REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Review No.: CU/2115/2011

In the matter between

THE STATE Appellant

and

XOLANI MATIWANE Respondent

Coram: HLOPHE, JPet SAMELA, J

Judgment by: SAMELA, J

Magistrate: W LAWRENCE 021 638 3801

Date of Review Judgment: 13 AUGUST 2012

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Before the Honourable Hlophe JP et Samela J

Cape Town, Monday 13 August 2012

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In the matter between

THE STATE	Appellant
versus	
XOLANI MATIWANE	Respondent

REVIEW JUDGMENT

SAMELA, J

[1] This matter came before me in terms of section 304 of Criminal Procedure Act 51 of 1977 (as amended, hereinafter referred to as the Act). The Accused appeared in person in court having elected to represent himself. The allegations were that on the 20 August 2011 at or near Manenberg, the Accused unlawfully and intentionally stole 40 packets of yeast, each valued at R2.79, total value being R111.60, the property or in lawful possession of Pick h Pay stores.

[2] The Accused pleaded guilty. The court after questioning the Accused in terms of section 112 (1) (b) of the Act, found the Accused guilty as charged. He was sentenced to three years imprisonment. He has been in custody since 16 May 2012.

[3] After reading the court's record it became clear to me that justice and fairness had not been done in this case. To correct this I had to consider inter alia the following:

(i) Reviewing powers in terms of section 304 of the Act;

(ii) The test for interference;

(iii) Considerations to be taken into account when dealing with previous convictions; and

(iv) Guidelines to be followed in arriving at an appropriate sentence and "Ubuntu (humanity)" principle.

<u>Reviewing court powers.</u>

[4] The reviewing Court derives its authority from section 304 of the Act. Section 304 (2) (c) provides:

> Such court, whether or not it has heard evidence, may, subject to the provisions of section 312 -
>
> (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
>
> (ii) confirm, reduce alter set aside the sentence or any order of the magistrate's court;
>
> (iii) set aside or correct the proceedings of the magistrate's court;
>
> (iv)generally give such judgment or impose such sentence or make such order as the magistrate's court sought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
>
> (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and [Sub-para, (v) amended by s. 13 of Act No. 105 of 1982.]
>
> (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.

As it will be indicated hereunder, section 302 (c) (ii) of the Act is applicable in this matter.

<u>The test to be applied in an unjust and unfair sentence.</u>

[5] It is trite that the "golden rule" regarding impositioning of a sentence, is that it is a matter which is pre-eminently for the discretion of a trial court. It will only be interfered with where the trial court has not exercised its discretion judicially. The test for interference is (i) whether the discretion of a trial court has been judicially and properly exercised. If the answer is negative, then interference would be appropriate (ii) whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. If the answer is positive, then interference would be appropriate, see **S *v Rabie 1975*** (4) S.A. 855 (A) at 857 D-G see also **S *v Muggel 1998*** (2) SACR 414 (C) at 418 e-f. I am of the view that the principles regarding the interference with the sentence in appeal matters is applicable in review cases mutatis mutandis.

<u>Considerations to be taken into account regarding previous convictions by the sentencing court.</u>

[6] An important consideration is to what extent is it permissible to take previous convictions into account when determining the imposition of an appropriate sentence. Ngcobo J in *Muggel* case (supra) at 418 j - 419 j clearly set out the

guidelines to be followed. It is important, useful and relevant to set them in full:

"1. In terms of s271(4) of the Act the court is required to take previous convictions which have been proved against the accused into consideration when imposing a sentence.

2. In terms of s 271A previous convictions automatically fall away as previous convictions after the expiration of a period of ten years from the date of conviction unless the conviction relates to an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine or the person has been convicted of an offence for which punishment may be a period of six months' imprisonment without the option of fine during that period. This section does not merely provide that such previous convictions should not be taken into consideration when sentence is imposed, but it specifically provides that they fall away as previous convictions. **S *v Zondi 1995 (1) SACR 18 (A) at 23g-j.*** In terms of s 271A the sentencing court has no discretion. It cannot take into consideration any previous convictions which fall within the purview of the section. **S *v Zondi* (supra).**

3. Although s 271(4) requires the sentencing court to take previous convictions into account when determining the appropriate sentence, it does not take away the discretion of the sentencing court. The court is enjoined to exercise its discretion judicially when taking into consideration previous convictions.

