

SOUTH AFRICA / JUDGMENT

Sibiya v S (A447/2011) [2012] ZAGPJHC 65 (17 April 2012)

[2012] ZAGPJHC 65

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, T P Mudau

CASE / FILE NUMBER

A447/2011

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REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: A447/2011

DATE: 17/04/2012

In the matter between

BENNET JOSEPH SIBIYA.....APPELLANT

and

THE STATERESPONDENT

J U D G M E N T

VAN OOSTEN J:

- [1] The appellant was convicted in the Magistrate's Court, Roodepoort of theft. After the conviction the appellant was committed for sentence to the Regional Court under the provisions of s 116 of the Criminal Procedure Act 51 of 1977 (the CPA). The Regional Magistrate before whom the matter came for sentencing, in view of the appellant's previous convictions, declared him a habitual criminal.
- [2] The appeal is against both conviction and sentence, with the leave of the court a quo.

- [3] The facts of the matter are these: the appellant was found in possession of a LG 42" Plasma Television set, wrapped in a blanket, by members of the SAPS. The appellant emerged from the bushes behind the Roodepoort Hyperama and was about to cross Hendrik Potgieter Road, when he was apprehended. According to the two police witnesses, who testified at the trial, the appellant informed them that he had purchased the television set at the Hyperama, but he was not only unable to produce a receipt in respect of the alleged purchase but also refused to accompany the police to his house in order to search for a receipt. The appellant became aggressive, no further questions were asked and he was arrested.
- [4] The appellant testified that he had found the television set "next to the street on the grass" as if it had been abandoned. He picked it up and decided to take it.
- [5] The appellant's version was rejected as false by the Magistrate. The credibility finding was correctly not challenged. The issue before us, on the merits, concerns the correctness of the conviction of theft.
- [6] The appellant, in my view, was wrongly convicted of theft. There was no evidence, nor could it be inferred from the evidence, that the television set had been stolen. The evidence, however, did establish beyond reasonable doubt, an offence under s 36 of the General Law Amendment Act 62 of 1955, which in terms of s 264 of the CPA, is a competent verdict on a charge of theft. It follows that the conviction of theft must be substituted by a conviction of contravention of s 36 of the Act 62 of 1955.
- [7] Next, I turn to consider the appropriateness of the indeterminate sentence that was imposed. In terms of s 286 of the CPA the court may declare certain persons as habitual criminals "if it (the court) is satisfied that the said person habitually commits offences and that the community should be protected against him". In the consideration of a sentence in terms of s 286 of the CPA, the court is required to thoroughly investigate all the relevant circumstances (*R v Swarts* 1953 (4) SA 461 (A)). Of particular relevance are factors such as the frequency of the accused's previous convictions and the presence of a warning against an indeterminate sentence, at a previous imposition of sentence (*Hiemstra's Criminal Procedure* 28-46).
- [8] In the present matter no previous warning had been given. It is necessary to examine the appellant's previous convictions in order to establish whether the absence of such warning can be regarded as militating against an indeterminate sentence.
- [9] The appellant admitted the following previous convictions:

On 06/10/1999 the appellant was convicted of housebreaking with intent to steal and theft, and he was sentenced to 5 years' imprisonment.

02/12/2004 the appellant was convicted of possession of presumably stolen property, committed on 28/09/2004, and sentenced to 6 months imprisonment.

On 12/01/2006 the appellant was convicted of attempted housebreaking (committed on 20/04/2005) and sentenced to 4 years' imprisonment.

On 19/07/2007 the appellant was convicted of housebreaking with intent to steal, committed on 08/07/2004, therefore before the offence he was convicted of in 2004 (9.2 above). He was sentenced to 7 years' imprisonment in respect of which 3 years were ordered to be served concurrently with the sentence of 4 years' imprisonment imposed on 12/01/2006 (9.3 above). On 22/10/2009 the appellant was convicted of housebreaking with the intent to steal and theft, committed on 28/01/2003, which was before the offences he was convicted of in 2004 and 2007.

[10] In summary, the appellant committed the crimes he was convicted of in 2007 and 2009 (9.4 and 9.5 above), after the conviction in 1999, but before the convictions in 2004 and thereafter.

[11] It was disclosed to the court a quo that the appellant had been released from prison in March 2010, from his last effective sentence of imprisonment, which was in 2006. In view of the appellant's previous convictions in 2007 and 2009, relating to offences that were committed in 2003 and 2004, the imposition of an indeterminate sentence, in the absence of a prior warning, in my view, was not appropriate. This court is accordingly entitled to and should consider sentence afresh.

[12] In the consideration of an appropriate sentence I take into account the appellant's personal circumstances. At the time of sentencing, was 44 years old, married and the father of two children aged 18 and 15. He only reached a grade 3 level of education and was selling vegetables for the meagre income of R150 a day. On the other hand he has shown no respect for the law. A total of 24½ years' imprisonment has been imposed, over a period of 10 years, in respect of 5 convictions, all involving an element of dishonesty. In the present matter he was convicted only 5 months after his release from prison. I am accordingly satisfied that a long term of imprisonment is warranted.

[13] In the result I make the following order:

The appeal against conviction is upheld to the extent that the conviction on theft is altered to a conviction of a contravention of s 36 of Act 62 of 1955.

The sentence imposed by the Regional Magistrate is set aside and substituted with the following sentence:

"The accused is sentenced to 8 years' imprisonment."

The effective date of the sentence is 23/03/2011.

The appellant is warned that he may be declared a habitual criminal in terms of s 286 of the Criminal Procedure Act 51 of 1977, should he again be convicted of any crime.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

T P MUDAU

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT ADV (MS) M BOTHA

COUNSEL FOR THE RESPONDENT ADV RN MOGAGABE

DATE OF HEARING 17 APRIL 2012

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