

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

Review No. : 766/2005

In the case between:

THE STATE

versus

TSHILISO TATELLO BELEBESE

CORAM: HANCKE J *et* C.J. MUSI J

JUDGMENT: C.J. MUSI J

DELIVERED ON: 8 AUGUSTUS 2005

[1] This matter came before me by way of automatic review in terms of section 302(1)(a)(i) read with section 304 of the Criminal Procedure Act, 51 of 1977.

[2] The accused was convicted – after a plea of guilty – of housebreaking with the intent to steal and theft. He was sentenced to 12 months imprisonment.

[3] I was of the view that the proceedings were not in accordance with justice and requested the magistrate to furnish

me with reasons for the sentence. The magistrate has supplied me with reasons. After considering the magistrates reasons I am still of the view that these proceedings were not in accordance with justice.

[4] The accused was 16 years old when the offence was committed. He left school in Standard 2. The magistrate requested a probation officer's report. From the report it is clear that this accused's background is pitiful. He is an orphan. His elder brother's whereabouts are unknown. He lives with his grandmother who receives an old age pension from the state. His uncle receives a disability grant. A family of seven have to survive on the old age pension and the disability grant because no one in the family is employed. The family lives in a three-roomed corrugated iron shack which the social worker describes as "not conducive for the upbringing of children."

[5] The accused pleaded guilty and informed the court that he and someone else entered the premises through a window and stole a bicycle and two motorvehicle wheels to the value of R5 530,00.

[6] The magistrate correctly states that housebreaking with the intent to steal and theft is a serious offence. The

magistrate however misdirect himself in firstly finding that: “counselling was attempted to no (avail). An attempt to take care of the accused while attempts were made to establish a home for orphans, accused simply showed no interest and absconded and went to commit crime.” In the context of the social workers report it is not clear when the accused stayed with Pastor Graige or under what circumstances he ran away. Neither is there evidence that he “went to commit crime again”. Secondly, the state did not prove previous convictions against the accused. He was therefore a first offender. The social worker in her report stated that the accused is “said to be a sixth offender.” (my underlining). It is not clear from the report where the social worker got her information from. The magistrate was clearly and wrongly influenced by this, because the magistrate concludes that “Although the state did (no) prove (the) previous convictions the accused have”

[7] This accused is clearly a member of the so called lost generation. He is a victim of his socio economic circumstances.

The magistrate's view that the accused circumstances are such that prospects of him being rehabilitated outside prison are non-existent is devoid of all contexts. The magistrate should not have taken into consideration the social worker's evidence, which was in any event based on hearsay, that the accused have six previous convictions.

[8] In my view a sentence of 12 months imprisonment for a 17 year old child with no previous convictions is shockingly inappropriate even for an offence such as the present. I have considered sending this matter back to the magistrate to reconsider sentencing in the light of what I said above but decided against it because the accused has already been exposed to prison life and he will be prejudiced by such an order. A totally suspended sentence would be appropriate in this matter.

[9] In the circumstances the following order is made:

- a) The conviction is confirmed.
- b) The sentence of 12 months imprisonment is set aside and replaced by the following sentence:

12 months imprisonment which is suspended for 5 years on condition that the accused is not convicted of housebreaking with the intent to steal and theft committed during the period of suspension.

C.J. MUSI, J

I agree.

S.P.B. HANCKE, J

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