FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A275/2009

In the appeal between:-

MERIAH MOTSIHIDISI MOTAUNG Appellant

and

THE STATE Respondent

HEARD ON: 11 OCTOBER 2010

CORAM: MOCUMIE, J et MATLAPENG, AJ

JUDGMENT BY: MATLAPENG, AJ

DELIVERED ON: 15 OCTOBER 2010

INTRODUCTION

[1] The appellant was charged with theft in the Magistrates' Court of Welkom. At the conclusion of the trial she was found guilty as charged and sentenced to twelve months imprisonment of which six months were suspended for a period of five years on certain conditions. She has lodged an appeal to this court against sentence only.

FACTUAL BACKGROUND

[2] The appellant was accused no. 1 and had a co-accused. For convenience I will use the same appellation as in the lower court. Accused no. 1 was a cashier at Shoprite. On the day in question, the state witness, a security officer saw her helping accused no. 2 at the tills.

[3] Accused no. 1 did not appear settled as she kept looking around. It later became apparent to the security officer why the accused was unsettled. The reason therefore is that accused no. 1 was not scanning all the items in accused no. 2's grocery trolley.

[4] After accused no. 2 had made payment to accused no. 1, the security officer approached no. 2 and requested to check her purchases against the till slips that she received from accused no. 1. He found nineteen items that did not appear on the till slip. On being confronted, accused no. 2 could not produce proof of payment of the items and stated that an unnamed person had left with the till slip. The proof of purchase was never produced.

[5] Accused no. 1 stated that as she was busy on the particular day with many customers, she did not realise that the items in question were not scanned. The court disbelieved the two accused and they were convicted of theft.

THE ISSUE

[6] The issue to be decided in this appeal is whether the sentence imposed by the court *a quo* was appropriate.

SUBMISSION BY THE PARTIES

[7] On behalf of accused no. 1 Mr. Tshabalala submitted that the sentence imposed was inordinately harsh especially taking into account that the sentence imposed on her is disparate from the one imposed on accused no. 2. The state conceded that this court should interfere with the sentence imposed by the court a quo as the trial Magistrate did not exercise his discretion properly, the trial court failed to consider all factors taken into account for punishment in a balanced manner and it underemphasised accused's favourable personal circumstances.

THE LEGAL POSITION

[8] Sentencing is pre-eminently within the discretion of the trial Court and a Court of appeal can only interfere where the trial Court has failed to exercise such discretion properly. The Court of appeal is limited to those instances where there is an irregularity or a misdirection or where there is a striking disparity between the sentenced imposed by the trial court and the one the appeal court would have imposed. See **S v M** 1982 (1) SA 589 (A) and also **S v MATLALA** 2003 (1) SACR 80 (SCA). In **S v FAZZIE AND OTHERS** 1964 (4) SA 673 (A) at 684B-C the following is stated:

> "Where, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh."

APPLICATION OF THE LAW TO THE FACTS

[9] Accused no. 2 was sentenced to pay a fine of one thousand five hundred rand or five months imprisonment in lieu of the fine. She was sentenced to a further five months imprisonment which was wholly suspended for a period of

five years on certain conditions. The fine imposed was deferred and accused no. 2 was ordered to pay it in three monthly instalments.

[10] The major complaint levelled against the sentence imposed by the court *a quo* on accused no. 1 is that the learned Magistrate overemphasised the interests of the society over those of accused no. 1 and this led to the harsh sentence that he imposed. Whilst the interests of the community have to be taken into account, care should be taken not to overemphasise those interests at the expense of those of the offender. A right balance between the triad of punishment should be struck. See **S v RABIE** 1975 (4) SA 855 (A).

[11] Considering that accused no. 1 has to serve six months direct imprisonment, it becomes clear that there is a shocking disparity not only between the sentence which this court would have imposed on accused no. 1 but also on the sentence imposed on two people who were acting in concert. The symbiosis between the two accused made it possible for the offence to take place. Their moral blameworthiness is equal. Whilst punishment has to be individualised, it does

happen that on certain occasion the interest of justice demand that people charged together with one offence should be given similar punishment.

[12] As a result, I am of the view that failure by the court to give due weight to the personal circumstances of the accused is a misdirection which entitles this court to interfere in the sentence imposed and to consider the sentence afresh.

[13] In consequence of my conclusions, what needs to be determined is an appropriate sentence taking both mitigating and aggravating factors into account. The accused's personal circumstances are as follows: She is a first offender, is twenty five years of age, has a minor child whom she used to support. The complainant did not suffer any loss as all the goods were retrieved. Accused no. 1 lost her job as a result of this offence and is unemployed. In aggravation the following appear. The offence is a serious one and is very rife in this court's jurisdiction. The accused breached the trust placed on her by her employer and did not show any remorse.

[14] It need not be emphasised that the offence the accused was convicted of is serious. It is also correct that she was in a position of trust and she breached such a relationship by stealing from her employer. However, any sentence imposed on the accused should be efficacious in that it has build and reform her and not break her. In my view, direct imprisonment is not a suitable sentence taking into account all the mitigation and aggravating factors into account. Although the accused is currently unemployed there is no indication that she cannot pay a fine. In fact she is out on bail and the indications are that with support from her family she will be in a position to pay a fine. Taking into account the mitigating and aggravating factors, I am of the view that a fine coupled with a term of imprisonment and additional term of imprisonment to be suspended will be appropriate.

[15] In the circumstances I make the following order:

Order

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

"Accused no. 1 is sentenced to a fine of R1 500.00 (one

thousand five hundred rand) alternatively 5 (five) months imprisonment in lieu of the fine. Accused is also sentenced to a further 5 (five) months imprisonment which is wholly suspended for a period of five years on condition that the accused is not found guilty of theft or attempted theft committed during the period of suspension."

2. The fine imposed is deferred and to be paid as follows:

2.1 R1000.00 (one thousand rand) on 15 October 2010 before 15h30.

2.2 R500.00 (five hundred rand) on or before 3 December 2010.

2.3 All payments to be made at Welkom Magistrates' Court.

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D. I. MATLAPENG, AJ

I agree.

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B. C. MOCUMIE, J

On behalf of appellant: Mr. L. M. Tshabalala
Instructed by:

Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. R. Hoffman
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

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