

Republic of South Africa



IN THE HIGH COURT OF
(WESTERN CAPE HIGH

SOUTH AFRICA
COURT, CAPE TOWN)

[Reportable]

Case No: A369/2013

In the matter between:

NICOLEEN WILLIAMS

Appellant

And

THE STATE

Respondent

JUDGMENT DELIVERED ON 20 SEPTEMBER 2013

HENNEY, J:

Introduction

[1] The appellant in this matter is a 40 year old domestic and farm worker who was in the employ of the complainant, an 86 year old woman, and was charged with the theft of two rings, which belonged to her employer, the value of which was R219 000,00.

[2] The offence was committed on 13 April 2013 at Strand. The appellant

was arrested on 16 April 2013 and arraigned before the local Magistrate's court on 17 April 2013. She was granted legal representation and assisted by an attorney in the employ of Legal Aid South Africa.

The Facts

[3] On 26 April 2013 the appellant pleaded guilty to the charge of theft. In a Statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 ("CPA") in which the appellant admitted the allegations against her, she admitted that on the day in question she was at the complainant's home. She was busy cleaning the complainant's room and came across two rings in a jewellery box. In a moment of weakness and desperation, she removed the rings and stole the items. She went home and sold one of the rings the next day at Cash Crusaders for an amount of R500,00. She kept the other ring in her cupboard at home.

[4] The following Monday she was phoned by the complainant who asked her to come and work for her. She was confronted about the rings that were stolen and immediately confessed to the complainant that she stole the rings. The appellant thereafter took the complainant to Cash Crusaders as well as her home and both rings were retrieved.

[5] The appellant was correctly convicted and after giving evidence under oath and an address by her legal representative as well as the prosecution she was sentenced to three (3) years imprisonment.

Leave to appeal the sentence was dismissed by the court a quo.

[6] Leave to Appeal

The appellant thereafter sought leave from this Court. *Salie-Samuels, AJ* and myself were seized of this application and granted Leave to Appeal and immediately ordered that the appellant be released from prison. This was done due to the manner in which the proceedings were conducted by the Magistrate who presided over the matter. This court also ordered that upon release the appellant make an appearance before another Magistrate and ordered that the appellant appear before the Regional Court, to avoid that the appellant appear before the same district court.

[7] The Judge President directed that the appeal be heard on an urgent basis before myself and *Salie-Samuels, AJ* due to the fact that we were already seized of this matter. The reason for having taken this unusual course of action is evident from a reading of the manner in which the proceedings were conducted by the Magistrate.

Consideration of the Appeal

[8] During the sentencing phase, the appellant testified in mitigation of

sentence. This evidence was not disputed by the State. From this evidence it emerged that the appellant is a 40 year old single mother of two children. The appellant stayed at a farm outside Stellenbosch where she lived with her two children, a girl aged 12 years old and a boy aged 16 years old and where she worked in the vineyards. From the facts of this case, it further emerged that she also worked as a domestic worker to supplement her income. Both her children attended school. The older child attends school in Tulbagh and is in Grade 11. He also stayed in the hostel attached to the school. The younger child is still at primary school. During the appellant's evidence it emerged that her son had not attended school since the beginning of the year, due to the fact that she did not work and did not have any money to send him back to Tulbagh.

[9] She was booked off by the doctor and could not continue working on the farm due to the fact that she is HIV positive and also suffers from tuberculosis. This prompted her to steal the rings and sell one of them so that she could get money to send her child back to boarding school. Based on the record of the proceedings, it becomes clear that the sentence that the Magistrate imposed was grossly inappropriate and disproportionate. Furthermore, the conduct that she had displayed towards the appellant during the sentencing proceedings as well as thereafter was totally unbecoming of a person holding judicial office. I will now deal with some of the worrisome aspects of the proceedings.

