

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

THE STATE

and

JOSIAS SHIRINDA

REVIEW JUDGMENT

PISTOR AJ:

This is an automatic Review. The accused was found guilty of housebreaking with the intent to steal and theft. He was sentenced to R10 000-00 or 1 year imprisonment. When the matter came before me in the first instance, I was of the view that the conviction was in order but that the fine imposed by the learned presiding Magistrate, was so excessive that it was not reasonably possible for the accused to pay the fine. I then requested the Magistrate's views in this regard as follows:

“Could the presiding Magistrate please indicate whether the amount of R10 000-00 is not so high that it is not reasonably possible for the accused to pay it and, in this regard especially bearing in mind:

a) that when an option of a fine is granted, it is desirable that it should be a real option, that is to say the fine must be such that it is reasonably possible for the accused to pay it (**S v Lekgoale and Another** 1983(2) SALR 175(B) at 176(C-E), **S v Masia** 1988(2) SA 730(T) and **S v Sithole and Another** 1979(2) SA 67(A) at 69(D-G)); and

a) that the accused has an income of only R950-00 per month as a casual worker.”

The Magistrate has now benefited me with the following comment:

“Having considered the nature of the offence its prevalence and the

difficulty of tracing the perpetrators, the court arrived at the sentence imposed.

I now concede that the court imposed a fine that accused cannot afford.

I therefore recommend that the sentence be altered.

The suggested sentence is Four Thousand Rand (R4000) or Twelve (12) months imprisonment."

According to the charge sheet the accused is 25 years of age. He broke into the house of the complainant on 22 August 2002. He stole a number of items from the house to the value of approximately R4000-00. However, when he was on the point of leaving the house he was observed by a neighbour. He dropped the stolen items and fled. He was apprehended and handed to the police. All the stolen items were recovered. No previous convictions were proved. With regard to sentence the accused requested a suspended sentence and indicated to the court that he was employed as a casual worker at "Score" where he earned R950-00 per month. He also indicated that he was not married and that he could afford a fine. The Magistrate did not conduct any further enquiry as to his ability to pay a fine. The Magistrate also did not enquire as to whether a deferred fine would not in the circumstances be appropriate.

Once a court has decided to give to an accused the option of a fine, the fine in my view should be of such a nature that it can reasonably be expected that the accused would be in a position to pay the fine either from his cash resources or from other resources available to him. In **S v Sithole and Another** 1979(2) SA 67(A) at 69 D to G it was *inter alia* held by MILLER JA:

"The evidence of the appellants' monthly earnings is the only evidence on record as to their financial position. It is manifest that, if they have no assets or other source of income, the fine imposed on them is far beyond their means to pay. The opportunity of keeping out of gaol which the learned Judge decided to afford them because they were first offenders and of fairly advanced age, would then be wholly illusory..... When a court has decided that a convicted person ought to be afforded the opportunity of staying out of gaol by giving him the option of paying a fine, it should not impose a fine which to its knowledge or belief is utterly beyond the means of such person to pay.....

The problem as to what should now be done in this case was canvassed in argument before us. It appears to me that the indicated course would be to set aside the sentence and remit the case the Court a quo for the purpose of ascertaining such further facts as to the

appellants' financial resources as it may be able to and reconsidering the whole question of sentence thereafter."

In **S v Lekgoale and Another** 1983(2) SA 175(B) at 176 C to 177 F HIEMSTRA, CJ remarked *inter alia* as follows:

"In general the option of a fine is given where the offence is not one of such gravity that imprisonment seems to be the only appropriate sentence.

When an option is granted, it is desirable that it should be a real option, that is to say the fine must be such that it is reasonably possible for the accused to pay it, either from (i) cash resources of his own; or (ii) such money as he can borrow; (iii) by the realisation of such assets as he may possess. The court should therefore inquire about the accused's ability to pay..... unless the circumstances are quite obvious.

If, however, the ability to pay should be strictly taken into account, there will be unacceptable anomalies. A court might wish to keep the offender out of prison by giving him the option of a fine, but if he has to take the accused's means into account, the fine will sometimes have to be so small that it has no deterrent value to others and it might seem as if the court regarded the offence as a trivial one.....

The possibility of allowing a fine to be paid by instalments comes to mind..... magistrates could in suitable cases allow fines to be paid in instalments, to keep first offenders out of prison. It must be remembered that the court should lean away from imprisonment where the accused is generally a prudent citizen who has dependants to support and who will probably lose his employment if he should be locked up.....

We say therefore that fines should not be imposed which are clearly impossible to pay. They must be scaled down, but not so much that the offence looks trivial"

Apart from the information that was conveyed by the accused to the trial court in respect of his sentence, there appears on the record the evidence of the accused when he applied for bail prior to his trial having started. His evidence in that regard contains relevant information with regard to his ability to pay a fine. However it is not clear as to whether the circumstances which then prevailed, still prevail. I am in agreement with the Magistrate that a fine would in the circumstances be proper, but in my view it would be wrong for this court to attempt to impose a suitable sentence without having had the benefit of a further inquiry as to the accused's present ability to pay a suitable fine. I am therefore of the view that the matter should be referred back to the presiding Magistrate in order to enable him to enquire into the accused's ability to pay a fine, whether directly or in instalments and to then pass a suitable sentence, bearing in mind the contents of this judgment. Consequently I make the following order:

ORDER:

The sentence imposed by the trial court is set aside. The matter is remitted to the trial Magistrate for the purpose of conducting an enquiry as to the ability of the accused to pay a suitable fine and to reconsider the whole question of sentence thereafter, bearing in mind the remarks contained in this judgment, and to then impose a suitable sentence.

J H F PISTOR

ACTING JUDGE OF THE HIGH COURT

I agree.

H N HENDLER

JUDGE OF THE HIGH COURT

12 DECEMBER 2002