

A357/05
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 24/03/05

NOT REPORTABLE

Magistrate:

CULLINAN

Review Case no.: 848/04

High Court Ref. No.: 5529

THE STATE VS PATRICK MOCHEKECHEKE

REVIEW JUDGMENT

WEBSTER J

The accused was *convicted* in the Magistrate's Court, *Cullinan*, on one count of theft of one (1) brown pair of leather shoes and one pair of brown leather sandals *valued* at approximately R520.00. He was sentenced to a fine of R5 000.00 (*five* thousand rand) or eight (8) months' imprisonment which was wholly suspended for *five* (5) years on condition that the accused is not *convicted* for theft or attempted theft committed during the period of suspension. The matter is before me on automatic *review*.

The accused, aged 25 years, pleaded guilty to the charge. The facts can be stated briefly as follows: The accused was employed at a mine as a contractor. On 6 September 2004 the accused stole the pair of shoes and on 29 October 2004 he stole the sandals, in a change room: they had been left on the floor by the complainant. He admitted all the elements of the offence. I am satisfied that he was properly convicted.

In mitigation of sentence he informed the court that he lost his employment as a result of the theft. He had earned R890 per month. He stated that he was married with one minor child. The shoes, presumably both pairs, had been given back to the complainant. He had no previous conviction.

In imposing a wholly suspended sentence the Magistrate justifiably succeeded in keeping the accused out of prison. The fine imposed, however, was clearly a very high amount regard being had to the personal circumstances of the accused, the fact that the shoes had previously been worn and the remorse of the accused as can be inferred from his plea of guilty.

I queried the sentence with the trial Magistrate. In his response the Magistrate arrogantly remarks as follows: "The fine is not excessive at all. In terms of section 92(b) of the Magistrates' Court Act 32 of 1944 the district court's jurisdiction in terms of fines is R60 000. In terms of imprisonment it is now 3 years. If that is compared to the Adjustment of Fines Act 101

of 1991, it is clear that for 1 (one) year, the court can impose an amount of R20 000 fine. Moreover, the sentence is wholly suspended. I submit that the system will be failing itself if the courts were obliged to impose sentences which would encourage accused persons to commit further crimes, knowing that they can afford the imposed suspended fine".

The views of the Director of Public Prosecutions were also sought. Counsel for the State are of the view that the trial Magistrate committed " ... a serious misdirection" in clearly over-emphasizing the deterrent effect of sentence at the expense of the mitigating facts and imposing a fine that was clearly beyond the means of the accused.

I agree with State Counsel. A fine must not be beyond the means of an accused person (*S v Mlalazi and Others* 1992(2) SACR 673 (W); *S v Heilig* 1999(1) SACR 379 at 386; *S v Le Kgoale* 1983(2) SA 175 at 176E). Further, the fact that the sentence was wholly suspended does not mitigate the severity of the sentence for there exists a real possibility that the accused may contravene a term of the suspension and find himself having to serve the sentence no matter how trivial the value of the item he may steal. (See *S v Sethoboko* 1981(3) SA 555 (O)).

The imposition of a sentence is a serious matter. It must not be contemplated in anger and intended to sacrifice an

accused person on the altar of deterrence. It must be balanced and tempered with mercy: those are the basic hallmarks of justice.

It is my considered view that the mitigating circumstances justify interference with the sentence imposed. In my view the appropriate sentence will be as set out below.

The following order is accordingly made:

- 1. The conviction is confirmed;**
- 2. The sentence imposed by the court *a quo* is set aside and substituted with the following:
"The accused is sentenced to R500 or three (3) months' imprisonment wholly suspended for three (3) years on condition that the accused is not convicted of theft or attempted theft committed during the period of suspension for which he is sentenced without the option of a fine".**
- 3. A copy of this judgment must be furnished to the trial Magistrate.**

G. WEBSTER
JUDGE IN THE HIGH COURT

I agree.

J M DOLAMO
ACTING JUDGE IN THE HIGH COURT