

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 363/2011

In the review between:

THE STATE

versus

LEBOHANG RANOHA

CORAM: MOCUMIE, J *et* NAIDOO, AJ

JUDGMENT BY: NAIDOO, AJ

DELIVERED ON: 23 February 2012

REVIEW JUDGMENT

[1] This is a review which came before this court in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 ("the CPA"). In this matter the accused was, on 3 August 2011, convicted of two counts of assault and one count of assault with intent to do grievous bodily harm (Assault GBH). On both counts of assault, which were taken as one for the purposes of sentence, the accused was sentenced to R500, 00 or 100 days imprisonment. On count 3, the charge of

assault with intent to do grievous bodily harm, the accused was sentenced to 30 months' imprisonment in terms of section 276(1)(b) of the CPA.

[2] The magistrate was requested to furnish reasons for sentence and to comment on why he found that correctional supervision was not a suitable sentencing option. His response, in summary, is that:

- (i) it was clear that the accused was the aggressor on the day in question;
- (ii) the level of violence that he used on the complainant in count 3 was not insignificant;
- (iii) the nature, seriousness and prevalence of violence in that district militates against another suspended sentence or a sentence of correctional supervision.

[3] The magistrate concluded by remarking that although it is difficult to sentence a first offender to direct imprisonment, the circumstances (of this case) did not allow him to impose any other sentence.

- [4] Sentencing requires a fine balancing act where the court must consider the well known triad expounded in **S Zinn 1969(2) SA 537 (A) at 540 G**, namely the seriousness of the offence, the interests of society as well as the circumstances of the accused. The offence of assault with intent to do grievous bodily harm is indeed serious and in the present case, a great deal of force must have been used to cause the complainant's arm to fracture.
- [5] It is well-established in our law that, depending on the circumstances of each case, one or more of the factors I have mentioned may require more emphasis than the others. It is also required of a court to guard against over-emphasising one factor at the expense of the others, as this could well lead to an unjust sentence.
- [6] The magistrate, in my view, over-emphasised the interests of society and the seriousness of the offence and did not give sufficient weight to the personal circumstances of the accused and to the circumstances under which the offences in this case were committed. The accused, who is not permanently employed, is obliged to take care of his

daughter, while the mother of the child, who is a police officer in receipt of a regular salary, does not contribute to the upkeep of the child. It would appear that the accused's sole source of income was the casual work that he undertook. Against this background, the interactions he had with the mother of the child and her brothers on the day in question turned ugly and violent.

- [7] The magistrate correctly pointed out that this level of violence cannot be tolerated and that the courts need to impose the kind of sentences that reflect the unacceptability of this type of conduct. However, to my mind, the interests of the minor child were not taken into consideration when sentencing the accused to imprisonment for such a long period, nor the fact that he is a first offender who had made a genuine effort to care for his child with meagre resources. In the matter of **M v S (Centre for Child Law as *Amicus Curiae*) 2007 (12) BCLR 1312 (CC)**, the Constitutional Court had to consider whether a fresh approach to sentencing was required where the person being sentenced is the primary caregiver of a minor child. In this case, the Constitutional Court set out guidelines to be adopted by sentencing courts

where a custodial sentence of a primary caregiver is being considered or is in issue. These guidelines were summarised in **S v S (Centre for Child Law as *Amicus Curiae*) 2011(7) BCLR 740 (CC)** as follows:

- “(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)The court should also ascertain the effect on the children of a custodial sentence if such 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.”

[8] In **S v S** referred to above, the applicant, a mother of two minor children, was sentenced to a custodial sentence. **Khampepe J** delivered the minority judgment in terms of which the applicant was placed under correctional supervision in terms section 276(1)(h) of the Criminal

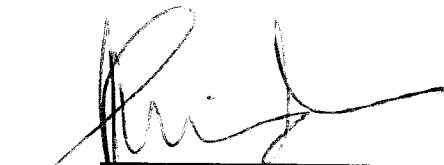
Procedure Act 51 of 1977. In terms of the majority judgment, delivered by **Cameron J**, the appeal to the Constitutional Court was dismissed, and part of the Court's order was that the "National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department of Correctional Services visits the children of the applicant, Mrs S, at least once every month during her incarceration, and submits reports to the office of the National Commissioner as to whether the children of the applicant are in need of care and protection as envisaged in section 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision."

- [9] In the present matter, my prima facie view is that the accused is not someone who needs to be removed from society at this stage, but someone who can benefit from correctional supervision and the programmes that are offered under the auspices of such a sentence, for example, the anger management programme. In this way the accused's deviant conduct would be addressed, the requirement for punishment would be fulfilled and the minor child would still have the benefit of the one parent who appears to care for her well-being. This, however, needs to be properly investigated and canvassed. This investigation must be

undertaken urgently as the accused was sentenced on 3 August 2011 and has been in custody for over six months.

[10] In the circumstances, I make the following order:

The matter is remitted to the magistrate to request a pre-sentence report and consider sentence, including the imposition of correctional supervision, afresh.


S. NAIDOO, AJ

I agree.


BC MOCUMIE, J

/sp