

SOUTH AFRICA / JUDGMENT

S v Noordien (43/2022;9/15/2022;11/2022) [2022] ZAWCHC 149 (25 July 2022)

[2022] ZAWCHC 149

COURT

Western Cape High Court, Cape Town

BEFORE

Nziweni, Thulare

CASE / FILE NUMBER

43/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

HIGH

COURT REF NO: 43/2022

REVIEW

CASE NO.:9/15/2022

MAGISTRATE'S

SERIAL NO.: 11/2022

In

the matter between:

THE
STATE
and
RAMEEZ
NOORDIEN
Accused

JUDGMENT

DELIVERED: MONDAY, 25 JULY 2022

Nziweni AJ:

- [1] Mr. Rameez Noordien, ('the accused') age 30 was properly convicted on a strength of his guilty plea; on a charge of theft of chewing gum worth R187. 90 from a supennarket. Pursuant to the conviction, the magistrate imposed a sentence of 18 months' imprisonment. The matter came before me on automatic review. I then directed a query to the magistrate asking whether the sentence imposed by him was compatible with shoplifting of chewing gum, costing less than R200,
00. I also raised a query as to whether he considered another option of a sentence as the accused indicated that he is employed.
- [2] In response to the query, the learned magistrate referred to the extensive list of previous convictions which the accused has racked up. The magistrate also indicated that he did not take into account the fact that the accused stated that he was employed as the accused had been in custody since his arrest.
- [3] When one reads the reasons of the magistrate; it is evident that the sentence he imposed was heavily influenced by the previous convictions of the accused. In his response, the magistrate did not mention anything about the petty nature of the offence.
- [4] In the present case, of course, as the learned magistrate is at pains to point out, it is difficult not to notice that all the accused's 15 previous convictions are for theft; for which he received sentences In the form of paying an admission of guilt fine, caution and discharge, wholly suspended sentence, direct imprisonment with and without an option of a fine. The highest direct imprisonment which was imposed on the accused was one of 12 months imprisonment, in terms of section 276 (1) (i) of the Criminal Procedure Act, 51 of
1977. It is clear that the accused has chosen a path of lawlessness. Nevertheless, he was only convicted of stealing items of nominal value.
- [5] During the sentencing proceedings, in determining the level of an appropriate sentence, various factors come into play. For instance, the court looks inter a/ia at the nature of the offence, in order to rank its seriousness and pettiness, and will take into account factors such as the accused's criminal history.
- [6] Although the magistrate was correct in stating that the accused multiple previous convictions show that he is a recidivist who has blatant disregard for the law. In my view, it is of first importance to recognise that our courts have repeatedly sounded a warning that an accused person's bad criminal record does not necessarily mean that he should be

sentenced for it. It is paramount that a criminal record should not be given greater significance or weight such that it becomes more prominent than the nature of the offence. The important corollary of this is that proportionality is the key. Broadly speaking, it is quite crucial and clearly established that punishment should fit the crime.

[7] Undoubtedly, an accused person's previous convictions are among the aggravating factors which a court will take into account in arriving at an appropriate sentence. But as mentioned previously, what is equally important and true is that the principle of proportionality is now firmly established in our jurisprudence. Thus a sentence should never be increased or made heavier to the point that it is not proportionate to the crime committed merely to prevent recidivism. See *S v Salman* [2008] JOL 21701 (E).

[8] It is desirable and very apt to refer to what was stated by Thulare AJ in *S v Heuwel* 2018 (2) SACR 436 (WCC) (20 December 2017), particularly when he states the following at paras 10, 11, 13 and 14:

"[10] The trial court cannot be faulted for concluding that the path of the accused required a severe corrective measure. A prison sentence can hardly be avoided. The proximity between the repeat offences is both pronounced and obtrusive - *S v Scheepers* 2006 (1) SACR 72 (SCA) at para 11. Despite this, in my view, 18 months direct imprisonment for theft of biltong to the value of R1154-89 is not only severe but shocking in its disproportion to the offence. It is also avoidable, having regard to the other alternatives which the trial court did not consider.

