

SOUTH AFRICA / JUDGMENT

S v Gqobozi (P1272/2002) [2002] ZAWCHC 6; 2005 (1) SACR 589 (C) (17 February 2002) [2002] ZAWCHC 6

COURT

Western Cape High Court, Cape Town

BEFORE

A P Blignault, R B Cleaver

CASE / FILE NUMBER

P1272/2002

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IN THE HIGH COURT OF SOUTH AFRICA

CAPE OF GOOD HOPE PROVINCIAL DIVISION

Review Number: 025285

Magistrate's Serial Number:20/2002

Case No: P1272/2002

In the matter between

THE STATE

and

SIPHIWO GQOBOZO

Accused

REVIEW JUDGMENT : 17 FEBRUARY 2002

BLIGNAULT J:

- [1] The accused was indicted in the magistrate's court for the district of Wynberg on a count of theft, namely that on 2 August 2002 and at or near Samora, Phillipi he stole 200 metres of Telkom cable. The accused pleaded not guilty. He did not have any legal representation. After hearing the evidence of one state witness and the accused the magistrate convicted him of theft.

[2] The state did not prove any previous convictions. The magistrate was informed that the accused was 23 years old and that he was in standard 8 at school. No information regarding the value of the cable was placed before the court. The magistrate asked the accused: "Can you pay a fine?" He answered : "I

have money to pay a fine."

[3] The magistrate then sentenced the accused as follows:

"Fined R1 000,00 or 6 months' imprisonment. A further 6 months imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of the crime of theft, committed during the period of suspension."

[4] The matter came before me on automatic review. I had no problem with the conviction but the sentence concerned me. I accordingly directed the following query to the magistrate:

"The accused was convicted of the theft of 200 metres Telkom cable. He was sentenced to a fine of R1 000,00 or 6 (six) months'

imprisonment and a further 6 (six) months' imprisonment suspended for 5 (five) years.

(i) The record does not reflect the value (or the cost) of the cable. What assumptions, if any, were made in this regard.

(ii) According to the record there was no full investigation of his ability to pay a fine of R1 000,00. This was apparently not paid. Was it explained to him that he could arrange to pay it by way of instalments?

Your comments on these matters would be appreciated."

[5] The magistrate replied that no evidence had been led regarding the value of the cable but in the light of his experience he assumed that the value was about R800,00. He accepted that the accused had no income of his own and that someone else paid his bail of R400,00. He regarded the offence as a serious one and he was of the opinion

that a heavy fine was appropriate. He referred in this regard to the following passage in S v BOKBAARD 1991 (2) SACR 622 (C) at 623f:

"Boetes word egter ook opgelê wanneer 'n strafoplegger meen dat 'n beskuldigde eintlik gevangenisstraf verdien, maar tog bereid is om hom 'n geleentheid te gee om die geheel of 'n gedeelte van sy gevangenisstraf af te koop."

According to the case record it was not explained to the accused that he could arrange to pay the fine by way of instalments. The oversight, he said, was regretted. Finally he advised that the accused did not pay the fine but he was released on correctional supervision on 28 November 2002, twenty days after he was sentenced.

- [6] It seems to me that the sentencing procedure in this case was irregular in a number of respects. The first irregularity is that the value of the stolen goods was not proven nor was any admission thereof obtained from the accused. It is trite law that the seriousness of the crime is a relevant factor when it comes to sentence. In a case of theft the value of the stolen goods would generally be a relevant factor affecting the severity of the sentence. Although the onus of proof does not apply in its ordinary sense to the process of sentencing, the procedure being more inquisitorial than the trial itself, it is accepted that an accused is entitled to the benefit of the doubt in a case where there is uncertainty in regard to the facts. See *S v SHEPARD AND OTHERS* 1967 (4) SA 170 (W) at 181H; *S v M* 1988 (2) SA 779 (A) at 783 HI; Schmidt Bewysreg 4e uitgawe 60.
- [7] Applying this approach to the facts of the present case leads to the conclusion that the magistrate was not entitled to assume that the value of the stolen goods was R800,00. It should have been proved by the state or else admitted by the accused. In obtaining such admissions it is necessary to heed the judgment of Conradie J in *S v OCTOBER* 1991 (1) SACR 384 (C). At 384 -5 he said the following:

"The value was established in the lower court by way of admission. Each of the accused in the lower court was asked the following question:

'Erken u dat die waarde daarvan (meaning the stolen goods) plus minus R5000 is?'

In the case of the appellant he said: 'Ja, ek stem saam daarmee', and in the case of the other accused who was asked:

'Erken u dat die waarde van die goedere wat u gesteel het plus minus R5000 beloop?' his answer was 'Ja'.

