REPORTABLE
Case number: 261/2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

GAWA CASSIEM **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: SCHUTZ JA, MELUNSKY *et* MTHIYANE AJJA

DATE OF HEARING: 15 FEBRUARY 2001

DELIVERY DATE: 8 MARCH 2001
Theft - clothing worth R59 831,52 found in appellant's possession - proof of theft.
Sentence - whether sentence of seven years' imprisonment competent under s 276(1)(i) of Act 51 of 1977.

JUDGMENT

MTHIYANE AJA

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[1] The appellant was convicted on nine counts of theft in the regional court,

Wynberg. She was sentenced to five years imprisonment subject to the provisions of s 276(1)(i) of the Criminal Procedure Act 51 of 1977, and to a further two years imprisonment suspended for four years on condition that she was not convicted of theft or attempted theft committed during the period of suspension. The magistrate recommended that the appellant not be released under correctional supervision until she had served half her sentence. An appeal to the Cape Provincial Division failed, but that court granted leave to appeal to this Court against both conviction and sentence.

[2] The facts giving rise to the convictions were these. On 24 July 1994 a Sergeant John King of the South African Police Services, Claremont, found the appellant selling clothing at the Retreat flea market. The clothing was new and each item bore the name and price tag of a specific store such as Woolworths, Foschini and Edgars. Sergeant King became suspicious. The clothing did not appear to him to be of the type normally sold at flea markets. It appeared that the clothing was being sold for the same price as that indicated on the tags and he found it strange that someone would buy clothing and then sell it for the same price for which it was bought. When Sergeant King asked the appellant to whom the clothing belonged she told him that it belonged to her daughter. He was unable to trace the daughter that day. When he asked the appellant where she lived she gave 274 Ernest Curry Road as her residential address. The appellant was then taken to this address, which turned out to be the house of her daughter-in-law. The daughter-in-law told the police that the appellant did not live there. Sergeant King eventually established that the appellant lived at 20 Ernest Curry Road. But when the police took her there she initially denied that she lived there, although she later admitted it. Having secured this admission the police found that they could not enter the house. Appellant told them that she did not have the key. A policewoman in the company of Sergeant King had to search her for the key without success. The appellant then told the police that the key was with her husband who was expected to arrive at any time.

[3] After the police had waited for over an hour and half they managed to get into the house by opening a sliding side door with one of their keys. In the appellant's bedroom they found clothing in the wardrobe and in five plastic

bags. They also found bedding, more clothing and a new set of pots and pans in the ceiling. All these items were, with the exception of only a few, new and bore store names and price tags.

[4] When the appellant was asked for an explanation she first said that the clothing in the wardrobe belonged to her daughter, but later said that it were hers. The appellant subsequently changed her story and alleged that the clothing belonged to her husband. He died subsequently, before the trial.

[5] The appellant's defence at the trial (persisted in in this Court) was that she was merely selling the clothing for her husband and did not know where he got it from. Whenever she asked him he would tell her to keep her mouth shut because it was none of her business. She was told to just continue to sell. At one stage her husband had mentioned that he got the clothing from a man who worked at a factory and who obtained it cheaply. The appellant continued selling the clothing for some two years, until her arrest. She received four plastic bags full of clothing every weekend, sold two and left the other two in the ceiling to be sold later. She said that she did not know that the clothing had been stolen. She did not even think that the clothes might have been stolen.

[6] It was not disputed that the clothing were found in the appellant's possession and that it was valued at R59 831,52. By agreement with the defence only two of the complainants, namely Mrs Priscilla Maryna Murray of Foschini in Kenilworth Centre and Mrs Hayley Tracey Poole of Topics in Claremont, were called to testify. They identified the clothing as products of the stores to which the name and price tags referred. Although they could not say from which branch the clothing had been stolen, they testified that all the branches carried the same clothing. Because their evidence was in all respects similar to the evidence to be presented by the complainants from the other stores, such as Woolworths and Edgars, the defence admitted it, and they were not called as witnesses.

[7] The main issues in this appeal are whether theft has been proved and whether the appellant was aware that the clothing found in her possession was stolen. The alternative issue raised is whether the appellant could be convicted of contravening the provisions of ss 36 and 37 of the General Law Amendment Act 62 of 1955. Relying on *Osman and Another v Attorney-General, Transvaal* 1998(4) SA 1224 (CC) at 1230 D para [16], counsel submitted that no adverse inference should be drawn from the appellant's failure to give a satisfactory account of her possession because such inability is an element of the offence, the burden of proving which was on the State. As to s 37 the State could not, so the argument goes, rely on the appellant's inability to explain where the clothing came from for a conviction, because the provision in the section burdening the appellant with a reverse *onus* was declared unconstitutional in *S v Manamela and Others* 2000(1) SACR 414 (CC). The need for a decision on the alternative points raised with reference to ss 36 and 37 will depend on the view we take on the main issue.

[8] Before dealing with the main issue I propose to make a few general observations concerning the nature of the common law crime of theft. I can do no better than cite the following:

> "[I]t has been accepted by our courts that theft is a 'continuing crime'. By this is meant that
>
> > 'the theft continues as long as the stolen property is in the possession of the thief or of some person who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of the original thief or party to the theft".
>
> There are two significant consequences:
>
> (1) Even though the original *contrectatio* took place outside the court's jurisdiction, the thief may be tried at the place where he is found with the property. It is irrelevant whether the original *contrectatio* was a crime according to the law of the place where it occurred.

