

A265/05

THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

DATE: 21/2/2005

NOT REPORTABLE

Magistrate:

ERMELO

Review Case no: 257/04

High Court Ref no: 4821

THE STATE V INNOCENT SKHUMBUZO MNISI

REVIEW JUDGEMENT

SHONGWE J

[1] This matter came before me by way of an automatic review. The accused has been convicted of theft and sentenced to twenty four months imprisonment of which twelve months are suspended for three years on condition the accused is not convicted of theft or fraud committed during the period of suspension. This is after he pleaded guilty to the charge. He was unrepresented because he elected to conduct his own defence.

- [2] After pleading guilty the presiding officer applied the provisions of **Section 112 (1) (b) of the Criminal Procedures Act 51 of 1977**. The purpose of which is to establish whether the accused person admits all the elements of the crime charged. In addition an unrepresented accused person is protected from the adverse consequences of an ill-considered plea of guilty.
- [3] In *casu* it is clear that the record is incomplete. It is also clear that at no stage was the accused asked whether he knew that his conduct was unlawful and therefore punishable by law. It is not the function of the trial court, at this stage of the proceedings, to evaluate the answers as if it were weighing evidence during analysis at judgment stage. **(See S vs Mkhize: 1978 (1) SA 264(N)).** A conscious awareness of the unlawfulness of an accused person's conduct is an essential element of an offence. In the absence of this element, which tasks the intention to steal, the commission of the offence of theft cannot be complete. It is my considered view that, as matters appear on record, I am not satisfied that the accused voluntarily admitted all the elements of the offence and therefore the court *a quo* should have entered a plea of not

guilty in terms of Section 113 of the Criminal Procedures Act.

[4] Sentence is pre-eminently a matter of discretion by the presiding officer, which discretion must be exercised justicially. In my considered view the sentence is proportionally imbalanced considering the triad referred to is the famous Zinn case. It is therefore shockingly inappropriate (See S vs Jantjies: 1990 (2) SACR 440

[5] In terms of Section 312 of this Criminal Procedures Act this matter must be remitted to the court *a quo* to reconsider the provisions of Section 112 (1) (b) also 113 of the Criminal Procedures Act, if need be.

[6] Therefore the following order is made:

(a) The conviction and sentence are set aside.

(b) The case is remitted to the court *a quo* to deal with the provisions Section 112 (1) (b) properly and, if need be, to invoke the provisions of Section 113 of the Criminal Procedures Act.

J B SHONGWE
JUDGE OF THE HIGH COURT

I agree.

G. WEBSTER
JUDGE OF THE HIGH COURT