IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Review Ref: 171092
Magistrates Serial No: 24/2017

In the matter between

THE STATE

v

TYRON ANTHONY HEUWEL

CORAM: MANTAME J; THULARE AJ

REVIEW JUDGMENT

THULARE AJ

[1] The accused, a 29 year old male pleaded guilty and was convicted of theft of 7 packets of biltong to the value of R1154-89 from Pick n Pay, Cape Gate, Brackenfell in the Magistrates' Courts for the district of Kuilsriver. He was sentenced to 18 months imprisonment. The matter was submitted before us for review.

[2] After his rights to legal representation were explained on his first appearance on 23 August 2017, the accused elected to apply and was granted legal representation by Legal Aid South Africa. On 30 August 2017 the attorney, Mrs Harmse, informed the court that the accused indicated that he will conduct his own defence. The accused confirmed

that and Mrs Harmse was excused. The accused thereafter indicated that he intended to plead guilty.

[3] The State put the charge, the accused pleaded guilty and after being questioned, the court was satisfied that he admitted the allegations in the charge to which he pleaded guilty, that he was guilty of the offence and after the State had accepted the plea, convicted the accused on his plea of guilty. The matter was postponed to 29 September 2017 for SAP 69's and sentence.

[4] On the 29 September 2017, the State proved the following previous convictions against the accused:

a) On 22 September 2009 he was found guilty of unlawful possession of drugs and sentenced to a fine of R200-00 or 5 days imprisonment.
b) On 11 February 2011 he was found guilty of robbery and sentenced to 3 years imprisonment, 2 years of which was suspended for 5 years on condition that he is not convicted of robbery committed during the period of suspension.
c) On 6 May 2013 he was found guilty of use of other persons property without their consent in contravention of s 1(1) of the General Law Amendment Act, 50 of 1956.
d) On 27 September 2013 he paid an admission of guilt fine of R300-00 for theft.
e) On 25 February 2015 he was convicted of housebreaking with intent to steal and theft and was sentenced to 12 months imprisonment of which 8 months imprisonment was suspended for a period of 5 years on condition that the accused is not convicted of housebreaking with intent to commit any offence committed during the period of suspension.
f) On 11 September 2015 he was convicted of theft and sentenced to 12 months direct imprisonment.

[5] In mitigation of sentence, the accused informed the court that he is 29 years old, unmarried and has 3 children aged 11, 9 and 7 years old, respectively. The children reside with him and he is staying with his mother. The mother of his children is in Durban. He works at Table Bay Cold Storage and earns R800-00 a week. He took the biltong as he

did not have enough money to buy it. He was sorry. He will never be seen in court again. In his address, the Prosecutor Mr Campher simply asked for direct imprisonment. The accused was sentenced and his rights on review were explained.

[6] The question is whether the sentence imposed appears to be in accordance with justice.

[7] Section 271(4) of the Criminal Procedure Act, 51 of 1977 (CPA) provides that:

"(4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted."

[8] The trial court provided no reasons for the sentence. A judgment is an explanatory analysis of a decision of a judicial officer. Without that proper analysis, the pronouncement made is not transparent. In a judgment by a trier of fact, justice must be visible, ensuring that all the issues have been considered and have been carefully weighted thought out. In clear and precise terms, directly and boldly, with an exposition of judicial reasoning, a judgment must speak for itself. It must say what it means and mean what it says and it should leave nobody in doubt about why a decision was arrived at. There is nothing on record to show that the trial court applied a properly informed mind to its duty to sentence the accused.

[9] In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 10 it is said:

"Sentencing is innately controversial. However, all the parties to this matter agreed that the classic *Zinn* triad is the paradigm from which to proceed when embarking on 'the lonely and onerous task' of passing sentence. According to the triad the nature of the crime, the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence. In *Banda* Friedman J explained that:

> The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at

the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern."

