



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

High Court case no: 350/2024

Magistrate's case no: 73/2024

Magistrate's serial no: 04/2024

[Reportable]

In the matter between:

THE STATE

and

NOMVULA BUTHELEZI

ACCUSED

ORDER

Delivered on: 6 September 2024

On review from the Dundee Magistrates' Court (sitting as court of first instance):

1. The sentence of three years imprisonment imposed by the magistrate on 30 July is set aside.
2. The accused is to be released from prison forthwith;
3. The accused is sentenced to a term of six months' imprisonment suspended for a period of five years on condition that the accused is not convicted of theft or any attempt thereto which is committed during the period of suspension, which sentence is ante-dated to 30 July 2024;
4. The order declaring the accused unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000 is set aside.

REVIEW JUDGMENT

M G Chetty AJ (E Bezuidenhout J concurring):

Introduction

[1] This is an automatic review that was placed before me by the registrar of this division on 27 August 2024. In view of the urgency of the matter, I have dispensed with directing an enquiry to the magistrate as any delay will further prejudice the accused and her minor child.

Facts

[2] The accused appeared in the Dundee Magistrates' Court where she was charged on one count of theft in that on or about 18 July 2024 she unlawfully and intentionally stole two Nivea roll-ons to the value of R75, which was in the lawful possession of TFS or Mr Siyabonga Khumalo.

[3] The magistrate enquired from the accused how she intended to plead and she stated that she intended to plead guilty. The accused informed the magistrate that she wanted to conduct her own defence. He enquired from the accused whether she stole the items to which she replied she did. The magistrate enquired further, where she put the roll-ons and she stated that she put them into her pocket.

[4] The prosecutor asked for the matter to be placed on the roll for hearing 25 July 2024 for a plea to be taken. The prosecutor upon enquiry informed the magistrate that the State is opposed to the granting of bail. The matter was postponed to 25 July 2024 for a possible plea and the accused was ordered to be kept in custody.

[5] On 25 July 2024, and when the matter was called, the prosecutor informed the magistrate that the matter was on the roll for a plea and that the accused was conducting her own defence. However, the prosecutor suggested that the matter be postponed until the following Monday, 29 July 2024, as it was already late in the day. The matter was postponed to 29 July 2024 and the accused was ordered to remain in custody.

[6] On 29 July 2024, and when the case was called, the prosecutor put the charge to the accused, whereupon the magistrate asked her how she pleads to the charge. The accused indicated that she pleads guilty and further that she intended to conduct her own defence.

[7] The magistrate thereafter proceeded to question the accused in terms of the provisions of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 and he subsequently convicted the accused on the offence charged.

[8] The prosecutor read out the accused's previous convictions, which are the following:

- (a) On 3 November 2016 the accused was convicted of theft in the Dundee Magistrates' Court and she was cautioned and discharged and she was not declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000;
- (b) On 22 August 2018, the accused was convicted in the Dundee Magistrates Court for the offence of theft and she was sentenced to a fine of R300 or 30 days imprisonment. She was not declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act;
- (c) On 18 July 2024, she was convicted on the offence of theft at the Dundee Magistrates Court and she was sentenced to a fine of R500 or thirty days imprisonment, which was wholly suspended for five years on condition that the accused was not convicted of theft or attempted theft during the period of suspension.

[9] When the magistrate enquired from the accused whether she was aware of her previous convictions that were read out by the prosecutor, the accused informed

the magistrate that she did not know her previous convictions. The magistrate informed the accused that what the prosecutor had read out to the court were the offences for which she had been found guilty. The accused responded that she was only aware of the one conviction where she was sentenced to pay a fine of R500 or thirty days' imprisonment, which was wholly suspended. The accused stated further that she did not know about the convictions in respect of the case of 2016 and 2018. The prosecutor then requested the matter to be adjourned in order for the investigating officer to confirm the accused's previous convictions. The matter was then adjourned to 30 July 2024. The accused was held in custody as no bail was fixed.

[10] On 30 July 2024, the prosecutor placed on record that the accused had informed her that she now remembers her previous convictions. The prosecutor read the previous convictions into the record whereupon the magistrate enquired from the accused whether she was aware of her previous convictions to which she responded in the affirmative and further and she confirmed that those were her previous convictions. It is recorded that the accused admitted her previous convictions and the SAP 69 was handed in as an exhibit marked "A".

[11] The magistrate then gave the accused the opportunity to present mitigating factors and other relevant facts which he would take into consideration when arriving at an appropriate sentence. The magistrate enquired whether she wished to give evidence under oath and the accused informed the magistrate that she would not.

