



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

[REPORTABLE]

High Court Ref No: 15248

Magistrate Case No: 5/1595/2015

Review No: 07/2015

In the matter between:

DENVER THORNE

Applicant

And

THE STATE

Respondent

REVIEW JUDGMENT: 23 APRIL 2015

Henney, J:

[1] This is a matter that is subject to review before this court in the ordinary course in terms of Section 302 of the Criminal Procedure Act (“the Act”) 51 of 1977. The accused, a 42 year old male appeared before the Magistrate’s Court, Mitchell’s Plain on a charge of theft, committed on 12 December 2014 at Pick ‘n Pay, where it was alleged that he stole 7 blocks of cheddar cheese valued at R287,75. He was

not legally represented and elected to conduct his own defence. He pleaded guilty to this charge and after the Magistrate questioned him in terms of Section 112(1)(b) of the Act, he was convicted on the offence charged. The prosecutor thereafter proved a list of previous convictions against him. The court thereafter, after eliciting information from the accused about sentence and after having given the prosecutor an opportunity to address the court sentenced the accused to a period of twelve (12) months imprisonment and an additional twelve months imprisonment that was suspended for a period of five (5) years on condition that the accused is not convicted of theft or attempt thereto during the period of suspension. When the review was presented to me, I directed the following query to the Magistrate.

“The Magistrate is requested to furnish reasons for sentence, especially in the light of the fact that the previous convictions of the accused, except for the recent one to which he was sentenced on 19 December 2014 to a term of 6 months imprisonment that was suspended on certain conditions, the other convictions were respectively committed in 1996 and 1997 which was 17 and 18 years ago respectively.”

The Magistrate gave a comprehensive set of reasons to which I will refer to where necessary at a later stage.

[2] **THE FACTS**

The accused in his answers to the Section 112(1)(b) questions to the Magistrate admitted that he stole 7 blocks of cheese at Pick ‘n Pay, Town Centre, Mitchell’s

Plain on 12 December 2014. He did this by taking the blocks of cheese and putting it into his pocket, whereafter he walked out of the shop. He was apprehended by the security guard and thereafter arrested. He further stated to the Magistrate that he would have sold the cheese to get some money. He was unemployed and had no income and also did not receive any grant from the government. In mitigation of sentence he said to the Magistrate that he is unmarried and the father of two children, 11 years of age and 16 years. He further said that he managed to pass standard 7 at school. He further told the Magistrate he wants to sort out his life and that he will stop stealing.

[3] **THE ACCUSED PREVIOUS CONVICTIONS**

The accused has the following list of previous convictions:

YEAR	OFFENCE	SENTENCE
1. 1996	Theft	R1 600,00 or 4 months imprisonment which is suspended for a period of three (3) years on condition that he is not convicted of theft or any attempt thereto, committed in the period of suspension.
2. 1997	Theft	12 months correctional supervision and in addition a

		further 16 hours community service per month.
3. 2011	Possession of Drugs in contravention of Section 4(b) of Act 140 of 1992	R1000 or 10 days imprisonment which is wholly suspended for a period of 3 years on condition that the accused is not convicted of contravening Sections 4(A) or 4(B) Act 140/92 committed during the period of suspension.
4. 8 May 2012	2 x charges Contravention of Section 170 of Act 51 of 1977. Failure to attend court	R100 or 5 days imprisonment on each count.
5. 13 November 2013	3 x charges Contravention of Section 17 of Act 116 of 1998 Contravening Domestic Violence Court Order	Charges taken together for purposes of sentence. R1 500,00 or 3 months imprisonment and in addition the accused is sentenced to a further 2 months imprisonment suspended for a period of 5 years on condition that he is not convicted of contravening Section 17(A) of Act 116 of 1998 and which is committed during the period of suspension.
6. 9 December 2014	Theft	(Six) 6 months imprisonment

		which is wholly suspended for (three) 3 years. ¹
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[4] **MAGISTRATE'S REASONS**

The Magistrate in his reasons with respect did not directly address the pertinent issue that was raised in the query, but instead made generalized statements about the aims of punishment, the so-called triad and referred to the relevant case law on these aspects which the court would regard as trite. He said much about the offence and the prevalence of the so-called crime of shoplifting². He also made some general remarks about the interests of society. In his reasons he further states the following in about seven sentences about the accused.

“Mnr Thorne se persoonlike omstandighede is deur homself op rekord geplaas dat hy ‘n 37 jarige manlike persoon is wat ongetroud is. Hy (sic) slag st 7. Hy het 2 kinders. Sy kinders is 11 en 16 onderskeidelik. Hy is werkloos. Volgens sy pleit is sy houding dat hy nie toelaes van die staat kry nie en werkloos is en voel die staat behoort vir hom te sorg. In die hof blameer hy sy misdaad op die staat wie vir ander mense toelaes betaal maar hy kwalifiseer nie en hy weet nie hoekom nie want hoe moet hy vir homself sorg as hy nie werk het nie. Hy is glad nie berouvol vir sy optrede nie.”

[5] Regarding the accused's previous convictions, the Magistrate says that the previous convictions of the accused started in 1996 until 2014 and that he had the

¹ This previous conviction was proved by means of a J14 and the Clerk of the Court it seems did not fully state the conditions of the suspended sentence.

