IN THE HIGH COURT OF SOUTH AFJUCA IRB
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 21/8/2006
HIGH COURT REF NO: 1230
CASE NO. A 275/06

REPORTABLE

In the matter between

THE STATE

and

SONT AGA SUNDAY MACHETE **Accused**

REVIEW JUDGMENT

BERTELSMANN J

1. The accused was convicted in the Magistrate's court for Letaba held at Tzaneen of theft and, upon conviction, sentenced to a fine of R6 000-00 (six thousand rand) or three (3) years imprisonment.

2. The accused pleaded guilty to a charge of having stolen copper pipes to the value of R 3000-00 (three thousand rand).

3. The accused was convicted correctly .

4. The accused was a first offender.

5. On review, my brother Preller J, queried inter alia the imposition of a " fine of R 6000-00, which was clearly beyond the ability of the accused to pay.

6. My brother Preller J furthermore enquired why it had taken two months for the record of ten pages to reach the Registrar of this division. The trial magistrate replied that he was unaware of the reasons for the delay.

7. As far as the sentence was concerned the trial Magistrate replied that,

> " in our Law (sic) a Magistrate is entitled to impose any other sentence *mero motu* which he or she deems fit depending on the surrounding circumstance of each particular case in the light of evidence adduced before it (sic) under oath,"

8. He added that in S *v Motlagomang and others,* 1958(1) *SA* 626 *(T),* Boscoff J, as he then was, with whom Steyn AJ concurred, upheld a sentence imposed by what was then referred to as a native commissioner upon women who. had destroyed their so-called

"reference books" or as these identity documents were also called, "dompasses" .

9. The native commissioner had imposed the fines that were manifestly (beyond the ability of the accused to pay in order to deter other women who might have intended to do the same, as the offence was clearly prevalent in the district for which the commissioner had been appointed, namely Marico.

10. It is difficult to comprehend what guideline the trial Magistrate seeks to find in a matter that is neither in *pari materia*, nor of recent vintage. In fact, it is a judgement that was given to uphold a pillar of the apartheid system from which our Constitution seeks to move our post-1994 society. It is fundamentally in conflict with our Constitution's imperative to uphold the dignity of every accused, regardless of the crime he may have been convicted of.

11. The Magistrate failed to comply with his duty to inform the accused that he could apply for payment of the fine in instalments, or for deferment of the fine, as has been emphasised repeatedly by this division is the correct course to follow: S *v Dandiso* 1995(2) *SACR 573 (w);* S *v Maluleke 2002* (1) *SACR 260 (T);* S *v Lekgwabe 1992*

(2) SACR 219; *and* S *v Zitha 2003* (1) *SACR* 628 *(T),* where Bosielo J said the following

" I still cannot understand why magistrates persistently ignore what the law requires them to do, ie to make proper enquiries regarding the means of the accused and his ability to pay a fine either at once or by instalments. If for any good reason, the magistrate wishes to see the accused serving imprisonment, he must have the courage to sentence the accused to imprisonment. It is unacceptable that a magistrate must disguise the term of imprisonment under the guise of a fine, which he knows the accused will not be able to pay. Clearly the conduct of the Magistrate in *casu* is seriously deplorable."

12. These sentiments apply in full measure to the judgment presently under review.

13. Add to this that the J4 form had not been properly completed and that the record arrived at this court in a seriously deficient state, it must be said that "the fate of the accused apparently mattered very little to the presiding officer.

14. It is clear that the trial court was aware of the fact that the accused would not be able to pay the fine. Under the circumstances of this case, the sentence is therefore as inappropriate as the one that was imposed in S *v Nthele*, 1993 (2) *SACR 610 (W).* The Magistrate

should furthermore have considered decisions such as ***S v Gqobozo 2005* (1) *SACR* 589 *(C).***

15. The worst aspect of this review is, however that this magistrate has been criticized for his approach to sentencing, and his reliance on (outdated and utterly inappropriate authority by this Court in the very recent past.

