

SOUTH AFRICA / JUDGMENT

S v Sithibe (69/2904/2012) [2013] ZAGPJHC 20 (11 February 2013) [2013] ZAGPJHC 20

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, L Windell

CASE / FILE NUMBER

69/2904/2012

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

High Court Ref no 33/12

Magistrates' Serial no 61/12

Case no 69/2904/2012

In the matter between

THE STATE And MOTSWIRI MICHAEL SITHIBE Accused

Review

- Sentence - cumulative effect of sentences imposed for escaping, theft and assault - all offences committed in a single spree of criminal behaviour - effective cumulative sentence reduced.

REVIEW JUDGMENT

VAN OOSTEN J:

- [1] This matter comes before me by way of automatic review. The accused was convicted in the Magistrates' Court in Protea of firstly, escaping from lawful custody, secondly, theft and thirdly, and lastly, assault with intent to do grievous bodily harm. He was sentenced to an effective term of 5 years' imprisonment, as follows: on count 1, 2 years' imprisonment, on count 2, 1 year imprisonment and on count 3, 2 years' imprisonment. He was also declared unfit to possess a firearm.

[2] A summary of the somewhat unusual facts of the matter is the following. The accused, on the day of the incident, attended the Naledi Police station where he informed Captain Mdlalose, who was on charge office duty, that somebody owed him money which he sought to recover. She informed him that he should avail himself of the Small Claims Court procedures. He left but later that afternoon returned, this time accompanied by the alleged debtor. The “debtor” testified at the trial that the debt was for the meagre sum of R30-00 in respect of dagga sold to him by the accused. The accused again explained his predicament to Captain Mdlalose. Constable Zulu entered the charge office and requested Captain Mdlalose to enter a certain password on the computer in order to enable him to register a docket on the system. She agreed, requested the accused and his companion to wait and proceeded to the

computer room, which was adjacent to the charge office. The accused, without more ado, jumped over the counter and grabbed Captain

Mdlalose’s police handbag which she had left on the table, and concealed it under his arm underneath his clothes. Upon her return to the charge office Captain Mdlalose became suspicious that the accused was armed. She requested Constable Zulu to search the accused. He did so and the handbag was found clenched under the accused’s arm. It was only then that she realised that her bag, which she testified, apart from personal items, also contained cash in the amount of R1 000, had been snatched by the accused. Constable Zulu arrested the accused and in the process started putting on handcuffs locking it to one of his wrists. The accused produced a key ring to which a nail clipper was attached with which he struck Constable Zulu on the forehead. In the resultant commotion the accused ran away with the handcuffs still attached to his one wrist. He was later that day re-arrested.

[3] The Magistrate, in a carefully considered judgment, accepted the evidence of the two police officers and the debtor presented on behalf of the State. The accused’s version was rejected as false. The findings in my view cannot be faulted. The defence proffered by the accused was fanciful. He admitted his attendances at the police station and having taken the handbag but testified that it had quite apparently been left abandoned under the chair he was sitting on. He picked it up and searched the contents of the bag in an attempt to establish the identity of the owner of the bag. He did not consider it necessary to simply ask who the handbag belonged to. The police officers without any justification accused him of theft and started assaulting him which caused him to flee. He denied the assault. The contents of the bag being the personal items belonging to Captain Mdlalose, the fact that it was a particular brand and colour bag owned only by female members of the SAPS and that Constable Zulu had in fact sustained an injury to the forehead which was shortly after the incident sutured with three stitches, effectively destroyed the credibility of the accused’s version. I am accordingly satisfied that the conviction is in order and in accordance with justice.

- [4] This brings me to the sentence. A cumulative sentence of 5 years' imprisonment, in the circumstances of this case, strikes me as unduly harsh and therefore excessive (see *S v Dube* 2012 (2) SACR 579 (ECG) para [11]). The deputy Director of Public Prosecutions, to whom this matter was referred for an opinion, with helpful submissions, is in agreement with this view.
- [5] A brief summary of the considerations that are applicable to the assessment of an appropriate sentence in this case, is the following: The accused is 32 years old with no dependants. He at some time was employed earning a salary of R2 500 per month. At the time of sentencing he was unemployed. He indicated in his evidence in mitigation that he would not be able to pay any fine. This was not his first brush with the law: the accused admitted two previous convictions: the first for assault in 2002 for which he was sentenced to fine of R900 or 90 days imprisonment, and, the second, in 2010 for attempted rape in respect of which a wholly suspended sentence was imposed. His conduct in general displays an arrogant albeit naïve indifference to the law affording credence to the idiom: fools rush in where angels fear to tread.
- [6] The crimes the accused has been convicted of, as rightly found by the Magistrate, are all serious in nature. Imprisonment in these circumstances and in view of the accused's previous convictions is the only appropriate sentencing option. On the other hand, the offences were committed in a spree of criminal behaviour. The one led to the other. It is of course true that the offences are not inter-related. The mitigating factors which in my view ought to be considered are that the handbag was returned to its owner, albeit absent the R1 000, the injury sustained by Constable Zulu was relatively minor, and moreover inflicted on the spur of the moment much in retaliation to the attempt to arrest the accused and, finally, the accused was re-arrested shortly after the incident. In these circumstances I am of the view that a certain measure of concurrency should have been ordered, which was not considered by the court a quo. In view of a misdirection having occurred this court is entitled on review to consider sentence afresh along the guidelines and principles outlined above. In my view an effective term of 30 months' imprisonment would be just and fair.
- [7] In the result the following order is made:

The sentence imposed on the accused is set aside and substituted with the following sentence:

"On count 1: 18 months' imprisonment.

On count 2: 6 months' imprisonment.

On count 3: 18 months' imprisonment.

It is ordered that 3 months' imprisonment of the sentence imposed on count 2 and 9 months' imprisonment of the sentence imposed on count 3 be served concurrently with the sentence imposed on count 1.

The effective sentence accordingly is 30 months' imprisonment."

The sentence is backdated to the date of its original imposition.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

L WINDELL

ACTING JUDGE OF THE HIGH COURT

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