[10] During her evidence, the appellant expressed regret and remorse for her actions. When she was cross-examined by the prosecutor, she once again expressed her remorse. To this the Magistrate made the following remarks

(page 38):

Hof: *“Nee, dit is baie goed gestel. Ek bedoel net dit is nou formele woorde maar dit beteken in plein Afrikaans, die mense in die Strand, Gordonsbaai, almal, sê nou die saak kom nou in die koerant – ek dink hy was al in die koerant – nou dat ons daarvan praat – sê nou hulle sien nou volgende Donderdag as daai koerantjie uit kom, hierdie vrou het weggekom met ‘n opgeskorte vonnis, moet dit net nie weer doen nie, ag siestog, wat dink jy gaan hulle voel? Dink jy hulle gaan dink dit is ‘n gepaste vonnis?”*

In answer to this the appellant retorted that she knew it was wrong. She added that she did ask the complainant to lend her some money so that she could send her child back to school, but she refused.

[11] When the prosecutor further put it to the appellant in cross-examination that notwithstanding her circumstances, her conduct cannot be justified, the court interjected and made the following remarks towards the appellant (page 48):

Hof: *“Ja maar dit is nou – antwoord die vraag – u dink nou net oor me, myself and I, maar voel u rêrig u is die enigste persoon wat in so ‘n situasie is? As almal wat in u situasie is gaan steel van hulle werkgewer, waar dink jy gaan hierdie land eindig?”*

[12] These remarks of the Magistrate clearly show a disregard and a lack of respect and compassion towards the plight of the appellant. The Magistrate it seems was more concerned about what other like-minded persons would think

as well as what would be reported in the local newspaper about this case than the exercise of a judicial discretion based on humanity and decency towards a fellow human being, as expected in a constitutional democracy. During the sentencing judgment the Magistrate remarked that “*Die feit dat u hierdie ringe van u werkgewer gesteel het grens nou ook aan gulsigheid – greed.*” Loosely translated, “*The fact that you stole these rings from your employer borders on greed.*” This clearly was not the case because the evidence paints a different picture.

[13] Then she further remarked that the appellant should have known that the rings were valuable and definitely not costume jewellery. She further remarked that when the appellant went to Cash Converters and was given R500,00 must have known that the ring must be worth something and nonetheless proceeded. Then the Magistrate made the following remarks: “*Tipiese me, myself and I situasie. Tipiese me, myself and I wat steel van my werkgewer en net bekommerd is oor my en my kinders se omstandighede.*” How the Magistrate could have come to such a conclusion is once again not borne out by the facts.

[14] The Magistrate further remarked that too much emphasis was placed on the offender and the children of an offender without having due regard to the interest of society and the offence. Then she concluded that it was for these reasons that crime in this country was out of control.

[15] After she sentenced the appellant she made the following remark as to why she did not order otherwise than that prescribed in terms of Section 103(1)

of Act 60 of 2000 (the Firearms Control Act), whether or not the appellant should be declared unfit to possess a firearm.

“Ek vertrou nie ‘n huiswerker met ‘n vuurwapen nie. Die volgende stap is moontlik ‘n huisroffing.”

[16] Then she further stated that society has had enough and that the court could not only consider the appellant and her children. In relation to the decision of *S v M* 2007 (2) SACR 539 (CC) she made the following remark:

“Die hof kan nie net hamer op die arme beskuldigde en haar kindertjies nie. Die hof neem in ag wat die S v M beslissing sê, maar as die hof elke woord daarvan letterlik opneem, met die grootste respek aan my kollegas wat die beslissing gemaak het, word – ons sal die vraag vermy as iemand dan ‘n paar moorde gepleeg het en hy het kinders by die huis en dit is ‘n primary caregiver, moet daardie persoon ook nie tronk toe gaan nie? Dit is nie te sê almal kan met moord wegkom nie.”

[17] The Magistrate it seems felt that she was not obliged to apply and follow the decision of *S v M (Centre of Child Law as Amicus Curiae)* (supra) because she did not agree with the decision. She concludes that this decision paved the way for parents who are primary caregivers not to accept responsibility for their crimes and it even means that where a primary caregiver has committed murder, such caregiver may not be sent to prison, because he or she might use their children to escape an appropriate sentence. Firstly, it must be said that the

Magistrate's view regarding the Constitutional Court decision, is disturbing. The Magistrate's interpretation clearly shows a lack of a proper understanding of the *S v M* case. It is exactly an understanding which the court in *S v M* (supra) warned against at paragraphs [34] and [35] where the following was said by Sachs J:

“[34] In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct. This would be a mischaracterisation of the interests at stake. Indeed, one of the purposes of s 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.

