

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

CASE NO: A537/08

In the matter between:

**MICHAEL PETERSEN**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT  
DELIVERED ON 4 JUNE 2010**

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**JAGA AJ**

**INTRODUCTION**

1. On 11 March 2008 at the Bellville Regional Court the Appellant was convicted of the offences of robbery with aggravated circumstances as intended in terms of section 1 of the Criminal Procedure Act 51 of 1977 and kidnapping.
2. Subsequent to the aforesaid conviction on 28 March 2008 the Appellant was sentenced as follows:

- 2.1 On the charge of robbery with aggravated circumstances: 12 years' imprisonment of which 2 years' imprisonment was suspended for a period of 5 years on condition that the accused is not convicted of the offence of robbery with aggravated circumstances which is committed during the period of suspension.
  - 2.2 On the charge of kidnapping, 12 months' imprisonment. The Court ordered that the sentence on the charge of kidnapping runs concurrently with the sentence of the charge of robbery with a aggravated circumstances.
3. The Appellant was granted leave to appeal to this Court against his conviction and sentence.
4. Counsel for the Appellant has informed this Court that the Appellant does not intend to proceed with the appeal against his conviction on both the charges. The Appellant only appeals against his sentence.

### **THE CHARGES**

5. At the trial, as per the charge sheet, the State alleged that on 17 May 2004 and at Geelbos Street, Delft, the accused wrongfully and intentionally assaulted one Flip Loubser by stabbing him with a screwdriver and by kicking him, and by force took from him a Nissan 1400 Bakkie and a cell phone valued at R100.00. The State further alleged that

on the same day at Geelbos Street, Delft, the accused unlawfully and intentionally deprived the complainant of his freedom of movement by means of dragging him out of his car and by putting him in the boot of a BMW motor vehicle, and by driving around with him from 09h55 until 15h10.

### **THE FACTS**

6. On the morning of 17 May 2004, the complainant went to Delft at the instance of his ex-wife, Nicole Petersen, in his Nissan Bakkie. The complainant and Nicole arrived at a house in Geelbos Street, where Nicole wanted to collect some papers at a house. Complainant waited for Nicole in his motor vehicle, but later decided to have tea with Nicole at the said house.
7. Thereafter, Nicole and the complainant got back into the latter's vehicle and drove to a field, where Nicole got out of the vehicle and went to a house. Nicole did not want the complainant to join her as she felt that it was dangerous at the house where she went to. Complainant then waited in his car. Nicole returned to the car.
8. A 23-year old male then approached the complainant and asked him for a cigarette, which he obliged him with. When Nicole got into the car, the Appellant also got into the vehicle with Nicole. Appellant was in possession of a big screwdriver with a red handle. He attacked the



complainant by stabbing him in the left upper arm. A struggle ensued between the complainant and the Appellant. Complainant attempted to drive away with his vehicle, but the Appellant knocked the gear of the vehicle out of place which resulted in the vehicle stalling. Appellant then removed the vehicle's keys.

9. The complainant was thereafter pulled out of his vehicle and assaulted by the 23-year old male who the complainant had earlier given a cigarette. The Appellant joined in and also kicked the complainant. Both these men then threw complainant into the back of his bakkie. A woollen cap was then placed over the complainant's face.
10. The complainant's car started again after having stalled earlier with the complainant's assistance. The 23-year old male who accompanied the Appellant took the complainant's cell phone. The complainant was thereafter driven around in his vehicle and later he was told to get out of his vehicle and requested to get into the boot of a BMW motor vehicle. Whilst he was in the boot of the BMW motor vehicle, he heard someone driving off with his bakkie.
11. Whilst he was still in the boot of the BMW vehicle, he was driven around until they ended up on a bumpy road where he was requested to get out of the vehicle. The complainant who had earlier placed his bank debit cards in his own vehicle was requested to give the pin numbers thereof, or else Nicole would be raped. His assailants also wanted him to eat tablets

which he described as looking like snail poison tablets. He then wrote down his debit card pin numbers and gave it to his assailants.

12. The boot of the vehicle was closed again and the complainant was once more driven around in the vehicle until it ran out of petrol in Baden Powell Drive. In the complainant's presence, Appellant asked the 23-year old male to sell the complainant's cell phone in order to purchase some petrol. While the Appellant's acquaintance went away, complainant had a discussion with the Appellant. Appellant told him that he required R10 000.00 for his daughter as she required open heart surgery at Red Cross Hospital. The complainant did not believe the Appellant as according to him Red Cross Hospital does not charge for operations. The Appellant's 23-year old acquaintance then returned with petrol.
13. The complainant then devised a scheme, in terms where he told the Appellant that he would lend him an amount of R10 000.00. He then got back into the vehicle and more petrol was put into the vehicle, at a garage. They drove on again and once more stopped in Delft. Appellant's acquaintance left the vehicle and returned 5-10 minutes later and said that the bakkie had not been stripped yet.
14. Appellant then accompanied the complainant to ABSA Bank in Goodwood. This is the bank where the complainant normally did his banking. The staff of the bank was well known to him. At the bank, Appellant asked a consultant for a loan, in a tone which indicated that



something was amiss. Another consultant, one Conrad then took the complainant into an office where the complainant told Conrad that he has just been hijacked. He requested a pencil and a piece of paper from Conrad. On the paper he wrote that he was hijacked and indicated where in the parking area of the bank a BMW was standing. The Appellant entered the office and asked him for cigarettes, which he gave him. Appellant then left the bank. Whilst he was in the bank, the Appellant was arrested outside the bank.

