

SOUTH AFRICA / JUDGMENT

S v Van Wyk (35/2014) [2014] ZAFSHC 43 (20 March 2014) [2014] ZAFSHC 43

COURT

Free State High Court, Bloemfontein

BEFORE

S Naidoo, A Kruger

CASE / FILE NUMBER

35/2014

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Review No: 35/2014

In the review between:

THE STATE

and

PIETER VAN WYK

CORAM: KRUGER et NAIDOO, JJ

JUDGMENT:

NAIDOO, J

DELIVERED ON: 20 MARCH 2014

REVIEW JUDGMENT

[1] This is a special review under section 304(4) of the Criminal Procedure Act 51 of 1977. The accused pleaded guilty to a charge of theft (shoplifting) of a pair of Puma takkies worth R499,95 in the district court and was convicted under section 112(1)(a). Thereupon the magistrate passed the following sentence:

“6 months imprisonment wholly suspended for 3 years in that the accused is never found guilty of a similar crime.”

[2] The sentence is a text book example of how a sentence should not read. The maximum sentence a court can pass under section 112(1)(a) is a fine of R5 000 to which alternative imprisonment can be coupled. Under section 112(1)(a) the accused is convicted on the plea of guilty alone. Under section 112(1)(b) the presiding officer questions the accused to make sure that the accused admits all the elements of the offence. A provision similar to section 112(1)(a) did not exist under the previous Criminal Procedure Act 56 of 1955. Even if the accused pleaded guilty, the commission of

the offence still had to be proved, there had to be evidence aliunde, as it was put. The 1977 Criminal Procedure Act created the possibility that a person can be convicted on a plea of guilty alone, without any questioning, but then the sentencing options are limited. Section 112(1)(a), where there is no questioning by the presiding officer, is aimed mainly at the case where the accused virtually stands with the fine money ready, almost similar to an admission of guilt situation, and the accused does not want to waste the court's time and wishes to get the case over and done with. Section 112(1)(a) is not intended for lazy or incompetent presiding officers who do not want to, or are unable to, question the accused under section 112(1)(b) to determine whether the accused admits all the elements of the offence. Section 112(1)(a) is intended for minor cases. Presiding officers should use section 112(1)(a) only where the offence is of a minor nature, in the nature of a "petty". Shoplifting is a serious offence, and there could be cases where first offenders are given sentences of imprisonment. The charge in this case was not one which should have been dealt with under section 112(1)(a). The accused should have been questioned under section 112(1)(b). It is also not clear why the prosecutor did not direct the presiding officer's attention to the limited sentencing options under section 112(1)(a).

[3] The sentence offends against the provisions of the Criminal Procedure Act and against standard and long-standing rules:

(i) Firstly, only a fine of up to R5 000 can be imposed under section 112(1)(a), to which alternative imprisonment can be added. A sentence of imprisonment, even if suspended, without the option of a fine, is not competent under section 112(1)(a).

(ii) Where the court imposes a fine with alternative imprisonment the fine should always be the first option (in this case the court apparently did not even consider a fine).

(iii) Conditions of suspension must be clear. In the case of a conviction of theft the condition of suspension will normally be that the accused is not convicted of theft committed during the period of suspension. The words "similar offence" are vague, and should be avoided (*S v Mothobi* 1972 (3) SA 841 (O)).

(iv) The words "in that" are unclear, and do not convey a condition. The condition of suspension should be that the accused is not convicted of a named offence within a stated period committed in the period of suspension.

(v) The maximum period of suspension which a court can order is five years.

[4] The accused should have been questioned in terms of section 112(1)(b) because shoplifting is not a trifling offence. The

conviction and the sentence are incompetent.

[6] In our view these proceedings should simply be set aside.

ORDER

1. The conviction and sentence are set aside.

S. NAIDOO, J

I agree.

A. KRUGER, J

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