4. In the exercise of its discretion, the sentencing court is required to have regard to the nature, the number and extent of similar previous convictions and the passage of time between them and the present offence. The relevance and importance of those convictions depends upon the element they have in common with the offence in question. ***SvJ 1989 (1) SA 669 (A) at 675C- D.***

5. Previous convictions, which bear no relationship whatsoever to the crime, are relevant in a limited sense only and simply with a view to determining to what extent, if any, the forms of punishment imposed for those crimes served as effective deterrents for the person in his or her career of crime and also to indicate the extent to which the person has an uncontrollable urge to lawlessness which reduces the chances of reform. **S v J (supra at 675).**

6. The tendency of taking everything that appears on the form SAP69 into consideration, regardless of the passage of time, must be avoided. It must also be borne in mind that even a criminal is entitled to ask that the lid on the distant should be kept tightly closed. **S *v Mqwathi 1985 (4) SA 22(T).***

7. The degree of emphasis to be placed upon previous convictions is a matter which is within the discretion of the trial court. Where the degree of emphasis is disturbingly inappropriate, in that it cannot be said that the sentencing court exercised its discretion judicially, the Court of appeal will interfere."[3]

[7] In the present matter the Accused previous convictions record is as follows: (appeared in Accused SAP69 form).

Date	Offence	Sentence
30/9/2002	Housebreaking -Date committed 2002-05-10 -with intent to steal and theft	90 Dae G/S
2003/02/11	Theft -Date committed 2003-02-07	R600 of 2 maande G/S vonnis opgeskort vir 5 jaar, voorwaarde onbekend
2003/09/22	Theft -Date committed 2003-06-06	6 MNDE G/S
2004/08/25	Theft -Date committed 1997-04-11	R1000 of 3 maande G/S wat in die geheel opgeskort word vir 5 jaar op voorwaarde dat besek nie weer skuldig bevind word aan diefstal of poging daartoe gepleeg gedurende die tydperk van opskorting nie.
2006/11/24	Housebreaking -Date committed 1999-06-29 -With intent to steal and theft	Ingevolge art 276(1) (H) van die strafproseswet, wet 51 van 1997, word die besek gevonnis
		tot 12 maande korrektiewe toesig.	1087/6/1999
2008/01/11	Theft -Date committed 2008-01-04	R1 500.00 or 90 days IMP suspended for 3 years on condition that Acc is not found guilty of theft, attempted theft or possession of stolen property during this period.	Nkoko Andiie 2008 Kan 192 Cape Town Central 294/1/2008
2008/2/11	Theft -Date committed 2008-02-10	R500.00 or 50 days IMP suspended for 5 years on condition that Acc not convicted of same or related offence.	Manono Andiie 2008KBH811 Cape Town Central 788/2/2008
2008/04/04	Theft -Date committed 2008-03-26	Count 1: R1 800.00 or 6 months IMP of which half is suspended for 4 years on condition Acc is not again convicted of theft or att theft committed during the period of suspension.	Khakaka Vuyo 2008 JJZ071 Ciaremont 625/3/2008
2008/04/04	Theft -Date committed 2008-03-26	Count 2: R600.00 or 60 days IMP which is suspended for 4 years on condition Acc is not again convicted of theft or att theft committed during period of suspension.	Khakaka Vuyo 2008 JJZ071 Ciaremont 625/3/2008
2010/04/01	Theft -Date committed 2010-03-25	Cautioned and discharged	Mdumane Andiie 2010 SOC607 Cape Town Central 1666/3/2010
2010/04/22	Theft -Date committed 2010-04-21	Cautioned and discharged	Mgenqe Xolani 2010 OKU 891 Cape Town Central 1235/4/2010
2010/05/24	Theft -Date committed 2010-05-22	Fined R3 000.00 or 30 days IMP which is wholly suspended for a period of 3 years on condition that accused is not convicted of theft or attempted theft committed during the period of suspension.	Mashaba Andiie 2010SJC323 Table Bay Harbour 344/5/2010
2010/07/28	Theft	R1 500.00 or 90 days IMP	Mkaka Andiie

	-Date committed 2010-07-27		2010IUL831 Cape Town Central 1583/7/2010
2010/07/29	Theft -Date committed 2010-07-28	R1 500.00 or 90 days IMP	Mpama Vuyo 2010 SOC186 Cape Town Central 1647/7/2010
2010/10/11	Theft -Date committed 2010-09-07	R600.00 or 60 days IMP suspended for 3 years on condition that Acc not found guilty of theft or attempted theft committed during period of suspension.	Matiwane Lubabalo 2010 JJN621 Cape Town Central 393/9/2010
2010/10/14	Theft -Date committed 2010-10-11	R600.00 fine or 60 days IMP.	
2011/01/03	Theft -Date committed 2010-12-31	Fined R1 500.00 or 3 months IMP wholly suspended for 3 years on condition that Acc is not convicted of theft or attempted theft committed during period of suspension.	