[12] The below mentioned is what she placed on record:

- (a) She requested the court to give her 'a small sentence' because she lives with her minor child, whom she maintains.
- (b) The minor child is 11 years old and is going to school.
- (c) She has no parents.
- (d) She is 27 years old and unemployed.
- (e) She informed the magistrate that she supports herself and the child from a grant that she collects as well as the sum of R350, which she is collecting. She did not explain the origins of the grant nor did she state the amount thereof.

(f) When asked about the whereabouts of the child, she replied that she 'believe it [sic] is by the neighbours'.

(g) She has been in custody since 18 July 2024 and the matter had already been postponed.

(h) On being questioned by the magistrate on the whereabouts of the child's father, she replied that he ran away when the baby was still young and she was left alone with the child.

[13] The prosecutor placed on record that the aggravating circumstances of the case outweighed the accused's personal circumstances. The aggravating circumstances that were placed on record are as follows:

(a) The offence for which the accused was convicted was a serious offence which was prevalent not only in court's jurisdiction but around the entire country.

(b) The accused had been convicted of similar offences and is therefore a repeat offender.

(c) Her last conviction was on 18 July 2024 and after she was given a suspended sentence, she committed the same offence and was arrested on the very same day.

(d) She had not learnt from her past mistakes and she continues repeating the same offence.

(e) She does not take the child's wellbeing into consideration when she is committing these offences. She only thinks of the child when she is apprehended.

(f) The owners of the shop from which she had stolen look up to the courts to ensure that justice is served.

(g) Due to the conduct of the accused, business owners suffer losses and at some stage they would have to upgrade their security measures in order to combat such conduct.

[14] The prosecutor asked the magistrate to impose a sentence of direct imprisonment since a sentence coupled with a fine is not suitable for the accused. The prosecutor asked the magistrate to deal with the provisions of s 103 of the Firearms Control Act.

[15] The magistrate in passing sentence referred to the case of *S v Zinn*¹ where the below mentioned was said:

‘It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society.’

[16] In considering what the magistrate thought to be an appropriate sentence in the circumstances, he mentioned the following factors:

(a) The offence is both serious and prevalent, not only in the district, but also throughout the country. The court deals with these matters on a daily basis and there is not a single day where the court does not deal with the offences of this nature.

(b) Despite the value of the items being R75 and is a small amount, it is a huge amount for the owner of the shop, and hence does not detract from the seriousness thereof.

(c) The owner’s livelihood is running the store and that’s how he supports himself and his family. Should the business suffer, it would lead to retrenchments and worse the closure of the business. Business owners spend a huge amount of money on security as a result of persons such as the accused.

(d) The magistrate also took into consideration that the accused has an 11-year-old child who is school going and who is in grade three. Further that the accused does not know the whereabouts of the child and assumes that she is with the neighbours, because the child’s father ran away when the child was very young. The magistrate requested the prosecutor to get the investigating officer to contact Social Development to trace the child.

(e) The magistrate was of the opinion that the accused did not love her child because if she did, she would have thought of the child before committing the offence.

(f) He took into account that the accused is 27 years old, is unemployed and that she receives a grant as well as the sum of R350.

(g) The reason why the accused stole the items was because she did not have enough money to pay for the items. However, to this the magistrate remarked that the accused did not have to steal the items worth R75 as she was receiving a grant

¹ *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

as well as the sum of R350.If she did not have the money to pay for it, then she should have waited until she had the money.

(h) The magistrate commented that he is worried about the fact that the accused has three previous convictions and all previous convictions relate to the offence for which the accused has been found guilty namely, theft.

(i) The magistrate was concerned by the fact that the accused's last previous conviction was on 18 July 2024 which was a week prior to this matter being heard and further that on the very same day the accused committed a further offence. He added that the pace at which the accused is committing the offences is very alarming.

(j) The learned magistrate was in agreement with the submissions made by the prosecutor that the accused is not remorseful and that she has not learnt a lesson from her past convictions.

[17] In handing down sentence, the magistrate remarked that in passing sentence, the court will look into the interest of society and pass a sentence, which has a rehabilitative effect, a deterrent effect and a preventative effect. Each sentence must be blended with a measure of mercy according to the circumstances of each case. Sentences that are imposed by the court must not only deter the accused from committing further offences but must also deter like-minded persons like the accused from committing similar offences. A sentence must send a strong message that offences of this nature will not be tolerated. The complainant and community at large look up to the courts to impose a sentence or sentences that are in the interests of justice. The learned magistrate said he had considered the factors that were submitted by the prosecutor and those which were submitted by the accused and he is of the view that the appropriate sentence to impose is for the accused to undergo three years' direct imprisonment. In respect of s 103 of the Firearms Control Act he declared the accused unfit to possess a firearm.

