

SOUTH AFRICA / JUDGMENT

S v Cedars (A435/2009) [2009] ZAGPPHC 164; 2010 (1) SACR 75 (GNP) (14 May 2009)

[2009] ZAGPPHC 164

COURT

North Gauteng High Court, Pretoria

BEFORE

Hartzenberg, Phatudi

CASE / FILE NUMBER

A435/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Date:

14/05/2009

Case

no: A435/2009

THE

STATE

and

GRANO

CEDARS

REVIEW

JUDGMENT

HARTZENBERG J.

The accused was charged with having stolen toothbrushes to the value of R130, 00 from Checkers on 6 July 2008. He first appeared in court on 7 July 2008. On 14 July 2008 he pleaded guilty to the charge. The magistrate enquired from the prosecutor whether acceptance of (he plea in terms of section 112 (1)(a) of The Criminal Procedure Act would be in order. The prosecutor replied in the affirmative and the accused was found guilty upon the plea only.

The prosecutor thereafter proved two previous convictions for theft committed on 11 July 2007 and 1 March 2008 respectively. In

mitigation the accused stated that he had been unemployed for more than a year, and that that was the reason for his conduct. He is 42 years old, divorced and must pay maintenance for two children aged 16 and 12 years respectively. He stated that he did not have money for a fine and confessed that he had a drug problem. The matter was postponed on a number of occasions for pre-sentence reports. The accused was in custody. On 30 September 2003 the matter resumed. On what was before the court it was clear that the accused admitted that he committed the offence and that he wanted to be subjected to a rehabilitation program whilst under correctional supervision. At that time there was a report before the court indicating that the accused tested negatively for all the drugs for which he had been tested. The magistrate acceded to his request and sentenced him to 12 months correctional supervision. Appropriate conditions were imposed.

The matter was only sent on review during January 2009 and the magistrate was immediately asked whether the sentence was a competent one as the accused had been convicted in terms of section 112(1)(a). The magistrate's reply was received on 26 February 2009 and the Director of Public Prosecutions was asked to comment on 27 February 2009. An extremely helpful memorandum of Adv. H M Meintjes SC dated 29 April 2009 was received by the Registrar on 12 May 2009. There is an apology for the long delay.

The State, in my view, correctly concedes that the sentence of correctional supervision coupled with house arrest is not a competent

sentence where there was a conviction under section 112(1)(a). The incarceration of the accused between conviction and sentence was similarly not competent. On the other hand the State is correct that there is no doubt that the accused is guilty of the offence, has a bad record, and asked for the sentence in order to rehabilitate

himself. Although the sentence was technically incompetent it was an appropriate sentence and the accused has already served more than half of it.

In the matter of *R v Harmer*, 1906 TS 50 at 52 Innes CJ held that a court on review only has to certify that the proceedings are in accordance with real and substantial justice, not necessarily in accordance with strict law, as it is possible for proceedings to be in accordance with real and substantial justice, even although a rule of criminal procedure may not have been observed. In *S v Zulu*, 1967

- (4) SA 499 (T) at 502D Claassen AJP stated, with reference to the Harmer matter that the sentence dealing with automatic review does not require the judge to certify that the proceedings are in accordance with law but in accordance with justice. In that matter the court refused to set aside an incompetent sentence so that the accused could be sentenced to a more onerous compulsory sentence.

Directly in point is the matter of S v Dantei Maake, an unreported judgment in this division in case A592/36 wherein Kriegler J confirmed an incompetent sentence, after conviction on a plea in terms of section 112(1)(a), where the circumstances of the case did not warrant the setting aside thereof. M J Strydom J agreed with him Kriegler J with whom van der Merwe J agreed, also refused to set aside a sentence of a fine, where the relevant legislation did not provide for a fine, in the unreported matter of S v Sipeng and Nkung. no. A1125/88 in this division.

In my view the circumstances of this case do not relate that the sentence imposed is to be set aside. The reports of the social

workers and the address to the court by the accused, indicate that the accused wanted to be subjected to a rehabilitation program. He was aware of his dependency problem and he sincerely tried to overcome it and co-operated with the social workers and with the court. Moreover by now he has served more than half of the sentence. I am satisfied that the sentence was in accordance with real and substantial justice, although there was a technical irregularity

The following order is made:

The conviction and sentence are confirmed.

W J HARTZENBERG

JUDGE OF THE HIGH COURT

I agree

A M L PHATUDI

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