² Colloquially referred to theft from a supermarket or retailer.

benefit of a suspended sentence for the crime of theft. He further stated that as a second offender for the crime of theft even though he was sentenced to correctional supervision, such sentence did not deter him. Thereafter he committed a drug related offence, contempt of court and offences relating to domestic violence. He persisted with his criminal conduct and committed a further theft on 9 December 2014. Three days thereafter he committed the current offence.

[6] The Magistrate further remarked that due to his persistent criminal conduct he was of the view that the accused should be taught a lesson. The Magistrate further stated that retailers like Pick 'n Pay is entitled to protection by the court against repeated offenders. The court should therefore impose strong enough sentences to deter persons like the accused from committing offences like theft of this kind. Lastly, he was of the view that the accused has three previous convictions which is relevant to the charge of theft. It is for these reasons therefore that a sentence of direct imprisonment is the only appropriate sentence.

ANALYSIS

[7] This sentence imposed by the Magistrate in my view is clearly disproportionate. He failed to take into account that after the two previous convictions for theft committed respectively in 1996 and 1997, a period of between 17 and 18 years had lapsed. Thereafter, after a period of 14 years had lapsed, he was convicted on an unrelated offence of possession of drugs on 10 August 2011.

[8] In 2012 and 2013 he was once again convicted of unrelated offence of not as the Magistrate put it contempt of court, but a failure to appear in court in contravention of Section 170 of the Act. Thereafter in 2013 he was once again sentenced to an unrelated offence after he was convicted of contravening Section 17 of the Domestic Violence Act.

[9] Only in December 2014, after a period of 17 years, he once again committed the crime of theft. The Magistrate in finding that the accused has three previous convictions for theft, which he took into account before sentencing the accused clearly misdirected himself. This is not how I understand the law to be. Section 271A says the following:

“Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of—

(a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but—

(i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or

(b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.”

[10] This provision was first inserted by Sec 12 of Act 5 of 1991 and was later

amended by Sec 6 of Act 4 of 1992 and later substituted by Sec 2 of Act 65 of 2008 in its present form. Clearly, the previous convictions for the theft committed in 1996 and 1997 automatically lapsed respectively in 2006 and 2007 after a period of 10 years had lapsed. The accused further was not convicted of any offence during this period in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, could be imposed.

[11] Clearly the first offence after the 1997 theft conviction, he committed was of a relatively minor nature, which was committed after a period of 14 years had elapsed after his last conviction for theft. It was also unrelated and not an offence which was committed during the period of 10 years. The only conviction that could have been taken into consideration was the one committed in December 2014. The Magistrate's finding that he had three previous convictions was clearly wrong and a misdirection. See *S v Zondi 1995 (6) SACR 18(A)*.

[12] Apart from the Magistrate having clearly misdirected himself about the fact whether the 1996 and 1997 convictions should have been considered he also placed undue weight on the fact that the accused has previous convictions. 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. In *S v Baartman*

1997 (1) SACR 304 (E) at 305 e – f, the learned judge said the following:

“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.”

[13] In this particular case the offence committed by the accused was not out of pure greed or to enrich himself, but it was in an attempt to get money to feed his family. He was also not characterized as a dangerous criminal against whom society needed protection and who had to be removed from society.

[14] Most of the offences he had committed even those unrelated were of a minor nature that would not ordinarily have justified the imposition of a term of imprisonment. Therefore even if those two convictions could have been taken into consideration, given the relative minor nature of the offence, the fact that there was no pressing need for the accused to have been removed from society and the personal circumstances of the accused, it did not justify the imposition of a sentence of direct imprisonment.

[15] The Magistrate in my view also over-emphasized the seriousness of the offence when he sentenced the accused to a period of twelve (12) months direct imprisonment as a second offender, without having considered other sentencing options. He also over-emphasized and improperly took into consideration the lapsed previous convictions for theft of the accused. This is a harsh sentence given the fact

that the accused had been convicted of theft of 7 blocks of cheese.

[16] He was previously sentenced to correctional supervision 17 years ago for theft, which seem to have had the desired effect. Unlike the view of the Magistrate it seems that after this sentence was imposed, the accused did not after the imposition of this sentence up to at least 2011 where he was convicted and sentenced to an unrelated offence and only after a period of 14 years, had any run-ins with the law. This could have been an appropriate sentencing option for the court once again to consider, and was clearly not considered by the Magistrate. The accused it seems has been incarcerated since 25 February 2015 in this matter, which is a period of 1 month and 26 days. In my view in the light of the reasons given above, such period of incarceration should serve as adequate punishment.

[17] In the result, I make the following order:

1. That the sentence of twelve (12) months imprisonment imposed by the Magistrate on 25 February 2015 is set aside.
2. The accused is to be released from prison forthwith unless there is a lawful reason for his further incarceration.
3. That the accused is sentenced to a term of one (1) month and 26 days antedated to 25 February 2015. The accused is sentenced to an additional eight (8) months imprisonment which is suspended for a period of five (5) years on condition that the accused is not convicted of theft or any attempt

thereto and which is committed in the period of suspension.

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HENNEY, J
Judge of the High Court

I agree, it is so ordered.

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STEYN, J
Judge of the High Court