

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

High Court Ref No: 0600216
Magistrates' Court Ref No: 356/05
Case No 17/2898/05

In the matter between:

THE STATE

v

TERENCE THOMAS

Accused

REVIEW JUDGMENT DELIVERED 1 SEPTEMBER 2006

LE GRANGE AJ:

This matter comes before me by way of automatic review. The accused pleaded guilty in the Cape Town Magistrates' Court to a charge of theft involving 4 DVDs valued at R599.00. He was convicted in terms of s 112(1)(a) of the Criminal Procedure Act No 51 of 1977 and sentenced to 12 months' imprisonment. The said sentence was wholly suspended for a period of 5 years on certain conditions.

As the sentence appeared to be unduly harsh and inconsistent with the provisions of section 112(1)(a), I elected to raise my concerns with the magistrate. In response to my query with regard to section 112(1)(a) the magistrate replied as follows:

“The trial magistrate was at all times aware of the provisions of the said section and because in my opinion and in my interpretation and understanding of Section 112(1)(a) Act 51/77 the section is not mandatory, in that it reads as follows: “In terms of Section 112(1)(a) the magistrate MAY...”

In analysing the section further it is totally against imposition of any form of direct imprisonment and that is why it is required by the said section that evidence should be led before sentence.

In the case of S v Terence Thomas, after leading of evidence by both the State and accused the only sentence the court had in mind was imposing a fine expecting the accused to pay it; it transpired that the accused is unemployed and his uncle was going to pay on his behalf; in that instance it was not going to be fair to punish a third person for the wrongs of the accused, and the accused was not going to feel the nature of that

sentence as well as accepting responsibility for his own actions.

Had the court imposed the fine and the accused not able to pay that was going to be tantamount to imposing direct imprisonment; which will be in total contradiction with the provisions of the section in question.”

In respect of the appropriateness of the sentence, the magistrate commented as follows:

“It is my submission further that its case has to be dealt with according to its own merits, and therefore in this specific case after having listened to the evidence before sentence the court was of the opinion that a form of severe deterrent had to be canvassed, thus a term of direct imprisonment wholly suspended was deem to be just and fair under the circumstances and not overlooking the provisions of the said section in question.”

Section 112 deals in express terms with the situation where a conviction may follow upon a plea of guilty and the procedure to be followed in such circumstances. The section reads as follows:

112 Plea of guilty:

(1) Where an accused at a summary trial in any court pleads guilty

to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or

(ii) deal with the accused otherwise in accordance with law;

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount

determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

The language of the sub-section is clear and unambiguous. It must be given its ordinary grammatical meaning. "May", as an auxiliary verb, is subservient to the verb "convict" and serves to indicate the conditions under which such a conviction is permissible. Accordingly, on its proper interpretation, the sub-section authorizes a presiding officer to convict an accused on his plea of guilty alone only in circumstances where the offence in question does not merit imprisonment or any other form of detention without the option of a fine¹ and prohibits, in effect, the imposition of a sentence of imprisonment that is not coupled to a fine.

¹ In terms of Government Gazette 24393 dated 14 February 2003 the fine may not exceed
R1 5000.00

The magistrate's understanding and interpretation of the penal provisions of s112(1)(a) is thus clearly wrong. The contention by the magistrate that direct imprisonment without the option of a fine, which is conditionally suspended, brings the sentence under the provisions of s112(1)(a) is a patent misdirection and irregular. The sentence of 12 months' imprisonment was in the circumstances improperly imposed and must be set aside.

Moreover, even if the sentence imposed had been competent, the magistrate's approach to sentencing gives rise to some concern. If one has regard to the nature of the crime, the sentence is clearly open to attack on the basis that it is startlingly inappropriate. The sentence imposed fails to reflect sufficient weight being attached either to the accused's personal circumstances or the interests of society.

The accused is 31 years of age and a first offender. He is single, unemployed and has one minor child to support. He pleaded guilty and showed remorse for his criminal conduct. The prosecutor in his address before sentence requested that the court impose a suspended fine. The magistrate indicated that she had considered imposing a fine but was of the opinion that since the accused would not be able to pay it, a fine would be tantamount to direct imprisonment. Why the magistrate did not consider suspending the fine as suggested by the prosecutor is unclear, particularly in light of the mitigating factors recorded by the magistrate.

The magistrate concluded that:

“Therefore in this specific case after having listened to the evidence (my underlining) before sentence the court was of the opinion that a form of severe deterrent had to be canvassed, thus a term of direct imprisonment wholly suspended was deemed to be just and fair under the circumstances.”

In over emphasizing the seriousness of the offence and imposing a heavy sentence, albeit conditionally suspended in the hope that it would prevent the accused from further crime, the magistrate adopted an incorrect approach. Should the accused again be convicted of an attempted theft, even of a relatively insignificant item, he could face the possibility of the suspended sentence of 12 months' imprisonment being put into operation.

Hogarth in his book on *Sentencing as a Human Process* - 1971 makes the following remarks:

“There is no decision in the criminal process that is so complicated and so difficult to make as that of the sentencing judge. The accused's freedom, future, weal and woe are all in the hands of the presiding officer at sentence stage. The latter can set the accused on the downhill road to

crime until he or she becomes an unrehabilitated criminal or can, by the imposition of a suitable sentence, which still protects the community, set the accused on the path to rehabilitation, away from any criminal career. The sentencing officer must thus always carefully consider and reflect on an appropriate sentence, because he or she is not a robot, he or she must not impose sentence as one."

I agree with these sentiments.

Whilst I am mindful of the fact that punishment is pre-eminently a matter for the discretion of the trial Court, the degree of emphasis in this matter upon the offence is, in my view, sufficiently inappropriate and irregular to warrant interference on review.

I have further difficulties with this matter.

The record does not reflect that the accused's rights before sentence were explained to him, nor does it reflect any evidence led by either the accused or the State to which the magistrate refers in her reasons. The evidence of the accused's uncle, which the magistrate mentions in her reasons, was not recorded. These are serious procedural irregularities, exacerbated by the fact that *in casu* the court was dealing with an unrepresented accused whom it intended convicting on a plea alone.

In terms of s 4(1) of the Magistrates' Court Act 32 of 1944, every court shall be a court of record. It is therefore obligatory that a magistrate record all the proceedings, be it in handwriting, shorthand or mechanically, over which he or she presides and the failure to do so is inexcusable.

It will not be in the interests of justice to refer this matter back to the magistrate to reconsider sentence.

In the result I propose making the following order:

The conviction is confirmed. The sentence is set aside and substituted with the following:

“A fine of R800,00 or 40 days imprisonment which is wholly suspended for a period of 3 years on condition that the accused is not again convicted of theft or attempt thereto committed during the period of suspension.”

A LE GRANGE

Desai J: I agree. It is so ordered.

S DESAI