15. An Inspector Smith of the South African Police Service arrested the Appellant outside the bank, after having earlier followed the Appellant driving the BMW. In the BMW, Inspector Swart found a screwdriver, a knife and a woollen cap. These items were handed in as exhibits at the police station and this was confirmed by a Constable Mbobi.
16. One Andrew Samuel Fortuin testified on behalf of the State. He confirmed that he had lent his BMW to the Appellant on 17 May 2004 as the Appellant wanted to take his wife to a hospital. The Appellant took his vehicle at about 08h00. According to this witness, when he lent his vehicle to the Appellant he did not leave any screwdrivers or a woollen cap or any weapons in his vehicle. He stated that the Appellant, when he arrived at his house, did not leave a bakkie at his place. Later during the course of the day, he identified his vehicle at the police station.

17. Appellant's version was that on the morning of 17 May 2004 he met Nicole Petersen and the complainant at a taxi rank. The complainant was driving his bakkie, accompanied by Nicole. Complainant wanted some plastering work done. He then took the complainant to several places to see the quality of his workmanship. From the taxi rank, complainant drove in his vehicle a couple of streets away, where they decided to get into a BMW vehicle, leaving the complainant's vehicle behind.
18. Appellant stated that he and the complainant then drove Nicole to the hospital. From the hospital the complainant was taken in the BMW to see the quality of the building work. Complainant in his evidence denied that he was ever taken to a hospital.
19. Appellant stated that he requested a loan of R500.00 from the complainant as he was not working. They then went to a bank in Goodwood where he accompanied the complainant into the bank. Whilst in the bank, complainant asked him to wait for him. Five minutes later he asked the complainant whether he had cigarettes in the car. The complainant replied in the affirmative. He then left the bank, and before he could light his cigarette, he was arrested.
20. Appellant stated that he had not seen or met the complainant before 17 May 2004. He denied robbing the complainant, stabbing him or placing him in the boot of a car. He also denied the presence of the 23-year old male on the day in question. He stated that after the complainant had



given him a loan, a loan agreement would have been formalised in writing. He could not explain why the complainant left his vehicle behind, and decided to get into the BMW vehicle. He could not explain why complainant did not simply withdraw an amount of R500.00 at an ATM. He does not know why the complainant made all the serious allegations against him. Complainant's evidence was that he had proof that an amount of R500.00 had been withdrawn from his account, not by him, but after he had given his debit card to the Appellant. There appeared to be no motive why the complainant would falsely implicate the Appellant.

21. The Regional Magistrate evaluated all the evidence and in her judgment, was satisfied that the Appellant's guilt was proven beyond reasonable doubt. Upon perusing the appeal record, this Court is also satisfied that the trial Court rightly convicted the Appellant. The Appellant's version as to what happened on 17 May 2004 was, without any doubt, false.
22. I now deal with the question of sentence.
23. At the time of the trial, the Appellant was 40 years of age. He is unmarried and passed Std 1 at school. He has 4 children. They are aged 21 years, 12 years, 7 years and 2 years. He resides with his sister. The 21-year son and the 2-year old reside with him at his sister's house. The Appellant is self-employed, as a builder. He stated that when he was at work, his 2-year old child is looked after by "someone". He pays an amount of R150.00 per week towards the care of this child.



24. The 12-year old and 7-year old children are schooling and are cared for by Appellant's mother. He does not have contact with the biological mother of these two children. The 2-year old's mother is Nicole Petersen. The Appellant's parents live in Delft. His father is 68 years of age and his mother is 70 years of age.
25. Appellant called a friend of his to testify on his behalf in mitigation of sentence. This friend, a Mr Faizel Felaar, stated that there was a time that he looked after the 2-year old child as the Appellant's family did not look after the said child as they were drunk. According to him, the Appellant worked "*now and again*", but most of the time he was actually looking for someone to care for his child.
26. As to his willingness to look after the 2-year old child, he stated that he himself was married with two minor girls. He did not mind to look after the Appellant's 2-year old child, but realised afterwards that it would be a big adjustment to look after the child. He did not know the whereabouts of the mother of the 2-year old child.
27. In arriving at a sentence, the Regional Magistrate took into account the general principles regarding sentence and decided not to impose the minimum sentence applicable, as she found that there were substantial and compelling circumstances present, justifying a lesser sentence of 15 years' imprisonment.