[8] The Magistrate read every previous conviction that appeared in the SAP69 form and said the following:

> "Right, now before the court proceed to sentence, the court has the record of the accused here and the accused has acknowledged when the prosecutor has read it out to him that it is his, but the court just for the sake of being complete and thorough wants to go through this record with the accused so that he can confirm indeed that it is his, because the court has noticed that on this record there is different names of different people or different names attached ,so the court wants to confirm indeed that we are dealing with the same person".

The Magistrate proceeded to read all 17 Accused previous convictions from the SAP 69 form and the Accused confirmed all of them.

[9] The Magistrate placed further with the degree of emphasis the Accused previous convictions when he said:

> "Now in respect of the accused he had 17 previous convictions to which he all confirmed that it is indeed him and he was sentenced. The accused received a wide range of sentences from being cautioned and discharged to suspended sentences or fines, to direct imprisonment, to a fine or to fines also. Not once and even the correctional supervision has been given to the accused but not any ofthese has deterred the

accused to stop this kind of behaviour of theft. The court did consider transferring this case of the accused to regional court for a sentence to be imposed there because the accused has a lengthy record and 99 per cent of these offences are theft related. The last time the accused received a direct imprisonment was in the year 2003. After that he received correctional supervision for a housebreaking matter, that was in 2006 and this also did not rehabilitate the accused because the next year or while he was still doing this correctional supervision he was again convicted and again imposed 16 hours of community service. Now clearly this kind of sentence has been imposed and even these have now gone by and the accused does not stop with his offending. The court is satisfied that if the court imposes a fine it would not be an appropriate sentence because the accused has a lengthy record and the accused is also not in a position to pay the fine".

Guidelines to be considered and applied (generally) when thinking of an appropriate sentence to impose. The "Ubuntu" principle is applicable.

[10] In arriving at an appropriate sentence Holmes JA (Rabie case para 5 above) provided a simple, easy to follow guidelines for general application at 861A - 862F. It is useful to set them in full:

> (a)"Let the punishment fit the crime-the punishment fit the crime", sang the Mikado in 1885, echoing the British judicial sentiment of those days. (W.S. Gilbert was a barrister, who retained his interest, though not his practice, in the Courts). The couplet is still quoted in Britain, at any rate in relation to the retributive aspect of punishment; see *Criminal Law of Scotland,* G.H. Gordon (1967), p. 50, line 3.

(b) That used to be the approach in this country, too; see, e.g., ***R. v. Motsepe*** 1923T.P.D. 380 in fin.:

"The punishment must be made to fit the crime".

However, in 1959 this Court pointed out that the punishment should fit
"the criminal as well as the crime"; see ***R. v. Zonele and Others,*** 1959 (3) SA 319 (A.D.) at p. 330E.

(c) The interests of society in punishment were noted in ***R. v. Karg,*** 1961 (1) S.A. 231 (A.D.) at p. 236A-B, and **S. *v. Zinn,*** 1969 (2) S.A. 537 (A.D.) at p. 540G.

(d) Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society; see **S.** ***v. Narker and Another,*** 1975 (1) S.A. 583 (A.D.) at p. 586D. That decision also pointed out that it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it for mercy's sake. This was also recognised in **S.** ***v. Roux,*** 1975 (3) S.A. 190 (A.D.).

(e) This quality of mercy or compassion is not something that has judicially cropped up recently. It was first mentioned in this Court some 40 years ago, by BEYERS, J.A., in *Ex parte Minister of Justice: In re R. v. Berger and Another,* 1936 A.D. 334 at p. 341:

"Tereg word gese dat na skuldigbevinding die Regter in h ander sfeer verkeer waar die ople van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval".

(In passing, BEYERS, J.A.., pioneered the use of Afrikaans in the judgments of this Court; see ***Souter v. Norris,*** 1933 A.D. 41 at p. 48 (dated 27 October 1932); followed by WESSELS, C.J.., in ***R.v. Gertenbach,*** 1933 A.D. 119 (8 March 1933). For an early judgment in Afrikaans by VAN DEN HEEVER, J. (subsequently a pillar of this Court), see *Ex parte Pieterse,* N.O., 1933 S.W.A. 4 (6 March 1933)). Since then, the approach of mercy has been recognised in several decisions in this Court, with a number of Judges, in all, concurring; see **S.** ***v. Harrison,*** 1970 (3) S.A. 684 (A.D.) at p. 686A:

"Justice must be done, but mercy, not a sledgehammer is its concomitant";