16. On 30 January 2006 I delivered a judgment in the ***State v Matome John Sereto. High Court Reference No* 3474** with which my brother Claassen J agreed, in which the magistrate's sentence was found to be inappropriate and was set aside.

17 In defending his original sentence, the magistrate had relied on the self-same authorities that I have quoted above. In fact, the wording of his response to the queries he faced in *Seroto* is copied verbatim in the relevant portions in the present review, in spite of the stem criticism that was expressed in the earlier review.

18. In the *Seroto* review I said the following, dealing with the *Motlagomang* decision and the magistrate's attempt to justify his excessive sentence by invoking it as authority:

> It need hardly be pointed out that this approach to sentencing has little relevance to the. position which confronted the learned trial Magistrate in this ~I

matter in 2005. In the first instance, the context in which the accused was convicted differs completely from the position in which the accused in the ***Motlagomang*** case found themselves. Secondly, the imposition of excessive fines on the basis of politically and racially motivated legislation is, thankfully, a matter of the past. Thirdly, there have been a number of judgments in this Division by which the learned trial Magistrate is bound, since the ***Motlamogang*** decision, pointing out that the imposition of a fine that is clearly and indubitably beyond the means of the accused is a cynical exercise that undercuts the value of the option of a fine, which is normally aimed at giving an accused the chance to avoid incarceration.

19. Reference was then made to several judgments and text books in which the proper approach to sentencing under comparable circumstances has been set out. Several of them are referred to in this judgment.

20. By repeating the self-same mistake that was criticized in ***Seroto,*** and doing so in the very same words that are used in justifying the decision that was overturned in terms that expressly rejected his approach, the magistrate has, at best for him, demonstrated that he has not taken any notice of a judgment that was intended to draw his attention to an error that ought not to be repeated in the interest of justice. At worst, the magistrate is cocking a snoot at the High Court that overruled his sentence by deliberately ignoring the judicial pronouncements that are binding upon him and that he is obliged to apply.

21. In either event, his action falls significantly short of his duty as a judicial officer. It is particularly worrisome that he persists in (following and applying a judgment that bears all the hallmarks of a past that enforced racial discrimination and is entirely incompatible with the foundational values of the Constitution. His failure to appreciate the fact that the judgment he purported to rely upon belongs to the past that the Constitution has deliberately, eloquently and irrecoverably turned our society away from has repeatedly led to injustices being committed by him against undefended accused.

22. The failure by a judge to heed criticism by a higher court of a (mistake committed in an earlier judgment was severely berated by Botha JA in **S v *Albert Pieters en* (*Case no20/88 Appeal Court, 1988. unreported)*** and led to calls for the resignation of the judge concerned. Bearing in mind that the purpose of the entire review system is to ensure that the judiciary in the lower courts is given guidance, particularly to correct errors that might have occurred, and to prevent a repetition thereof, the gross failure by the magistrate to pay regard to this Court's judgment is regrettable, to say the least.

23. (A copy of this judgment will be sent to the Magistrate's Commission with the request to deal with this matter.

24. The State, represented by Adv M Mampuru and Adv E C J Wait, Deputy Director of Public Prosecutions Transvaal, agrees that the sentence is inappropriate. Ms Wait has suggested that the conviction should be confirmed but the sentence should be substituted with one of five (5) months imprisonment, which would mean that the accused would be released from jail immediately.

25. I agree that this is the appropriate route to follow.

26. The following order is made:

26.1 The conviction is confirmed.

26.2 The sentence is set aside and substituted with the following: five (5) months imprisonment.

26.3 It is ordered that the accused be released from imprisonment immediately.

26.4 This matter is referred to the Magistrate's Commission together with a copy of the judgment in the ***Seroto*** matter.

E BERTELSMANN
JUDGE OF THE HIGH COURT

I agree

D A BASSON
JUDGE OF THE HIGH COURT

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