28. In terms of section 28(1)(b) of the Constitution, every child has a right to family care or parental care or to appropriate alternative care when removed from the family environment.
29. In *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) at page 558, Sachs J had due regard to certain practical modes of ensuring that section 28(2) read with section 28(1)(b) is applied in a sensible way. There were four responsibilities on a sentencing Court when a custodial sentence for a primary caregiver is in issue. They are:
  - 29.1 to establish whether there will be an impact on a child;
  - 29.2 to consider independently the child's best interest;
  - 29.3 to attach appropriate weight to the child's best interests;
  - 29.4 to ensure that the child will be taken care of if the primary caregiver is sent to prison.
30. The Court held that these practical modes take appropriate account of the pressures under which the Courts work, without allowing systemic problems to snuff out their constitutional responsibilities.
31. The Court went on further and stated as follows:

*"Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mind set. Specific and well informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court".*

32. At paragraph 36 of the aforesaid judgment, the Court set out certain guidelines to a sentencing court:

- "(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.*
- (b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead*



*evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.*

- (c) *If on the Zinn-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.*
- (d) *If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence bearing in mind the interests of the children.*
- (e) *Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."*

33. In her very short judgment on sentence (record: pages 158 and 159), with regard to the 2-year old child, the Regional Magistrate stated as follows:

*"I also feel I cannot turn a blind eye to the issue of the child, because you indicated that because of liquor which is consumed at home, you do not trust leaving the child with your parents. You even went to the extent of enlisting the help of your friend to take care of your child".*

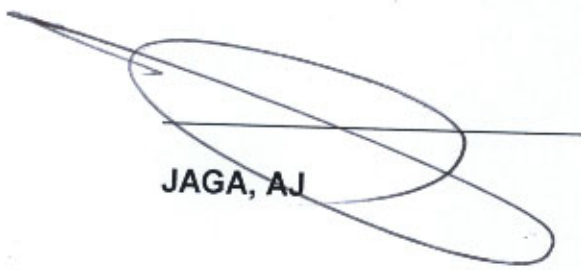
34. The Regional Magistrate said nothing further about the Appellant's 2-year old child.
35. In my view, the Regional Magistrate made no enquiry as to what would happen to the 2-year old child if the Appellant was sent to jail. There was no evidence placed before the Court as to who would maintain the minor should the appellant be sent to jail. The quality of whatever alternative care was available to the 2-year old child ought to have been investigated more fully. There was a dearth of information as to who actually cared for the 2-year old child, when Appellant worked. The Appellant's two other minor children aged 7 years and 12 years appeared to be residing with the Appellant's parents. Appellant's witness stated at some time he was required to look after the 2-year old child as the Appellant's own family did not have time for the child and also at the time his family were drunk. Appellant does not know the whereabouts of the biological mother of the 7 and 12 year old children. Similarly, he does not know the whereabouts of the biological mother of the 2-year old child. He stated that he did not know where the 2-year old child would go to should he be sent to jail.

36. This Court is of the view that the Regional Magistrate did not pay any attention as to who would maintain the 2-year old child in the Appellant's absence. In my view, although the Appellant and his witness gave evidence regarding his children, the aforesaid information was rather vague. The so-called "*people*" who looked after the 2-year old boy whilst Appellant went to work were not identified. The reason as to why the minor child in the first instance is residing with the Appellant was not established. The quality of the care given to the 2-year old child by the so-called "*people*" was similarly not established.
37. The Regional Magistrate also does not appear to have given any thought of calling for a Social Worker's report.
38. In her written heads of argument, counsel for the State stated that it was unfortunate that a Probation Officer's report was not requested at the trial Court. She stated that a Social Worker's report and a Correctional Supervisor's report might possibly have a significant impact on the best interests of the child and not on the sentence as there could be other arrangements regarding the welfare or best interests of the child. I do not agree with this submission with regard to sentence. There was simply insufficient evidence with regard to the minor's welfare in the absence of the Appellant.



39. There is nothing in the Regional Magistrate's reasons for sentence that shows that she applied a properly informed mind to the duties flowing from section 28(2) read with section 28(1)(b) of the Constitution.
40. The Regional Magistrate passed sentence without sufficient independent attention as required by section 28(2) read with section 28(1)(b) of the Constitution to the impact on the 2-year old child, of sending the Appellant to prison. In my view, the Regional Magistrate misdirected herself by not paying sufficient attention to these constitutional requirements.
- See: *S v M (Centre for Child Law as Amicus Curiae)* SACR 539 (CC).
41. This Court is of the view that the Regional Magistrate gives due consideration to calling for a Social Worker's report in respect of the Appellant's 2-year child. In doing so, the Regional Magistrate will be placed in a better position to determine as to who would maintain the said child, and the quality of whatever alternative care was available should the Appellant be incarcerated.
42. This Court is of the view that it would be prudent to remit the question of sentence to the Regional Magistrate to pass a sentence afresh in the light of this judgment and the judgment of *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC).
43. In the result, I make the following order:

- 43.1 The conviction on both the charges are confirmed.
- 43.2 The appeal on the sentence is upheld.
- 43.3 The matter is remitted to the Regional Magistrate to pass sentence afresh, in the light of this judgment and the judgment of *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC).



JAGA, AJ

I agree.


ALLIE, J