Issues to be decided

[18] There are two crisp issues which have to be decided in this review namely:

- (a) Whether the court misdirected itself in imposing a sentence of three years direct imprisonment without considering whether any other sentence could have been imposed; and,
- (b) Whether the learned magistrate had due regard to the accused's minor child when he sentenced the accused.

Did the magistrate misdirect himself in imposing a sentence of three years' direct imprisonment without considering whether any other sentence could have been imposed?

[19] As set out above, the magistrate, when arriving at an appropriate sentence made general comments and statements about the purpose of punishment. He referred to the *Zinn* triad and spoke about the prevalence of the petty crime of shoplifting. He focused on what losses the business owners had suffered and the effects it would have on the economy. He stated that the accused had previous convictions for similar offences, the latest being on 18 July 2024, a day before this offence was committed. He was of the view that the accused should be taught a lesson because of her previous convictions. The business from which the accused stole needs to be protected from persons such as the accused. The magistrate was of the view that the court had to impose a sentence that would deter others from committing offences of this nature. He was of the view that society needs to be protected from repeat offenders such as the accused. It was for these reasons that the sentence of direct imprisonment was the only appropriate sentence that he could impose.

[20] In my view, it is clear that the sentence imposed by the learned magistrate is disproportionate. The learned magistrate placed undue weight on the fact that the accused had previous convictions for similar offences.

[21] In light of this issue, the following was held in *S v Baartman*:²

'But the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise, it inevitably overemphasises the interests of society at the expense of

² *S v Baartman* 1997 (1) SACR 304 (E) at 305B-F (*Baartman*).

the interests of justice and the interest of the offender. If it does this, it cannot be a just sentence.

In a case such as this it is necessary to be aware of three considerations:

- (a) the accused should be sentenced for the offence charged and not for his previous record;
- (b) the public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
- (c) while it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased.

Thus, a thief who steals a loaf of bread should not have to go to gaol for 10 years because he has stolen countless loaves of bread, one at a time, in the past. His sentence should never escalate with the passage of time from a few weeks for initial offences, to a few months, eventually to years, and then to many years; the offence remains a petty offence no matter how often it is repeated.'

And the court in *Thorne v S*,³ referring to *Baartman* with approval added

'Even in the ordinary course of events where a past conviction can be considered as a previous conviction that would play a part in influencing a sentence a court would impose our courts has warned against a practise, where previous convictions as has happened in this case should be used to justify the imposition of ever increasing sentences. See *S v Stenge 2008 (2) SACV 27 at 30 c – d*. Especially in cases where an accused person's due to dire socio-economic conditions and poverty commit petty theft offences in order either to feed themselves or their families.

[22] *Baartman* held further that⁴

'it all comes down to the basic principle that punishment must fit the crime. Where the crime is petty theft and the offenders previous record makes imprisonment rather than an alternative form of punishment, imperative, the period must still be in proportion to the petty nature of the crime.'

[23] It is my view that the magistrate misdirected himself when he imposed sentence of 3 years direct imprisonment. Furthermore, that this is not a case where society needs to be protected from the accused by removing her altogether. The

³ *Thorne v S* [2015] ZAWCHC 52 para 12.

⁴ *Baartman* at 305F-G.

sentence imposed by the court is unduly harsh and inappropriate in the circumstances. The sentence will be set aside and replaced with an alternative sentence.

Did the court consider the best interests of the minor child when sentencing the accused?

[24] In *S v M*⁵ Sachs J, worded the issue as follows:

‘When considering whether to impose imprisonment on the primary caregiver of young children, did the courts below pay sufficient attention to the constitutional provision that in all matters concerning children, the children’s interests shall be paramount?’

[25] It is my view that the magistrate did not consider the child’s best interest when he sentenced the accused as the child’s primary caregiver to a term of direct imprisonment.

[26] Section 28 of the Constitution of the Republic of South Africa, 1996 provides that a ‘child’s best interests are of paramount importance in every matter concerning the child’. By not considering the interests of the accused’s minor child, the learned magistrate committed a grave misdirection.