[10] The trial court cannot be faulted for concluding that the path of the accused required a severe corrective measure. A prison sentence can hardly be avoided. The proximity between the repeat offences is both pronounced and obtrusive – *S v Scheepers* 2006 (1) SACR 72 (SCA) at para 11. Despite this, in my view, 18 months direct imprisonment for theft of biltong to the value of R1154-89 is not only severe but shocking in its disproportion to the offence. It is also avoidable, having regard to the other alternatives which the trial court did not consider.

[11] In sentencing, one should guard against treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity – *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) at para 31. Unlike a first offender, the book of old sins of an accused is opened for consideration when previous convictions are admitted or proven. Depending on the circumstances, the previous convictions may call for consideration of a severe sentence. A severe sentence does not mean a disproportionate sentence.

[12] In *S v Dodo* 2001 (1) SACR 594 (CC) the court said the following in paragraphs 37 and 38:

"[37] The concept of proportionality goes to the heart of the enquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognised in *S v Makwanyane.* Section 12(1) guarantees, amongst others, the right 'not to be deprived of freedom … without just cause'. The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom, is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the

seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.
[38] To attempt to justify any period of penal incarceration, … without enquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity."

[13] Proportionality between the offence and punishment is part of our law on sentencing. The previous convictions of an accused have a place in sentencing an offender, as required by section 271(4) of the CPA. They should, however, not be permitted to overwhelm the triad in *Zinn,* which remain factors which are relevant to just sentencing. The fact that one is dealing with a repeat offender with previous convictions is not sufficient reason to ignore the duty to balance the relevant factors and the purpose of punishment. The sense of proportion should not be lost and sentences be imposed which, by comparison, are too harsh – *S v Smith* 2003 (2) SACR 135 (SCA) at para 5.

[14] The number of times that the offence is being committed does not make it less petty. It remains petty no matter how often it is committed – *S v Stenge* 2008 (2) SACR 27 (C) at para 22. In my view, the number of times that an accused commits a particular offence does not make him or her less human, such that he or she is to be discriminated unfairly against and not enjoy the equal benefit of the law, in particular the legal principles on sentencing. Furthermore, it cannot be that once the previous convictions are admitted or proven, the convictions of old are resurrected and the previous sentences are extinguished, leaving the accused open to be sentenced again when he has already paid his dues.

[15] The moral culpability must bear relation to the crime he was currently convicted of. The length of the period of imprisonment imposed on the accused bears no relation to the gravity of the offence for which he has been convicted of. His personal circumstances are neutral – *Montsho v S* (20572/2014) [2015] ZASCA 187 (27 November 2015) at para 18. The accused was simply being used as a commodity to send a message to other would-be offenders. This denied him of his inherent and infinite worth. The length of the sentence

which has been imposed on the accused is so disproportionate that in my view, it denied him his humanity.

[16] In the past as well as in the current, the accused never enjoyed the benefit of a proper assessment by probation services, which is available within correctional services, and the accompanying correctional supervision if needs be. The proper evaluation of the person of the accused, his environment and his context needs consideration as part of the strategy to correct his behavior, which the Commissioner for Correctional Services may consider at his discretion. In *S v Scheepers (supra)* at paragraph 10 the court said:
"[10] The particular advantage of s 276(1)(i) should always be in the foreground when the sentencer considers that a custodial sentence is essential, but the nature of the offence suggests that an extended period of incarceration is inappropriate. In such cases, s 276(1)(i) achieves the object of a sentence unavoidably entailing imprisonment, but mitigates it substantially by creating the prospect of early release on appropriate conditions under a correctional supervision programme."

[17] The trial court did not consider this alternative option to sentencing, with its advantages. The failure of the trial court to consider other sentencing options appropriate for the accused, requires of this Court to intervene.

[18] In the result, I would make the following order:

a) The sentence imposed by the trial court is set aside and substituted with the following:
"The accused is sentenced to 12 months imprisonment under section 276(1)(i) of the Criminal Procedure Act 51 of 1977."

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DM THULARE
ACTING JUDGE OF THE HIGH COURT