[35] Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.”

[18] The Magistrate in this instance had a total disregard for the dignity of the appellant and the dire situation in which she found herself. She had no regard to the following:

- 1) That the appellant pleaded guilty and showed remorse;
- 2) That she went to show her employer where she sold her one ring and assisted to recover the other one;
- 3) That the appellant is an HIV and tuberculosis sufferer;
- 4) That she is a decent human being who despite her poor, socio-economic circumstances still tried to ensure that her children attended school; and
- 5) That she stole one of the rings to get money, not out of greed as the Magistrate incorrectly found, but to assist her older child to get back into boarding school in Ceres.

[19] In dealing with the plight of the appellant, she made the sarcastic, dismissive and demeaning remarks like “*siestog*” and “*die arme kindertjies*”. These remarks infringed upon and had no regard to the dignity and humanity of the appellant, and in making such remarks the Magistrate transgressed the bounds of appropriate behaviour and conduct as expected of a judicial officer. I

also find the remark that she does not trust a “*huiswerker met ‘n vuurwapen*” (a domestic worker with a firearm) unnecessary and inappropriate. This further display the lack of respect the Magistrate exhibited towards the appellant and the less said about it the better.

[20] Judicial officers should not regard people that have fallen foul of the law, as unworthy of being treated with dignity and respect. Especially where an accused person has taken full responsibility and surrenders him or herself to the mercy of the court. It is under those circumstances that a sentencing court in applying the values of the constitution should act with dignity and compassion especially in dealing with the poor and vulnerable such as the appellant. The administration of justice will be brought into disrepute if genuine and sincere appeals to mercy and compassion, as happened in this case, are scoffed and ridiculed at by Magistrates who has taken an oath in terms of Section 9(2)(a) of the Magistrate’s Court Act 32 of 1944 to uphold and protect the constitution and human rights entrenched in it.

In *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at 753 para [230] by Langa J (as he then was) held:

“The protection afforded by the Constitution is applicable to every person. That includes the weak, the poor and the vulnerable. It includes others as well who might appear not to need special protection; it includes criminals and all those who have placed themselves on the wrong side of the law.”

[21] The particular role of a judicial officer in a criminal trial in a constitutional

democracy was spelt out in *S v Thebus and Another* 2003 (2) SACR 319 (CC) at 367 *Yacoob J* at [109] held that:

“The over-arching role of a judicial officer in a criminal trial is to ensure that the trial is fair. There is a duty on the judicial officer to respect, protect, promote and fulfil all fundamental rights. In the exercise of the duty to ensure a fair trial, it would become necessary to balance the rights of the accused, the rights of the victim and society at large.”

[22] The Magistrate, in any event as pointed out earlier, totally disregarded and was dismissive of the fact that the appellant is a primary caregiver and clearly misdirected herself when she failed to have regard to this aspect during the sentencing of the appellant. She clearly overemphasized the seriousness of the offence and the interest of society and sacrificed the appellant on the altar of deterrence.

[23] In lieu of the above reasons, the appeal must succeed. In the result I make the following order:

“The sentence imposed by the Magistrate is set aside and replaced with the following:

Six (6) months imprisonment which is suspended for a period of five (5) years on condition that the accused is not convicted of theft or fraud or any attempt thereto and which is committed

during the period of suspension.

The Registrar is directed to send a copy of this judgment to the Magistrate's Commission for its consideration."

HENNEY, J

Judge of the High Court

I agree.

SALIE-SAMUELS, AJ

Acting Judge of the High Court

For the Applicant

Instructed by

:

Adv P J Burgers

: Legal Aid South Africa

For the Respondent

Instructed by

: **Adv C. Teunissen**

: Director of Public Prosecutions:

Western Cape

Date(s) of Hearing : **18 SEPTEMBER 2013**

Judgment delivered on : **20 SEPTEMBER 2013**