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9/6/08

IN THE HIGH COURT OF SOUTH AFRICA

(TRANVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

HIGH COURT REF: 817
MAGISTRATE'S SERIAL NO: H 37 / 08
MAGISTRATE'S CASE NO: G 19 / 00150 / 2008

REVIEW:
THE STATE
VS
LESEGO JERMAINE MODISELLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) CP INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
3/6/2008	
DATE	SIGNATURE

REVIEWJUDGEMENT

DU PLESSIS J:

The accused appeared in the Pretoria magistrates' court on a charge of theft. After the accused had pleaded guilty, the prosecutor requested the court to proceed in terms of section 112(1)(a) of the **Criminal Procedure Act, 51 of 1977** (the Act), that is to convict the accused on his plea of guilty only and without questioning him to ascertain whether he admits all the elements of the crime in question. The magistrate proceeded to convict the accused in accordance with the prosecutor's request. After the conviction, the learned magistrate sentenced

the accused to three months imprisonment, wholly suspended on appropriate conditions.

A presiding officer is only empowered to apply the provisions of section 112(1)(a) of the Act "if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding", at the moment, R1500 (See section 112(1)(a)). It follows that the sentence that the learned magistrate imposed in this case is incompetent.

Realising that the presiding magistrate had imposed an incompetent sentence, the acting senior magistrate of Pretoria referred the case to this court for review in terms of section 304(4) of the Act. The learned senior magistrate requested this court to set aside the sentence and to substitute it with one of a fine of R500 or three months imprisonment, wholly suspended on certain conditions.

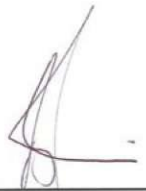
I have referred the matter to the office of the Director for Public Prosecutions. Messrs. De Beer SC and Roberts submitted a helpful memorandum to the effect that the request of the senior magistrate should be complied with. In **S v Addabba; S v Ngeme; S v Van Wyk 1992 (2) SACR 325 (T)** the court, consisting of three judges of this division, warned that this court, sitting as a court of review, cannot as a matter of course, where the magistrate

has applied section 112(1)(a) and has then imposed an incompetent sentence, simply reduce the sentence. I need not in this instance go into the reasoning that the judges followed in that case. In this case, as counsel for the DPP have pointed out, the prosecutor expressly requested the court to apply section 112(1)(a). That, in my view, is similar to the prosecutor accepting a plea of guilty and thus limiting the ambit of the *lis* between the accused and the state to one in which both parties accept that a sentence not exceeding the limits set by section 112(1)(a) is appropriate.

From the facts alleged in the charge sheet, it is apparent that the present is a case of what is colloquially called shoplifting. The accused is a first offender who is 22 years old and still at school. Although he stole four shirts from Jet Store, I am satisfied that the sentence that the senior magistrate and counsel suggest, is appropriate. As for the conditions of suspension, they must in my view be the same as those imposed by the trial court so as not to render the sentence more onerous.

In the result the following order is made:

1. The sentence is set aside and in its stead the following sentence is imposed: "The accused is sentenced to a fine of R500 or 3 months imprisonment wholly suspended for a period of three years on condition that he is not convicted of theft or attempted theft committed during the period of suspension".



B. R. DU PLESSIS

Judge of the High Court

I Agree



Judge of the High Court

E. Jordan