on page 5 of the typed version : “*Vra vir ‘n swaar vonnis*”, the Magistrate then proceeded to impose sentence on that premise without giving due consideration to the accused’s personal circumstances, the seriousness of the crime and the interests of the society. The impression gained further is that the Magistrate did not even reflect on the appropriate sentence to impose in this case.

[7] Imprisonment without an option of a fine should be imposed after a careful consideration of all the facts of the case, the personal circumstances of the accused, the nature and prevalence of the offence and the societal purpose that can be served by the imposition of the sentence including its possible negative effect on the accused.

[8] It is clear from the Magistrate’s *ex-post facto* reasons for sentence and his comments in his response to **Bloem AJ’s**

query that he placed considerable weight on the interests of society.

[9] However serious the offence may be, it is irregular to proceed from the assumption that because the offence was serious, imprisonment was the only appropriate sentence as stressed by the Magistrate in para 6 of the three-paged document:

“Redes:

‘n Lang termyn direkte gevangenisstraf is volgens my die enigste gepaste straf.” (Own underlining.)

See **S v D** 1999 (1) SACR 122 (NC) at 127a-b; *S v Du Toit* 1979 (3) SA at 857H-858A.

[10] The accused was 20 years of age when he committed this offence. The evidence shows how this offence was committed. It is clear that this is not the typical theft case (stock theft, theft emanating from housebreaking or robbery) that we find in our courts on a daily basis and are prevalent. The accused was unemployed and not attending school but had two minor children.

[11] What indeed counted against the accused was the two previous convictions of similar nature committed in 2000 and 2003. The fact that the cell-phone was never recovered also put him in a very bad light. It is correct that previous convictions reflect the character of the accused as one that has shown no repentance.

[12] The previous convictions of the accused including the sentences imposed in those cases (2000/2003) should not dissuade the court from applying its mind to the facts before it and exercising its discretion judiciously to impose an appropriate sentence and still send the correct message to the accused and to the society. The sentences imposed there (regardless of the circumstances then) show that even then no other consideration and options of sentences were considered when the accused was even younger and immature. Correctional supervision is one of the options for an alternative sentence provided for in the CPA. It is a severe sentence that has rehabilitation and retribution compacted into one. It gives results required if the aim of the

presiding officer is amongst others to ensure that this young offender is brought in line with the correct way of living where he can serve punishment amidst the society he has wronged. It can even be imposed in the most serious of offences including murder. See the exposition and value of correctional supervision by **Kriegler AJA** in **S v R** 1993 (1) SACR 209 (A).

- [14] When imposing sentence a presiding officer must blend the sentence it has in mind and eventually imposes with mercy. Mercy is not a sign of weakness or fear for the criminals. In **S v Groenemeyer** 1974 (2) SA 542 (C) at 544A-B the Court states:

“Die Howe is nie hier om wraak te neem nie. Die Howe sink nooit, ooit, tot die peil van die misdadiger nie. Straf moet onder alle omstandighede menslik wees, en, wat meer is, straf is nie iets wat jy uit 'n slotmasjien haal nie. Jy druk nie 'n misdaad in die masjien en haal 'n straf uit nie. Dit is die kenmerk van ons regstelsel dat mense gestraf word as hulle self, as mense. Dit is altyd die mens self wat die reg mee te doen het, en die landdros het dit uit die oog

verloor in hierdie vonnis. Hy het nie reg gehandel nie toe hy gesê het die Hof het nie genade nie. Die Hof het genade, - ek neem aan by 'genade' hier meen hy die Engelse woord 'compassion' - vir elke persoon wat voor hom verskyn. Daar kan geen geregtigheid wees sonder genade nie."

[15] A year later in **S v J** 1975 (3) SA 146 (O) at 159F-G **Steyn J** (as he was then) echoed the same words when he stated:
"Die Hof is nie 'n pynbank nie. Dit is nie 'n instrument van pyniging waarop 'n beskuldigde gebreek moet word omdat hy 'n weersinwekkende misdaad gepleeg het nie. Die Hof is die instrument waardeur die samelewing handel beide om homself te beveilig sowel as om die beskuldigde, indien moontlik, deur middel van straf te red as mens en te verbeter wanneer hy homself so gedra het dat hy die samelewing onwettiglik leed en skade aangedoen het. Wanneer 'n mens 'n lid van die samelewing op onwettige wyse onregmatiglik leed of skade aandoen dan doen hy die samelewing self ook leed en skade aan. Maar, ons is 'n beskaafde Westerse gemeenskap met die Christelike geloof as die grondslag en die hoeksteen waarop ons Staat en ons samelewing gebou is. Dit moet altyd in gedagte gehou word en die goue boodskap van die Bergprediking moet ook nooit uit die oog verloor word nie. Wanneer 'n Hof moet besluit watter straf opgelê moet word, moet hy derhalwe aandagtig daaraan wees dat die doodstraf die onbeskryflik-uiteerste stap is wat die samelewing kan doen en dat 'n menslike lewe uitgewis behoort te word alleenlik wanneer dit onder die omstandighede van die besonderesaak algeheel onvermydelik is en daar dus in werklikheid vir die Hof geen ander keuse is nie."

[16] I am of the view that the Magistrate misdirected himself in concluding that a prison sentence without an option of a fine,

or correctional supervision, was the only suitable sentence to impose on a 20 year old offender in these circumstances.

[17] I have considered remitting the matter back to the court *a quo* to reconsider sentence afresh. However, in the light of what I have said above I have decided against it because this Court is in as good a position to impose an appropriate sentence as the trial court. I am of the view that a fine coupled with imprisonment wholly suspended, would be appropriate.

In the circumstances I make the following order:

- 1. The conviction is confirmed.**
- 2. The 3 (three) years imprisonment imposed by the Magistrate is set aside and substituted with the following:**

“R1200.00 (one thousand and two hundred rand) or 8 (eight) months imprisonment of which R600, 00 (six hundred rand) or 5 (five) months imprisonment is suspended for 3 (three) years on condition that the

accused is not convicted of theft or attempt thereto committed during the period of suspension.”

I concur.

B.C. MOCUMIE, AJ

M.H. RAMPAL, J

BCM/sp