The charge-sheet does not contain a detailed schedule of the goods which were alleged to have been stolen. All that the charge-sheet

alleges is 'klere, skoene, kinderspeelgoed', these three categories of goods are bracketed together, 'totale waarde plus minus R5 000'. It does not appear to me to be a satisfactory procedure to establish the value of stolen goods in this haphazard manner. It would, in the case of a represented accused, not be entirely satisfactory, but in the case of an unrepresented accused I think that it is to be deprecated. There is authority for saying that an unrepresented accused should not be required to make admissions concerning matters of which he cannot be expected to have personal knowledge. Unless invoices or delivery notes or consignment notes or some documentation was shown to each of the accused in the regional court, he would have had no basis whatever on which to make an informed admission concerning the value of the goods."

- [8] The second irregularity in this case is the magistrate's reasoning in imposing a fine. The passage in the BOKBAARD case which he cited in his reasons does not support him at all. This is apparent when the entire passage, at 623 f-i, is considered:

“Boetes word egter ook opgelê wanneer 'n strafoplegger meen dat 'n beskuldigde eintlik gevangenisstraf verdien, maar tog bereid is om hom 'n geleentheid te gee om die geheel of 'n gedeelte van sy gevangenisstraf af te koop. (Sien in hierdie verband die bespreking

van F J Louw in (1990) 25 Die Landdros (Desember uitgawe).) Hierdie soort boetes tref mens veral aan by dwelmtransaksies waar 'n

strafoplegger vermoed dat groot winste gemaak is. Ek dink nie dat dit 'n ongesonde benadering is nie, met hierdie voorbehoud, dat waar 'n beskuldigde 'n boete opgelê word wat hy na alle waarskynlikheid nie sal kan betaal nie (en die huidige is so 'n geval) daar baie versigtig na die alternatiewe gevangensisteryn gekyk moet word. In so 'n geval is die alternatiewe gevangenisstraf nie primêr 'n afdwingings-meganisme nie maar primêr 'n bestraffingsmaatreël. Daar moet na die alternatiewe

gevangenisstraf gekyk word asof dit die enigste straf is wat opgelê word wanneer dit, vir alle praktiese doeleindes, die enigste straf is wat opgelê word. In casu sou die hof benede hom dus moes afvra of dit geregverdig was om vir hierdie betrokke misdryf een jaar gevangenisstraf op te lê. Die beskuldigde se finansiële vermoëns is blykbaar glad nie ondersoek nie. Hy het nog nie vantevore met betrekking tot dwelmmiddels oortree nie en het slegs een noemenswaardige vorige veroordeling, een van huisbraak in Maart 1989, waarvoor hy drie maande gevangenisstraf opgelê is.”

[9] In *S v LUTHULI* 2000 (1) SACR 338 (C) the general principle was reiterated, at 340 e-g:

“It is nevertheless a general principle of sentencing in our law that, where a fine is appropriate, the fine imposed should not so far exceed the accused's means that he or she will never be able to pay it (see, for example, S v Sithole and E Another 1979 (2) SA 67 (A) at 69G - H, S v Mlalazi and Another 1992 (2) SACR 673 (W) at 674f-g, S v Koopman 1998 (1) SACR 621 (C) at 623d-j, S v Kika 1998 (2) SACR 428 (W) at 429d-h and the other authorities referred to in these cases). However, this is by no means an inflexible rule and there are circumstances in which a fine outside the ability of the accused may legitimately be imposed...”

In the present case there are no considerations taking it outside the field of application of the general principle. The magistrate knew that the accused could not pay a fine of R1 000,00. Yet he proceeded to impose precisely such a fine. In my view that was irregular.

[10] There are a number of comparable decisions in which first offenders were given suspended sentences for housebreaking or theft namely *S v Jantjies and Another* 1990 (2) SACR 440 (C); *S v Pietersen and Another* 1990 (2) SACR 40 (C); *S v Sagarias* 1991 (1) SACR 231 (Nm); *S v Pienaar* 1992 (2) SACR 649 (C); *S v Standaard* 1997 (2) SASV 668 (C) and *S v Isaacs* 2002(1) SACR 176 (C). The principal reasons for this approach is that the prisons are overcrowded, that conditions are often appalling and that the exposure of the accused to hardened criminals is more likely to have a negative than a rehabilitative effect. For the same reasons direct imprisonment was inappropriate in this case.

[11] It seems to me therefore that the second portion of the sentence actually imposed upon the accused would have been an appropriate sentence in this case. The first part of his sentence which reads “Fined R1 000,00 or 6 months’ imprisonment” is accordingly set aside and deleted. The second part of the sentence is amended to read:

“A period of 6 months’ imprisonment is imposed which is suspended for a period of 5 years on condition that the accused is not convicted of the crime of theft, committed during the period of suspension.”

Save for these amendments the conviction and sentence of the accused are confirmed.

A P BLIGNAULT

CLEAVER J: I agree.

R B CLEAVER

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