(2) The doctrine may be used to justify the conclusion that persons who assist the thief after the initial *contrectatio* but while the theft 'continues' are guilty not merely as accessories after the fact, as they would be if the general principles applicable to other crimes were applied, but of theft itself. Just how far this line of reasoning can be taken will be considered below."

See J R L Milton - *South African Criminal Law and Procedure* vol ii 3rd ed

(1996) p 628. By the same token *contrectatio* and knowledge of the theft need

not be proved by direct evidence. Their existence can be inferred from the

facts and circumstances of the case. See *R v Blom* 1939 AD 188 at 202-203.

[9] I turn to the issue whether the State succeeded in proving the theft. There is no doubt in my mind that this question must be answered in favour of the State. The items of clothing found in the appellant's house were all new; they bore the price and name tags of various stores such as Woolworths, Edgars and Foschini. A large quantity of goods valued at R59 832,52, was found and on the probabilities neither the appellant nor her husband (who was a gardener) could afford the same. Some of the items were still in the hangers bearing the names of the above-named stores. These factors coupled with the fact that the appellant gave different versions regarding the acquisition and ownership of the goods leads to no other conclusion than that the goods were stolen. The argument that there was no identifiable complainant because the complainants could not prove the loss at their respective branches, is without substance. The

charges were formulated widely enough to cover goods stolen from any branches. I agree with the magistrate's finding that if one has regard to the evidence as a whole it was clearly proved that the goods were stolen from the manufacturers or at the distribution points of the above mentioned stores. Theft, being a continuous offence, it made no difference that the goods may not have been removed from the branches of the respective complainants or that the appellant was not involved in the original removal (*contrectatio*) of the goods. Her subsequent participation in disposing of them makes her just as guilty as the original thief.

[10] Turning to the question whether the appellant was aware that the clothing was stolen, there can be no doubt that the appellant was so aware. She did not want to disclose her residence to the police and deliberately lied to Sergeant King about where she lived. Her explanation that she told the police that she lived at her daughter-in-law's place because that is where she was going to spend the night, is so improbable that it was rightly rejected by the magistrate as false beyond a reasonable doubt. When the appellant got to her residence she was reluctant to let the police into the house. They only managed to get in purely fortuitously. The different versions given to the police as to the acquisition and ownership of the clothes is also a factor which bears on whether the appellant knew whether the clothing was stolen. I agree with the submission that her initial version that the clothing belonged to her daughter was an attempt to shift the blame away from her husband. But after her husband died he was then conveniently alleged to have been the owner of the clothing. Allied to this factor is the question whether she asked her husband where he had obtained the clothing. It is to my mind unlikely that the appellant would not have asked her husband about the source of the goods. Furthermore the appellant had been receiving clothing from her husband for two years prior to her arrest. It seems to me that she must have been alerted to the fact that there was something amiss about these goods, when her husband kept on saying "hou jou mond op" whenever she asked him where the clothing came from. If it had been acquired innocently it should have been clear to any adult that there would have been no reason for him to keep on saying that she should keep her mouth shut. Her husband was just an ordinary gardener employed at a government hospital but he repeatedly brought home four plastic bags full of clothing every weekend. It should have been plain to her that the goods were stolen. In the circumstances I am satisfied that the State has succeeded in proving that the appellant was aware that the clothing found in her possession was stolen.

[11] I turn to sentence. The magistrate sentenced the appellant to five years imprisonment subject to the provisions of s 276(1)(i) of the Act and to a further two years suspended on certain conditions. The effect of this was the appellant was, in effect, sentenced to a total of seven years imprisonment. This the magistrate was not empowered to do under s 276(1)(i). This Court in *S v Stanley* 1996(2) SACR 570 (A) has already decided that the suspended period

of imprisonment forms an integral part of the total period of imprisonment. It was held that to render the sentence under s 276(1)(i) competent the total period of imprisonment should not exceed five years, because such excess may interfere with the exercise of the discretion by the Commissioner of Correctional Services under the section. In my view, the sentence imposed by the magistrate offended against the provisions of s 276(A)(2)(b) which forbids the imposition of a sentence in excess of five years under s 276(1)(i). See *S v Slabbert* 1998(1) SACR 646 (SCA).

[12] In my view the additional two years suspended sentence is the only blemish in the magistrate's otherwise proper approach to the question of sentence. During argument counsel for the State conceded, correctly in my view, that he could not support the additional two years suspended sentence imposed by the magistrate. I consider that in all the other respects the sentence imposed by the magistrate was in order and there is no basis for interfering with his discretion. He carefully considered the triad consisting of the nature of the offence, the personal circumstances of the appellant and the interests of the community, and properly balanced the same against one another. See *S v Zinn* 1969(2) SA 537 (A) at 540G. Save only in the respect I have mentioned concerning the additional two years suspended sentence, the sentence of five years imprisonment under s 276(1)(i) was the appropriate sentence.

[13] In the result the following order is made:

1. The appeal against the convictions is dismissed.

2. The appeal against sentence succeeds.

3. The sentence imposed by the magistrate is set aside and replaced with the following:

   "Vyf jaar gevangenisstraf ingevolge art 276(1)(i) van die Strafproseswet 51 van 1977".

K K MTHIYANE
ACTING JUDGE OF APPEAL

SCHUTZ JA)Concur
MELUNSKY AJA)