

SOUTH AFRICA / JUDGMENT

S v Khumalo (A804/16) [2016] ZAGPPHC 1005 (24 November 2016) [2016] ZAGPPHC 1005

COURT

North Gauteng High Court, Pretoria

BEFORE

NV Khumalo, DS Molefe

CASE / FILE NUMBER

A804/16

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

A804/16

24/11/2106

District:

STILFONTEIN

High

Court Ref No: 208/16

Magistrate

Serial No: 01/2016

Review

Case No: 51/249

THE

STATE

and

STANDFORD

TSHEPO KHUMALO

RESPONDENT

REVIEW

JUDGMENT

NV KHUMALO, J:

- [1] This matter came before me on special review in terms of Section 304
- (4) of the Criminal Procedure Act 51 of 1977 ("the Act"). The accused was indicted and convicted in the Stilfontein Magistrate Court for theft of a battery and fittings from a motor vehicle. He was, according to the record of proceedings sentenced as follows: "fined R8 000.00 (Eight Thousand Rand) or Eight Months Imprisonment".
- [2] The sentence followed after the accused had informed the court a quo, in mitigation of sentence that he did not finish school, only went as far as Grade 10. He has just come out of prison. He is unmarried and has no children. He is unemployed and stays with his mother who supports him. His father is somewhere in Gauteng. He has money for the fine.
- [3] The trial Magistrate did not ask the accused how much he was going to be able to pay and where he was going to get money, even though it was apparent that he personally did not have the money. Accused has a previous conviction for housebreaking with intent to steal and theft for which he served a sentence of 3 years imprisonment and had just been released from prison in 2014. A year later he was arrested for theft being linked to the matter by fingerprints whilst arrested for another theft case matter that is pending in Klerksdorp Magistrate Court.
- [4] It is trite that when sentencing the accused the sentence imposed must affect him personally as the offender, punishment being aimed at him. Therefore the person of the accused (his personal circumstances) must be specifically carefully considered. It was therefore of paramount importance for the court a quo to have conducted a proper investigation as to the accused's ability to pay the fine before it imposed a sentence with an option for a fine. The court is expected to play a more active role taking the initiative to ask the relevant questions as much as it is necessary for it to do so; see *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205d-i). More so in this matter when the accused was not represented. It is also assumed that the sentencing officer considered a fine with an intention to give the accused person an opportunity to avoid incarceration, otherwise any contrary intention would result in the unfair, cruel, inhuman and degrading treatment or punishment of the accused, which is contrary to the constitution.
- [5] As far as the conduct of the overall proceedings are concerned they were in accordance with the fair administration of justice except for the part of the sentencing that referred to a fine as it was based on contradictory information that was not clarified by the Magistrate. It therefore cannot be said it was based on the Accused's ability to pay the fine.

[6] On the other hand, since the appropriate way was to impose an imprisonment sentence only without an option of a fine, as confirmed by the National Director of Public Prosecutions ("NDPP"), a sentence considered harsher, the imposition of the fine although unfair, did not as much prejudice the accused. Also since the removal of the option of the fine would result or amount to equivalent of imposing a

harsher or a more severe sentence, it is in the interest of justice to let the sentence stand, notwithstanding the shortcomings

identified in the sentencing proceedings; see *S v Morris* 1992 (2) SACR 365 (C). A review court cannot increase or render more onerous either the penalty or the conditions of suspension. The reason of the

review is to protect the accused, the removal of the fine does not put him in a better position.

[7] With regard to the imposition of an imprisonment sentence only, the NDPP conceded that it would be prejudicial to the accused.

[8] In respect of the conviction I am satisfied that it was in order and in accordance with the applicable section. The sentence imposed however although incompetent and not in accordance with the fair administration of justice due to the imposition of an option of a fine not properly determined will not be set aside since the correct formulation of the sentence by the reviewing court will have unintentional results of prejudicing the accused or result in more onerous conditions (*S v Colliard* 2007

(1) SACR 522 (W).

[9] I therefore find it apposite and in the interest of justice to leave the sentence as it is. Under the circumstances the absence of the magistrate's comment is not fatal to the proceedings.

[10] Under the circumstances I make the following order:

[10.1] The proceedings in the court a quo are confirmed both conviction and sentence upheld.

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

I concur

D S MOLEFE

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