

SOUTH AFRICA / JUDGMENT

S v Mkhwayimba (A 597/08B) [2009] ZANWHC 2 (4 February 2009)

[2009] ZANWHC 2

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

A 597/08B

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IN THE

HIGH COURT OF SOUTH AFRICA (BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO. A

597/08B

In the matter

between:

THE STATE
and
ELLIOT
MKHWAYIMBA
REVIEW

JUDGMENT

KGOELE AJ.

[1] The accused in this matter was convicted of housebreaking with intent to steal and theft. He was sentenced to two (2) years direct imprisonment.

[2] When this matter came before me on review, I raised the following issues concerning the sentence which was meted out by the presiding officer;

[2.1] The accused in this matter is 30 years of age and a first time offender. The value of the goods stolen amounts to R3250.00

[2.2] Did the presiding officer not overemphasize the seriousness of the offence over the personal circumstances of the accused by imposing an effective terms of imprisonment of two (2) years without an option of a fine or any form of suspension ?

[3] The presiding officer's response was as follows:

"The court weighed the circumstances personal to the accused, including his age and other factors mentioned and discussed in its reasons for sentence. The court's aim in sentencing the accused were to ensure that he will not again commit a similar offence and will rehabilitate himself. It was also the court's aim that the sentence should act as a warning and deterrent to others. For the reasons as discussed the court decided not to suspend the whole or a portion of the sentence imposed"

[4] As a background the accused was charged with housebreaking with intent to steal and theft of the following items: T.V set toaster, 3 pairs of shoes, leather jacket. Duvet set, glass bowls, all to the value of R3250.00.

He pleaded not guilty but was correctly convicted by the presiding officer on this charge. The only thing that was recovered amongst the articles which were allegedly stolen was the duvet set. No previous convictions were proven against the accused by the state. According to him he is working at a car wash. His earnings were not established by the presiding officer. The Prosecutor submitted to the presiding officer that the accused be given a sentence of imprisonment with the option of a fine.

[5] It is trite law that in addition to the theories of punishment which are retributive, preventative, deterrence and reformatory, the court has also to consider the well known principles as laid down in the case of *S v Zinn* 1969 (2) SA 537 (A) namely:

the crime

the offender and

the interest of the community

[6] What is of utmost importance is for the court not only to take these factors into consideration, but to weigh and evenly balance all of them in determining the appropriate sentence it seeks to impose. None of these factors should be overly and duly emphasized above the other by the court. It is also accepted that the sentence which is to be imposed should be blended with mercy because mercy is an element of justice itself. See *S v Rabie* 1975 (4) SA 855 (A).

[7] The accused in this matter is a first offender. He was 30 years of age when he committed the offence. He was working at a car wash at the time of his arrest. The value of the goods stolen is minimal. I am of the view that these personal circumstances that served before the court constitute mitigatory factors that counts in favour of the accused.

[8] Without overlooking the fact that the offence committed is serious and prevalent in our country, I am of the view that these factors do not per se justify the trial court to overlook the personal circumstances of the accused.

- [9] I am also of the view that "deterrence" as a reason given by the presiding officer for not imposing other alternative sentencing options in particular, does not justify the presiding officer to overlook these options. One has to bear in mind that too harsh a punishment serves neither the interests of justice nor those of a society. Neither does the one that is too lenient. Courts should therefore strive for a proper balance that has due regard to all the objects of sentencing.
- [10] I therefore come to the conclusion that the presiding officer unduly overemphasized the seriousness of the offence and the interest of the community above the personal circumstances of the accused. A proper balance of the objects of sentencing informs me that a less severe punishment will still serve the intended purpose.
- [11] According to the record the accused has been in custody since his arrest on the 12/09/2008. This court will also take into consideration the time the accused spent in custody in determining an appropriate sentence.

[12] Consequently the following order is made:

The conviction of the accused is confirmed

The sentence of two (2) years imprisonment is set aside and substituted by the following:

DATED: 04 FEBRUARY 2009

Two thousand rands (R2000-00) or two (2) years imprisonment half of which is suspended for three (3) years on condition that the accused is not found guilty of housebreaking with intent to steal and theft committed during the period of suspension.

A.M. KGOELE

ACTING JUDGE OF THE HIGH COURT

I agree

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Prepared on 12 October 2026 · Esheria