IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

C.A. & R.: 59/2015

Date Heard: 26 August 2015

Date Delivered: 27 August 2015

In the matter between:

SIPHOSETHU MALISWANE First Appellant

SEKIWE DWENGA Second Appellant

and

THE STATE Respondent

JUDGMENT

EKSTEEN J:

[1] The appellants, who pleaded guilty, were each convicted in the Magistrate's Court for Grahamstown of one count of theft and sentenced to 36 months imprisonment. Their application for leave to appeal was dismissed, however, leave to appeal against the sentence imposed was granted on petition to the Judge President of this Court.

[2] The first appellant was charged together with two other individuals (to whom I shall refer as accused 2 and 3 respectively) of theft of groceries valued at R4 697, 84 from Shoprite at Market Square in Grahamstown on 30 October 2012. The second appellant was charged of theft of shoes to the value of R1 610 at Woolworths, in Grahamstown, on 30 October 2012. It is difficult to understand why the second appellant was charged in the same proceedings along with the first appellant and

accused no. 2 and 3 and there is nothing on record to indicate that there is any correlation between the two offences.

[3] The appellant's both pleaded guilty. The appellants each have one previous conviction of theft, in each instance committed during the same year as the offence currently under consideration. By contrast accused no's 2 and 3, who are convicted of the same charge of theft as the first appellant are older and have very lengthy criminal records extending over numerous years reflecting multiple offences of dishonesty. All four the accused were treated equally and sentenced to three years imprisonment.

[4] I consider that the magistrate erred in this regard. While it is generally desirable that the same sentence be imposed on co-offenders the personal circumstances of each accused must always be recognised. In the present case the previous criminal history of the various accused differ so markedly that I do not consider that this is a case which calls for parity of sentence. Mr **Zantsi**, on behalf of the State, fairly in my view, conceded same.

[5] There is, however, more serious cause for concern. Firstly, in imposing sentence the magistrate's reasoning proceeds from the premise that all four the accused before her, including the first and second appellants were members of a syndicate. No reasons are provided for this assumption nor was any evidence placed before her to justify such a conclusion. As recorded earlier, the first appellant and second appellant were not convicted of the same offence. First appellant was convicted of theft at Shoprite while second appellant was convicted of theft at

Woolworths. It is so that the offences were committed on the same day and that all four the accused reflected their permanent residential addresses as being in Mdantsane. This on its own does not, however, justify the conclusion that they were all part of a syndicate. Some evidential basis would be required to reach such a conclusion. The second appellant, in particular, on the facts, acted alone.

[6] The magistrate proceeded, apparently on the strength of the assumption that all the accused before her were part of a syndicate and that shoplifting was a prevalent offence in her jurisdiction, to hold that it was necessary to make an example of the appellants in order to deter the community from committing similar offences. I consider for the reasons set out earlier that the approach of the magistrate reflects a serious misdirection on the facts.

[7] Secondly, the magistrate's judgment in respect of sentence contains no reference whatsoever to the personal circumstances of the appellants, save for their previous convictions. Her failure to give any or due consideration to the personal circumstances of the accused constitutes a further misdirection.

[8] The first appellant, who left school during Grade 12 is currently 21 years old. She is unemployed and has one minor child. She did not testify in mitigation, however, her legal representative, on her behalf, recorded that she takes care of the child and that there is no support system to care for the child should she be imprisoned. The child's father, so it was recorded, is obliged to pay maintenance in respect of the minor child, however, he does so only when forced by the first appellant to do so. Moreover, the monies paid as maintenance is insufficient to

maintain the minor child and, so it was argued, it was necessary for the first appellant to be available to care for the child.

[9] The second appellant too left school during Grade 12 and is currently 24 years old. She too is unemployed and she has two children, the youngest being just one year of age. She too did not testify in mitigation but it was placed on record on her behalf by her legal representative that her child was ill, suffering from bronchitis and was due to be taken to the Red Cross Hospital in Cape Town for treatment. By virtue of her arrest, however, the child did not go.

[10] In these circumstances the appellants' legal representative requested, with reliance on ***S v M*** (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC), that a probation officer's report be obtained in respect of the material circumstances relating to the two appellants. The magistrate, however, would have none of it and the appellants' legal representative was afforded no reasonable opportunity to present an argument in this regard. Having effectively prevented her from bringing the application the following exchanged occurred:

> "COURT: So you may proceed if you still want to mitigate for your clients, you may proceed. Is that all, or are you still going to mitigate for them?
> MISS NOTHYWANA: I am going to mitigate Your Worship that is if you are not granting the correctional [interrupted]
> COURT: No I'm not saying stop. You can see, I may listen to what I'm (*sic)* saying, but what I'm saying for them it is out let me tell you now."

[11] In ***S v M*** *supra* Sacks J stated at 551C-D:

> "Section 28(2) of the Constitution provides that '(a) child's best interests are of paramount importance in every matter concerning the child'. South African courts have long had experience in applying the 'best interests' principle in matters such as custody or maintenance. In our new constitutional order, however, the scope of the best-interests principle has been greatly enlarged."

[12] Later, Sacks J recognised that society had a great interest in seeing that its laws were obeyed and that criminal conduct was appropriately penalised. Indeed, he held that it was profoundly in the interests of children that they grow up in a world with moral accountability where criminality was publicly repudiated. On the other hand, he recognised that the children were innocent of the crime and yet their needs and rights tend to receive scant consideration when a primary caregiver was sent to prison. He then concluded at 562A-C to state:

> "Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."

[13] In the present matter the magistrate was dismissive of their interests. No attempt was made to investigate their circumstances or the quality of whatever alternative care was available. No attention was paid to who would maintain them in their mother's absence. The present case is clearly a matter in which further

investigation of the children's circumstances is called for. No social worker's report was called for nor was any other method used for acquiring adequate information. The magistrate proceeded blindly to pass sentence without having sufficient or any independent and informed opinion to enable her to weigh the interests of the children as was required by section 28(2) of the Constitution. Indeed, a perusal of her judgment reveals that she gave no consideration at all to the interests of the children or to the personal circumstances of the appellants.

[14] In these circumstances I consider that the magistrate has misdirected herself in these respects. The sentence imposed accordingly falls to be set aside and this court is at liberty to impose the sentence which we consider to be appropriate.

[15] A disturbing feature of this appeal is that it is heard at a time that the sentences imposed have in all probability already been served. The appellants were sentenced in November 2012 and the sentence imposed has virtually expired. The record reflects that the appellants have not been released on bail pending the appeal. In these circumstances no useful purpose can be served in referring the matter back to the magistrate to obtain an appropriate social workers report and to acquaint herself with the circumstances necessary for the consideration of an appropriate sentence as would ordinarily be desirable. Justice requires that we address the issue. On a reconsideration of the sentence imposed and having regard to such circumstances as we have at our disposal I consider that an appropriate sentence in each case would have been 12 months imprisonment.

[16] In the result:

1. The appeal succeeds.
2. The conviction of the appellants is confirmed.
3. The sentence imposed by the magistrate is set aside and substituted in each case by a sentence of twelve months imprisonment.
4. The sentence imposed is backdated to 12 November 2012.

J W EKSTEEN

JUDGE OF THE HIGH COURT

SMITH J:

I agree.

J E SMITH

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Mr H Charles instructed by Justice Centre, Grahamstown

For Respondent: Adv Zantsi instructed by National Director of Public Prosecution, Grahamstown