S. ***v. Sparks and Another,*** 1972 (3) S.A. 396 (A.D.) at p. 410G; ***S.v. V.,*** 1972 (3) S.A. 611 (A.D.) at p. 614H; **S.** ***v. Kumalo*** 1973 (3) S.A. 697 (A.D.) at p. 698A; **S.** ***v De Maura,*** 1974 (4) S.A. 204 (A.D.) at p. 208H; **S.** ***v. Narker and Another*** 1975 (1) S.A. 583 (A.D.) at p. 586. And does not Portia refer to the unstrained quality of mercy "which seasons justice", in a memorable passage worthy of judicial study? (The Merchant of Venice, Act IV, Scene 1-a court of justice

(f) The main purposes of punishment are deterrent, preventive, reformative and retributive; see ***R. v. Swanepoel,*** 1945 A.D. 444 at p. 455. As pointed out in Gordon, *Criminal Law of Scotland,* (1967) at p. 50:

"The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation ...The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment". It is therefore not surprising that

in ***R. v. Karg,*** 1961 (1) S.A. 231 (A.D.) at p. 236A, SCHERINER, J.A., observed that, while the deterrent effect of punishment has remained as important as ever, "the retributive aspect has tended to yield ground to the aspects of prevention and correction".

(g)It remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness. Judge Jeffreys ended his days in the Tower London.

(h) To sum up, with particular reference to the concept of mercy-

(i) It is a balanced and humane state of thought.

(ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.

(iii) It has nothing in common with maudlin sympathy for the accused.

(iv) It recognises that fair punishment may sometimes have to be robust

(v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.

(vi) The measure of the scope of mercy depends upon the circumstances of each case", (my own emphasis)

These guidelines are important and relevant in our legal system to-day as they were in the early nineteenth century.

[11] The correct approach regarding considerations to be taken into account before passing sentence was correctly stated by Corbett J.A. at 866 A-C (Rabie para 5 above) where he emphasised that:

> "A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case" see also Muggel (supra) where the above was referred to with approval, (my own emphasis)

The above relates in particular to the element of mercy when judicial officers are handing down their sentences.

[12] The offence the Accused committed is a serious crime and the interest of the society needs to be protected against offenders. At the same time, the interest of the society needs to be balanced against that of an offender and the seriousness of the offence. The question is whether a sentence of three years imprisonment is

disproportionate to the Accused's conduct. From the Appellant's conduct, it is clear that his aim was to permanently deprive the owner of his property, which is an intentional, unlawful and wrongful conduct on his part. The Accused stole 40 packets of yeast, valued at R2.79 each, with total value of R111.60. All these items were recovered from the Accused before he left the shop. Accused personal circumstances were that he is 32 years old, unemployed with dependants (his children). He had serious injury that needs medical attention (bowel problems). The Accused pleaded guilty and apologised to court. In my view three years imprisonment is too severe.

[13] I am mindful of the pressures which the judicial officers in the lower courts encounter daily in the exercise of their judicial functions. However, it is not an excuse not to approach each case with passion and impartiality it deserves. In casu, the Magistrate when dealing with personal circumstances of the Accused seemed to have been very casual. He did not question the Accused inter alia, his educational standards, the number of his children and their ages and who was supporting them. The Magistrate failed to address the Accused socioeconomic circumstances. When exercising discretion on previous convictions, a judicial officer should bear in mind that very often the accused person/s appearing before him/her did serve fully sentence/s imposed on him/her on previous occasions like in this matter. Here it seems to me the Magistrate overlooked all these important considerations.

[14] In casu, the Magistrate had relied heavily on the Accused previous convictions and this was disturbingly inappropriate. His reliance on the previous convictions constituted a material misdirection which warranted interference. The accused was convicted of theft, 40 packets of yeast valued at R2.79 each totalling in value to R111.60, and was imprisoned for three years.

[15] One should not lose sight of the fact that the Accused appeared in the previous cases under different names, however, it is not difficult to establish the truth about one's previous criminal record through finger print technology. I am of the view that the Magistrate seemed to have approached this matter with anger, resulting in the failure of the Magistrate to balance between the crime, criminal and the interests of the society. It is unfortunate that the Magistrate lambasted the Accused behaviour as one of the causes for the lack of developments in some African townships in the Cape Flats, resulting in investors being driven away from the townships. Consequently the Magistrate's anger and frustration resulted in the Accused getting a severe and unfair punishment. The Magistrate in my view should have been alive of the Accused socio-economic background and applied the well-known principle of "Ubuntu" (humanity) in this matter taking into consideration inter alia, the Accused personal circumstances, and the reason for being unable to pay a fine and his sickly condition at time of sentencing.

[16] In the result, I would make the following order:

1. The conviction imposed by the Magistrate is confirmed.
2. The sentence imposed by the Magistrate is set aside.

It is substituted with the following:

The Accused is cautioned and discharged and must be immediately released from prison.

SAMELA, J

I agree and it is so ordered

HLOPHE, JP