

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

Case No.: 1188/2005

In the case between:

THE STATE

and

ELLIOT LESENYEHO

CORAM: H.M. MUSI, J *et* MOLEMELA, AJ

JUDGEMENT: MOLEMELA, AJ

DELIVERED ON: 6 OCTOBER 2005

[1] This is an automatic review in terms of Section 302(1)(a) of the Criminal Procedure Act, 1977.

[2] The accused was, pursuant to his plea of guilty, convicted in the Theunissen Magistrate's court on a charge of theft of items of clothing to the value of R700,00. He was sentenced to 4 (four) months imprisonment.

[3] It is trite law that the main purposes of punishment are deterrent, preventive, reformatory and retributive. It is also trite

law that in determining a suitable sentence for a convicted accused, the following factors should be taken into account: the nature and seriousness of the offence, the interests of the community as well as the accused's personal circumstances. In recognition of the above principles, it was laid down in the famous judgment of Holmes JA in **S v RABIE** 1975(4)SA855 (A), that "punishment should fit the criminal and the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

- [4] *In casu*, direct imprisonment was not appropriate due to the following reasons: the accused readily pleaded guilty, from which it could be inferred that he was remorseful about his actions. He is a first offender and more importantly a youth who was still attending school. In my view, he deserved to be given a chance to complete the current school year. The items that were stolen have all been recovered and their value was not that high. Moreover, courts have in the past discouraged imposition of short-term imprisonment especially for first

offenders.

[5] It is indeed so that the factors mentioned in paragraph 3 above are intertwined and that none should be emphasized at the expense of the other. It cannot be denied that theft is a serious offence with a high prevalence and that members of the community ought to be protected against its incidence. However, the accused's personal circumstances also play a role in determining a proper sentence. Mercy is indeed an element of justice and must never be ignored when sentence is imposed. I am of the view that in sentencing the accused, the learned magistrate did not have sufficient regard to the mitigating factors presented to him and imposed too harsh a sentence under the circumstances. Such a sentence ought to be set aside.

[6] I therefore make the following order:

[6.1] The conviction is confirmed.

[6.2] The sentence is hereby set aside and substituted with the following sentence: 4 (Four) months' imprisonment wholly suspended for 3 (three) years on condition that the accused is not convicted of theft or any offence involving dishonesty committed during the period of suspension.

M. B. MOLEMELA, AJ

I agree.

H. M. MUSI, J

/em