



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]**

CASE NO: CA &R 201/2021

Date Heard: 31 August 2022

Date Delivered: 5 October 2022

In the matter between:

Jason Ioannides

Appellant

And

The State

Respondent

JUDGMENT

SMITH J and NTLAMA-MAKHANYA AJ:

[1] The appellant was convicted in the East London Regional Court of housebreaking with intent to assault and assault with intent to do grievous bodily harm. On 31 May 2019, he was sentenced to eight years' imprisonment, of which three years were suspended for a period of four years on certain conditions. He appeals against sentence only with the leave of the court a quo.

[2] It is trite that the imposition of an appropriate sentence is pre-eminently a matter for the trial court. A court of appeal will only interfere with the sentence if the trial court has committed a material irregularity or the sentence is so disproportionately harsh that the ineluctable inference is that the trial court did not exercise its sentencing jurisdiction properly.

[3] The appellant contends that the magistrate failed to exercise his sentencing discretion properly. He contends, in particular, that the magistrate failed properly to consider correctional supervision as a sentencing option.

[4] Mr. Koekemoer, who appeared on his behalf, submitted that it does not appear from the judgment on sentence that the magistrate has given proper consideration to the correctional supervision report and that, in any event, the report was lacking in certain material respects.

[5] In addition, he argued that the magistrate overemphasized considerations such as the prevalence of the offence in his district and the need for deterrence. He also erred in his factual finding that the appellant has a preponderance for violence and should be deterred from committing similar offences in the future. The fact that the magistrate overemphasised the gravity of the offence in the interests of the community at the expense of the appellant's personal circumstances, is a misdirection which entitles this court to interfere with the sentence, or so the argument went.

[6] Before us, Mr Koekemoer concentrated his argument almost entirely on the submission that the failure by the magistrate to give proper consideration to a non-custodial sentence is a serious misdirection which vitiates the sentence. He accordingly submitted that we should set the sentence aside and refer the matter back to the trial court for reconsideration, with a directive that a proper and comprehensive correctional supervision report be prepared and placed the court.

[7] The assault on the complainant and her boyfriend was particularly horrendous. The appellant and his co-perpetrator went to the complainant's flat in the early hours of the morning, kicked the door open and then started to assault them with a knuckle-duster and a baseball bat. The magistrate found that the attack was premeditated. The

complainant suffered serious injuries and had to receive four stitches on the left side of her face, two of her lower teeth were broken and her arm was injured to the extent that she could not use it for two weeks. The appellant furthermore also threatened to kill her while she was in hospital.

[8] The correctional supervision report contained, inter alia, the following material comments:

- (a) The accused is 44 years old and has no previous convictions. He has three children, aged 16, 5 and 3 years, respectively. His mother indicated that the appellant supports his children financially and socially. The report concludes furthermore that '[I]t is clear that the lives of these young children would be affected if the appellant is incarcerated'.
- (b) The appellant accepted the fact that he had done wrong and that shows a sense of remorse.
- (c) He has a strong support system, in particular, because he will be supported by his mother and sister.
- (d) The manager of his business is also willing to support him if a community-based sentence is imposed.
- (e) The complainant is aware of the fact that the appellant is very dedicated to his children, and since he has acknowledged his wrongdoing, she is now willing to forgive him.

[9] Next to the entries relating to house detention, community service support programs and restrictions to one magisterial district, the correctional official has simply entered 'YES' in respect of all, without providing any detailed recommendations for the court's consideration.

[10] It is indeed so that the magistrate addressed the contents and recommendations of the report in a rather perfunctory manner. After acknowledging

the fact that the correctional official has recommended a non-custodial sentence and narrating the appellant's personal circumstances, he embarks on a detailed description of the circumstances of the crimes in order to demonstrate their serious nature. However, nowhere in his judgment on sentencing does it appear that he gave due consideration to the conditions suggested by the correctional officer namely, inter alia, house arrest, community service and restriction to one magisterial district.

[11] In addition, in considering whether a non-custodial sentence will be appropriate the magistrate has failed properly to take into account the accused's personal circumstances, which are as follows. He is 44 years old and is a first offender. He is not married but is the father of three children; a son aged 16 and daughters aged three and five, respectively. He is an educated man, with a tertiary education and owns businesses, namely a Pub and Grub restaurant, as well as a butchery. His son lives with him, while his two daughters reside with their mother. It was also common cause that the appellant supports all three his children.

[12] The magistrate ultimately found that: 'In the present case, this case the crime has been clearly premeditated and there was no suggestion that you had acted in any heightened emotional state of mind. It was found in that case that the direct imprisonment was not inappropriate. Your conduct in this case cannot be condoned in any way. Brutal treatment of woman cannot be excused on the basis that one is in a rage or even drunk'.

[13] In terms of section 276(1) (h) and 276 (1) (i) of the Criminal Procedure Act, 51 of 1977, correctional supervision is a sentencing option in respect of all offences, even in serious crimes such as murder. The purpose of this sentencing option is to distinguish between two types of offenders namely, those who ought to be removed from society by imprisonment and those, although deserving of punishment, should receive a non-custodial sentence. (S V R 1993 (1) SACR 209 (A), at 22-G.

[14] Correctional supervision is not a lenient alternative to direct imprisonment, and with the imposition of appropriate conditions (depending on the circumstances of a particular case), it may constitute harsh and exacting punishment, while allowing the

accused to function in the community, be with his family, and provide for his minor children, thus creating more suitable conditions for rehabilitation.

[15] A trial court must therefore, in the exercise of its sentencing discretion, give proper consideration to correctional service as a sentencing option. The reasons for its decision in this regard must be clearly evident from the judgment. (S V Grobler 2015 (2) SACR 210 (SCA), at para. 8)

[16] It is, in my view, evident from the magistrate's judgment on sentencing that he did not give proper consideration to the appropriateness of correctional supervision as a sentencing option. He has, in particular, not considered the punitive and exacting effects of conditions such as house arrest, community service and restriction to a particular magisterial district. It appears that in concentrating on the seriousness of the crime, he appeared to have been of the view that correctional supervision would be a disproportionately light sentence, without considering the consequences of the abovementioned conditions. The judgment also does not evince that he has given due consideration to the effects a custodial sentence would have on the appellant's minor children.

[17] In the light of this finding it is not necessary for us to consider the other grounds of appeal advanced by the appellant namely, that the sentence was disproportionately harsh so as to point to a failure by the magistrate to exercise his sentencing jurisdiction properly.

[18] In summary then, we find that the magistrate has failed to give proper consideration to correctional supervision as a sentencing option and that the report that served before him was, in any event, deficient in material aspects. This latter factor has clearly further impacted negatively on the exercise of his discretion in this regard. The appeal must accordingly succeed to this extent.

[19] In the result the following order issues:

1. The appeal is upheld and the sentence imposed by the court a quo is set aside.

2. The matter is remitted to the court a quo to impose sentence afresh after obtaining from the correctional officer a more comprehensive report containing stipulations and conditional factors regarding the possible imposition of non-custodial sentence.

JE SMITH

JUDGE OF THE HIGH COURT

N NTLAMA-MAKHANYA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant : Adv JR Koekemoer
Instructed by: Allams Attorneys
East London

For Respondent : Adv AA Nohiya
National Director of Public Prosecutions
Makhanda