[11] In sentencing, one should guard against treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity - *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) at para 31. Unlike a first offender, the book of old sins of an accused is opened for consideration when previous convictions are admitted or proven. Depending on the circumstances, the previous convictions may call for consideration of a severe sentence. A severe sentence does not mean a disproportionate sentence.

[13] Proportionality between the offence and punishment is part of our law on sentencing. The previous convictions of an accused have a place in sentencing an offender, as required by section 271(4) of the CPA. They should, however, not be permitted to overwhelm the triad in Zinn, which remain factors which are relevant to just sentencing. The fact that one is dealing with a repeat offender with previous convictions is not sufficient reason to ignore the duty to balance the relevant factors and the purpose of punishment. The sense of proportion should not be lost and sentences be imposed which, by comparison, are too harsh - *S v Smith* 2003 (2) SACR 135 (SCA) at para 5.

[14] The number of times that the offence is being committed does not make it less petty. It remains petty no matter how often it is committed - *S v Stenge* 2008 (2) SACR 27 (C) at para 22."

- [9] Although I am the first one to admit that the previous convictions of an accused person may increase the severity of his or her punishment, or may lead to a lengthy prison sentence. It is however important that the sentence imposed should reflect both the nature of the offence [whether petty or serious] and the accused's lawlessness and it should not only focus on the accused's lawlessness.
- [10] I am mindful that the determination of what constitutes a 'serious' offence does not turn exclusively on the sentence imposed. However, generally, the severity of the punishment is one of the most relevant objective gauges or criterion for measuring the seriousness of an offence.
- [11] Ordinarily, the severity of the sentence should reflect the seriousness of the offence and not the past conduct of an accused person. As much as previous convictions play a significant and indispensable role in sentencing proceedings; it does not follow, however, that their existence transforms the petty nature of an offence into an offence which exhibits a character of a serious nature. Nor, in my view, can the offence become 'serious' merely because the person who committed it has a bad criminal record. Likewise, an accused should not be severely punished because of his long list of previous convictions. Plainly, a long list of previous convictions does not give a sentencing court a carte blanche to impose severe punishment regardless of the nature of the offence.
- [12] It should be apparent from the foregoing that in this case, the substantial term of imprisonment imposed by the magistrate does not induce a sense of proportion for both the criminal and the crime. The sentence meted upon the accused creates an impression that his criminal history alone determined the punishment. Additionally, the sentence of 18 months imprisonment took the offence out of the category of 'petty'. In particular, the sentence does not reflect the pettiness of the offence. That being so, an 18-month sentence of incarceration imposed upon the accused is demonstrably inappropriate for the offence and the offender. In all the circumstances, the sentence is manifestly excessive.
- [13] I wish to make it clear that I do not say that all shoplifting cases are petty, but the present one is petty. Equally, I should also not be interpreted as saying that a person who has been convicted of a petty offence or shoplifting and has a long list of previous convictions, which warrants prison term, should be spared from such a sentence.
- [14] What I am saying is that the sentence imposed should also reflect the pettiness of the offence in it. Clearly, the magistrate, in this matter, overemphasised the previous convictions of the accused, as a consequence the sentence is not consistent with the doctrine of proportionality. As a result of this error, invariably the sentence of 18 months imprisonment imposed by the magistrate plainly cannot be allowed to stand and needs to be substituted.

- [15] Since the accused has already been released from the correctional centre and given the fact that he already spent some time in prison towards the service of his sentence. I consider the following sentence to be appropriate under the circumstances.
- [16] The sentence of the magistrate is hereby reviewed and set aside. The sentence is replaced with the sentence of 36 days' imprisonment. Additionally, the accused is sentenced to 12 months' imprisonment which is suspended for five years on the condition that the accused is not convicted of theft or attempted theft committed during the period of suspension. This sentence is antedated to the date the magistrate imposed the sentence upon the accused, which is the 16th of February 2022. The investigating officer of this case should inform the accused of the sentence and hand him a copy of this judgment and submit a report to this court as confirmation that the accused is aware of the new sentence.

NZIWENI, AJ

I agree, and it is so ordered.

THULARE, J

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