[27] The majority judgment in *S v M* set out the duties of a court sentencing a primary caregiver of minor children. The court defined a primary caregiver as ‘a person with whom the child lives with and who performs everyday tasks like ensuring that the child is fed and looked after and attends school regularly.’⁶ The court held that ‘[f]ocused and informed attention needs to be given to the interests of the children at appropriate moments in the sentencing process.’⁷ The majority further held that what was expected of a sentencing court is to give ‘sufficient independent and informed attention as required by section 28(2) read with section 28(1)(b), to the

⁵ *S v M (Centre for Child Law as amicus curiae)* [2007] ZACC 18; 2007 (2) SACR 539 (CC); 2007 (12) BCLR 1312 (CC) para 1 (*S v M*).

⁶ *S v M* para 28.

⁷ *S v M* para 33.

impact on the children’⁸ when deciding whether to send primary caregiver to prison. Furthermore, *S v M* cautioned that⁹

‘The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. . . . the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.’

[28] In *S v Piater*,¹⁰ the court held in this regard as follows:

‘Section 28(2), read with s 28(1)(b), imposes four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is in issue, namely:

- (a) To establish whether there will be an impact on the child;
- (b) to consider independently the child's best interests. In other words, the child's best interests should not be considered as an appendage to the primary caregiver's personal circumstances;
- (c) to attach appropriate weight to the child's best interests; and
- (d) to ensure that the child will be taken care of if the primary caregiver is sent to prison.’

[29] In the present case, the accused responded to the court’s enquiry as to who is taking care of the child, as follows ‘I believe it [sic] it is by the neighbours’. The court enquired from the accused as to the whereabouts of the father of the child and she replied ‘He ran away and left me alone with the child when the baby was still young’.

[30] Insofar as the child’s well-being is concerned, the magistrate directed the prosecutor to inform the investigating officer to contact social development and trace the whereabouts of child. Aside from this, the magistrate did not consider any further factors regarding the child. The accused is the primary caregiver of the child. Now that she is incarcerated, she herself is uncertain as to the whereabouts of the child. Clearly, the court did not consider the interests of the child when sentencing the accused. There is nothing in the magistrate’s reasons reflecting that he properly applied an informed mind to the duties flowing from s 28(2) read with s 28(1)(b) of the Constitution.

⁸ *S v M* para 48.

⁹ *S v M* para 33.

¹⁰ *S v Piater* 2013 (2) SACR 254 (GNP) para 23.

[31] I therefore conclude that the magistrate, in passing the sentence, did not give sufficient, independent and informed attention as is required by s 28(2) read with s 28(1)(b) to the impact the sentence will have on the child by having sentenced the accused to prison. In fact, he only considered the prevalence of the crime, the seriousness of the crime and the interests of society.

[32] The sentence which I propose is – the accused is sentenced to a term of thirty days imprisonment suspended for a period of five years provided that the accused is not convicted of theft or any attempt thereto which is committed during the period of suspension, which sentence ante dated to 30 July 2024. The accused would have by the time this judgment is handed down, completed serving thirty days' imprisonment.

[33] In so far as the order granted by the magistrate that the accused is unfit to possess a firearm, that order is set aside as sentence now imposed is a non-custodial sentence.

[34] The learned magistrate ought to have conducted an enquiry in terms of s 103(1) of the Firearms Control Act but failed to do so. The prosecutor merely 'left it in the hands of court to deal with this issue'. What is envisaged by legislature is for the magistrate to conduct an enquiry and have full regard for all the relevant and material facts that are placed before it by the accused as well as by the prosecutor.¹¹ In this case no enquiry was conducted and no questions were asked of the accused, nor did the prosecutor make any submissions with regard thereto.

Conclusion

[35] In the circumstances, the sentence imposed by the magistrate is not appropriate and not in accordance with justice.

[36] In the premises, the below mentioned order is made:

1. The sentence of three years imprisonment imposed by the magistrate on 27 July 2024 is set aside.

¹¹ *S v Mkhonza* 2010 (1) SACR 602 KZP see also *S v Smith* 2006 SACR 307(W) see also *S v Lukwe* 2005 (2) SACR 578(W).

2. The accused is to be released from prison forthwith;
3. The accused is sentenced to a term of 30 days imprisonment suspended for a period of five years provided that the accused is not convicted of theft or any attempt thereto, which is committed during the period of suspension, which sentence is ante dated to 30 July 2024
4. The order declaring the accused unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000 is set aside.

M G Chetty AJ

E Bezuidenhout J