

SOUTH AFRICA / JUDGMENT

S v Demele (CA&R 153/2013)

[2013] ZAECGHC 64 (5 June 2013)

[2013] ZAECGHC 64

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, C M Plasket

CASE / FILE NUMBER

CA&R 153/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

REVIEW CASE NO: 201300102

CASE NO: CA&R 153/2013

DATE DELIVERED: 05/06/2013

In the matter between

THE STATE

and

PIKISILE DEMELE

Nature of matter: Review - the accused was convicted in the Magistrate's Court, Grahamstown, after pleading guilty, of housebreaking with intent to steal and theft. He was sentenced to pay a fine of R30 000, alternatively to undergo 36 months imprisonment, R10 000 or 12 months of which was conditionally suspended. The matter was initially sent on special review for the purpose of correcting the wording of the condition of suspension of sentence.

Order: The sentence imposed by the magistrate is set aside and substituted as follows:

“The accused is sentenced to twelve (12) months’ imprisonment, suspended for three (3) years on condition that the accused is not convicted of housebreaking with intent to steal and theft, committed during the period of suspension.”

[13.2] The sentence is ante-dated to 21 February 2013.

REVIEW JUDGMENT

ROBERSON J:-

- [1] The accused was convicted in the Magistrate's Court, Grahamstown, after pleading guilty, of housebreaking with intent to steal and theft. He was sentenced to pay a fine of R30 000, alternatively to undergo 36 months imprisonment, R10 000 or 12 months of which was conditionally suspended. The accused was legally represented at his trial.
- [2] The matter was initially sent on special review for the purpose of correcting the wording of the condition of suspension of sentence. Mey AJ however addressed the following query to the magistrate:

"In considering the appropriate sentence to be imposed in this matter it was indicated that direct imprisonment would not be considered."

The accused's wife is unemployed. He is self-employed and sells honey for a living.

In terms of the sentence imposed the accused is required to pay a sum of R20 000 or he must be imprisoned.

To what extent was his ability to pay an amount of R20 000 explored? Is the imposition of a fine of such a large sum not effectively

sentencing the accused to direct imprisonment, when this was specifically indicated as not being the intention of the court?"

The magistrate's response to this query was as follows:

"The accused person has an alternative to serve his term should he not pay the fine, he also have an option of a deferred fine."

- [3] The matter came before Nepgen J who referred the matter once again to the magistrate, pointing out that her reply did not deal with the last paragraph of Mey AJ's query.

The magistrate's further response was as follows:

"The accused person has an alternative to serve his term should he not pay the fine, he also have an option of a deferred fine. The accused person is at list (sic) a businessman should the fine be deferred he would be able to pay his fine, I felt the sentence was better than direct imprisonment taking into account he does have an income."

- [4] Regrettably, the magistrate has still not properly answered Mey AJ's query in that she does not say whether the accused's ability to pay such a large amount was explored. However it seems little purpose will be served by referring the matter to her again.
- [5] In his statement in terms of s 112
- (2) of the Criminal Procedure Act 51 of 1977 (the Act) the accused admitted breaking into the house of the complainant and stealing a DVD player, clothing, CD's and groceries to the total value of R2 119.

[6] The state had no objection to the accused being treated as a first offender. In mitigation, the accused's attorney placed on record the following circumstances: the accused is 36 years old, married with three children, two of whom are minors, for whom he receives a social grant; he sells honey for a living and his wife is unemployed; the stolen items were recovered and returned to the complainant; the accused suffers from tuberculosis and asthma; the offence was not pre-meditated and he expressed remorse.

[7] It was submitted on the accused's behalf that a suspended sentence would be a sufficient deterrent. The prosecutor suggested a fine with an alternative of imprisonment.

[8] In sentencing the accused, the magistrate said, inter alia:

"However, being a first offender there is nowhere where it says that first offenders do not get direct imprisonment if that will address the offence and it will deter the community. However, at this stage direct imprisonment will not be considered as the Court will take the accused person's personal circumstances as they are on record, community interest and the seriousness of the offence. This offence is prevalent nationally and not only in Grahamstown. Being a first offender a correctional supervision will not be a suitable sentence so do periodical imprisonment."

(My emphasis.)

[9] In addressing the court with regard to fitness to possess a firearm, the accused's attorney said that even though he was self-employed, he was looking for work.

[10] In my view, in all the circumstances of the case, the amount of the fine imposed, even with a portion suspended, was, to say the least, disturbingly, if not shockingly, inappropriate. The accused's income from selling honey was not investigated, but considering the nature of his self-employment, the fact that he was looking for work and the fact that he receives social grants for his two minor children, it was highly improbable that he could afford anywhere near that amount. The effect of the amount of the fine was that the accused would have to go to prison, despite the magistrate's expressed intention not to impose direct imprisonment. Her response to the effect that the accused had the alternative of serving his prison sentence was directly at odds with her intention in keeping him out of prison, and is difficult to understand. An appropriate sentence in my view would have been a wholly suspended sentence.

[11] Predictably, the accused did not pay the fine. He was sentenced on 21 February 2013. I have established from the Department of Correctional Services that he was released on 11 March 2013 in terms of s 287 (4) (a) of the Act, which section gives the Commissioner of Correctional Services the discretion to act as if the sentenced person has been sentenced in terms of s 276 (1) (i) of the Act. The accused is therefore currently undergoing correctional supervision.

[12] In spite of this turn of events, the sentence cannot stand.

[13] The following order is made:

[13.1] The sentence imposed by the magistrate is set aside and substituted as follows:

“The accused is sentenced to twelve (12) months’ imprisonment, suspended for three (3) years on condition that the accused is not convicted of housebreaking with intent to steal and theft, committed during the period of suspension.”

J M ROBERSON

JUDGE OF THE HIGH COURT

PLASKET J:-

I agree

C M PLASKET

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Prepared on 11 October 2026 · Esheria