IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

High Court Ref No: 454/07
Magistrate's Serial No: 52/2007
Review Case No: 3/5341/2007

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
9th May 2008 ..... DATE
..... SIGNATURE

12 February 2008

Magistrate
RANDBURG

THE STATE v ADAMS, WESLEY

REVIEW JUDGMENT

SALDULKER, J:

[1] The accused, a 21 year old male, was charged in the Randburg Magistrate's Court with theft of a DVD player to the value of R800,00.

[2] The accused was not legally represented and he pleaded guilty to the charge. He was sentenced to R3 000,00 fine or 12 months' imprisonment of which R1 500,00 or 6 months was suspended for a period of 5 years.

[3] The matter came before us on automatic review .We have had the benefit of the reasons from the Magistrate who convicted the accused and the opinion from the Director of Public Prosecutions.

[4] While it is true that where crimes are serious and prevalent the court should impose deterrent sentences, a careful and balanced evaluation of the accused's personal circumstances, the nature and extent of the offence and the interest of the community must always be made before considering the imposition of imprisonment.

[5] From the record it appears that:

(a) The accused pleaded guilty;

(b) He was under the influence of alcohol at the time of the offence;

(c) He confessed to the crime;

(d) The DVD was returned to its owner;

(e) He has no previous convictions;

(f) He was unemployed.

All of the above appear to be mitigating factors.

[6] It does not appear that the magistrate took into account all of these mitigating factors in sentencing the accused in the manner that she did. The intoxication of the accused appears to have been considered as an aggravating factor outweighing all of the mitigating factors.

[7] No evidence with regard to his personal circumstances was led in the court *a quo*. A judicial officer must in the case of an unrepresented accused, enquire into the personal circumstances of the accused to assist him/her. The

learned magistrate failed to enquire into the accused's social and family background. The accused's personal circumstances appear to be vague and sketchy.

[8] It does not appear from the record that the magistrate considered other sentencing options such as a wholly suspended sentence. Furthermore the magistrate did not question the accused in order to determine whether or not he could afford to pay a fine.

[9] In *S v Siebert* 1998 (1) SACR 554 (AD) at 559C it was held that:

> *"An enlightened and just penal policy requires a broad scope of sentencing option from which the most appropriate option, or combination, of options can be selected to fit the unique circumstances of the case before court. It requires a willingness on the part of the trial court to actively to explore all the available options and to choose the best suited to the crime the criminal, the public interest, and also the aims of punishment."*

[10] In S v Silimela 1999 (2) SACR 7 it was held that:

Imprisonment ought not lightly to be imposed upon a first offender, especially if the objects of sentencing might be satisfied by resorting to other forms of punishment.

[11] A fine is often a desirable alternative to imprisonment for a first offender. The fact that an accused is unemployed, does not automatically mean that he will be unable to pay one. It behoves a judicial officer to at least make an enquiry as to whether an accused can afford to, or raise funds to pay a fine especially in the case of an unrepresented accused. But *in casu*, the ability of the accused to pay a fine was not enquired into properly.

[12] In S v Mlalazi and Another 1992 (2) SACR 673 h (W) it was held that:

Even if the prospects of raising the money are not particularly good, the judicial officer would be correct in affording the accused the opportunity at least of trying to avoid gaol, an opportunity which a more prosperous accused person would avail himself of as a matter of course.

[13] From the aforegoing it is clear that there are mitigating factors which the court *a quo* ought to have taken into account. In these circumstances we are of the view that the sentence imposed by the court *a quo* is inappropriate and must be set aside.

[14] In the result the following order is made:

1. The sentence imposed by the court *a quo* is set aside and substituted with the following sentence:

> "*The accused is sentenced to 12 months' imprisonment or a fine of R1 000,00, wholly suspended for 3 years on condition that he is not convicted of the crime of theft or attempted theft committed during the period of suspension.*"

H SALDULKER
JUDGE OF THE HIGH COURT

I agree:

P A MEYER
JUDGE OF THE HIGH COURT