A66/18

19/02/2018

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

13-02-2018
DATE

SIGNATURE

HIGH COURT REF. NO.: 330/17
MAGISTRATE'S CASE NO.: A583/17
MAGISTRATE'S SERIAL NO.: H41/17

DATE: 13 February 2018

THE STATE

And

THABANG EMMANUEL MABENA

REVIEW JUDGMENT

MABUSE J:

[1] This matter came before me as a review.

[2] The accused in this matter, a certain Mr. Thabang Emmanuel Mabena, a 24 year old male at the time of these crimes, appeared before a Magistrate's Court at Cullinan where he was charged with two counts. In count 1 he was charged with Housebreaking with intent to steal and theft. It was alleged by the State in that count that the accused had upon on during the period 25-26 September 2017 and at or near Refilwe, Ext. 5, unlawfully and intentionally, and with intent to steal broken into a shack of a certain Emmanuel Lukhele and once in the shack, stolen certain properties in the lawful possession of the said Emmanuel Lukhele.

[3] In count 2, he was charged with housebreaking with intent to commit a crime unknown to the State. It was alleged by the State that this offence was committed by the accused on 3 February 2017 at or near Ext. 3 Refilwe when he broke open and entered the house of a certain Victor Molepe with the intention therein to commit an offence unknown to the State.

[4] The accused, who had chosen to conduct his own defence, pleaded guilty to both counts. Having satisfied himself through a question and answer exercise that the accused genuinely pleaded guilty to both counts, the magistrate convicted the accused accordingly and upon conviction sentenced him to three years' imprisonment on each count, one of each was suspended for 5 years on condition that the accused was not again convicted of housebreaking with intent to steal committed during the period of suspension. The order that the magistrate made in terms of the Firearms Control Act 60 of 2000 is, if any, not clear.

[5] The matter was thereafter sent to the registrar of this Court for review purposes. Having perused the file I raised two queries with the magistrate. The first query to the magistrate was whether the accused had been advised of his rights to legal representation. Secondly, the magistrate was requested to comment on the severity of the sentence he had imposed on the accused.

[6] With regards to whether the accused had been warned of his rights to representation, the magistrate responded as follows:

"The typed record of the proceedings reflects the first appearance of the accused to be the 10th of October 2017. It was actually an oversight from the typist as the accused first appeared on the 4th of October 2017 wherein his rights were explained. The record has now been rectified. Apologies are sent forthwith."

It was clear from the above record that the accused's rights to legal representation had been explained to him and that he had told the court that he would conduct his own defence. With regard to sentence the magistrate remarked that:

"Housebreaking is an offence which is normally heard in the regional court. In this instance, the court suspended half of each count. In effect the accused will only serve 3 years for both counts. From the first appearance the State informed the court that his mother does not want him at home. Therefore he does not even have an address. On the first count, the complainant is the owner of a spaza shop trying to make a living. The accused broke and entered and stole her stock. On the second count even his neighbour is not spared. He waits to see him leave to work and breaks in."

[7] It is clear that by making the following remarks the magistrate overemphasised the seriousness of the offence and the interests of society:

"I submit that the offences are serious and the society expects the courts to protect them from people like the accused."

[8] On receipt of the responses from the magistrate I forwarded such responses and the entire file to the office of the Director of Public Prosecutions for their comments. There the matter was handled by Senior State Advocate C Mnisi and Advocate HM Meintjies (SC), the deputy director of Public Prosecutions, Gauteng Division, both of whom provided me with their educated view about the conduct of the sentencing proceedings in the magistrate court. I am greatly indebted to both of them for their invaluable assistance and contributions.

[9] Having perused the magistrate's reasoning in his assessment of the appropriate sentence, Mr. Mnisi remarked that the State failed to indicate or lead any evidence on the value of the items stolen and of the value of the items recovered. It is imperative that the value of the items involved in such offences as theft be reflected in the charge sheet. The value is crucial in the assessment of an appropriate sentence. Theft of an article with less value will not attract a severe sentence whereas theft of some valuable item will. It is correct, as pointed out by Mr. Mnisi, that *in casu* the value of the items involved was not reflected. No steps were taken by the State to determine the value of such items. No attempt was made by the court to obtain all the necessary details required for the assessment of sentence. The court went ahead, without all the relevant details, to impose sentence on the accused.

[10] Mr. Mnisi pointed out that by pleading guilty to both offences the accused demonstrated remorse. This he supported by reference to S v Brand 1998 (1) SACR 296 (CPD), 304 where the Court had the following to say:

"If an accused shows genuine remorse, punishment will be accommodating especially when the accused has taken steps to translate his/her remorse into action."

Mr. Mnisi also referred to the case of S v Matyityi 2011 (1) SACR 40 (SCA) paragraph 13. In this paragraph the Court stated that:

"In order for the remorse to be a valid consideration, the pernitence must be sincere and the accused must take the Court fully into his or her confidence."

[11] In this case, so submitted Mnisi, with whom Mr. Meintjies agreed, the magistrate tended to overemphasise the nature and gravity of the offences and interests of the society at the expense of the personal circumstances of the accused. This amounts to a misdirection as pointed out in R v S 1958 (3) SA 103A, 104.

[12] It is submitted by both counsel that the sentence imposed by the court on the accused is disturbingly inappropriate or totally out of proportion with the gravity of the offence. The trial court, it is submitted, failed to exercise its discretion judicially. According to both counsel, the sentence imposed on the accused is rather steep and requires interference.

[13] According to Mr. Meintjies, there is a paucity of detailed information in the magistrate's reasons for sentence. To illustrate this point, he made reference to the following hand-written record:

"The triad of Zinn taken into account. Accused pleaded guilty. Accused has been convicted of serious offences. The community deserves to be protected by the court."

This statement clearly shows that the court overemphasised the seriousness of the offence and the interests of the society at the expense of the personal circumstances of the accused. In R v S *supra* the Court had the following to say:

"The infliction of punishment, said Innes CJ, in R v Maphumulo and Others, 1920 AD 56 at page 57, "is pre-eminently a matter for the discretion of the trial court."

There are well recognised grounds on which a court of appeal will interfere with the sentence; where the trial Judge – or magistrate, as the case may be – has misdirected himself on the law or the facts, or has exercised his discretion capriciously or upon a wrong principle or so unreasonably as to induce a sense of shock."

in my view, such grounds exist upon which I may interfere with the sentence imposed by the court on the accused.

[14] In its assessment of an appropriate sentence it behoves a court to take all the relevant factors, in other words, the offence, the offender and the interests of the society, all three now called "Zinn Triad", named after S v Zinn 1969 (2) SA 573 A, put them in an imaginary weighing scale, weigh them, according each one of them equal weight and from them distil what, in its view, is an appropriate sentence. Any over- or under emphasis of one or two of such factors at the expense of the other or others will constitute a misdirection according to R v S *supra*, and for that reason, I will be at large to interfere with the judgment. In the result, the following order is made:

1. The sentence imposed on the accused by the magistrate court is hereby set aside and in its place is substituted the following:

   "The accused is sentenced, in respect of each count, to two years' imprisonment, six months of which, in respect of each count, is suspended for a period of five years on condition that the accused is not again convicted of the offence of

housebreaking with intent to steal and theft or housebreaking with intent to commit an offence unknown to the State or prosecution committed during the period of suspension."

PM MABUSE
JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

NM MAVUNDLA
JUDGE OF THE HIGH COURT

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