

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A164/2010

In the appeal between:

NHLANHLA MOLAUTSI

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI J *et* MTHEMBU AJ

JUDGEMENT:

RAMPAI J

HEARD ON:

9 NOVEMBER 2011

DELIVERED ON:

24 NOVEMBER 2011

[1] These are appeal proceedings. The appellant appeals against the sentence. He was sentenced to undergo a period of 12-years imprisonment by the regional court magistrate. He comes to us with the leave to appeal granted by this court. The sentence imposed on him is not supported by the respondent.

[2] The appellant was arrested on the 6 November 2008 and charged with two crimes. The respondent accused him, in

the first place, of an attempting to murder Ms Anna Magarita Swarts. In the second place the respondent also accused him of housebreaking with intent to steal and theft. The value of the victim's stolen goods was estimated to be R12 300,00. Both of these crimes were committed at 22 Van Eck Street Sasolburg on the 28 October 2008.

[3] Almost 7 months later, on the 2 June 2009, the appellant appeared before Ms P J Ngewu, in the Sasolburg regional court for trial. Mr D Rantsane appeared for the state and Ms M Nethononda for the accused. He then pleaded guilty. The statement he made in terms of section 112(2) of the Criminal Procedure Act, number 51 of 1977 was read out and handed in by his lawyer as exhibit "a". He was convicted on the strength of his plea.

[4] The case was then remanded for the probation assessment report and correctional assessment report. The appellant was sentenced on 30 June 2009. The following documentary evidence was available on that day:

4.1 medical report form J88 in respect of the victim: Dr P Pillay: exhibit "b";

4.2 criminal record form SAPS 69C in respect of the accused: exhibit “c”;

4.3 correctional supervision report in respect of the accused:

Ms C van Hads, exhibit “d”;

4.4 probation officer’s report in respect of the accused: Ms L Morajane, exhibit “e”.

On that day the appellant was sentenced to 12 years imprisonment. The two offences were taken as one for the purpose of sentence. It would seem that the appellant is currently serving his sentence at Groenpunt Youth Centre.

[5] The appellant was aggrieved by the sentence. Still on 30 June 2009 he immediately applied for leave to appeal. His application was unsuccessful in the court *a quo*. On the 3 July 2009 he filed a petition. His petition was allocated to and considered by my colleagues Ebrahim J *et* Van der Merwe J on 30 November 2011. His petition was successful - hence this appeal.

[6] Among others, the appellants’ grounds of appeal were: that the court *a quo* misdirected itself by underplaying the

personal circumstances of the appellant on the one hand and by overplaying the seriousness of the crime on the other hand. The imbalance, so contended the appellant, produced a sentence which was not in line with the probation officer's or social worker's report and was, therefore, strikingly inappropriate.

- [7] In sentencing the appellant, the court *a quo* took into account the following aggravating factors:

The victim was attacked in the sanctuary of her own home. The attack was vicious. She sustained multiple stab wounds. She was 78 years old. She was alone in the house. Therefore, she was vulnerable and defenceless. The victim was paralysed as result of the violent attack. She permanently lost the use of her legs. The assault aggravated the victim's fragile physical condition. Her health steadily deteriorated after the assault. Her stolen goods were never recovered. In this case, the interests of society were badly or offensively undermined by the two crimes. These sorts of crimes, the trial court found, were becoming prevalent in the particular region of the province.

- [8] In sentencing the appellant, the court *a quo* also took into account the following mitigating factors: Firstly, the relative youth of the appellant. Secondly, his clean criminal slate.
- [9] Ms Kruger, attorney for the appellant, submitted that the court *a quo* did not properly take into account certain important factors favourable to the appellant. Ms Bester, counsel for the respondent, agreed. The appellant was born on 22 September 1992. At the time the appellant committed the two crimes on 28 October 2008 he was, therefore, 16-years of age. At the age of 16 years the appellant was plainly a child. The court *a quo* regrettably shyed away from that reality. Instead of describing the appellant as a child, it referred to him as a youth. A youth is not always necessarily a child. Ordinarily, though not uniformly, judges use the word to describe any offender above 18 but below 26 years of age.
- [10] That the court *a quo* did not treat the appellant as a child is apparent from the following:

“I admit that according to the records here you are (sic) a

minor when you committed the offences.

But your conduct fall (sic) short of my knowledge, **mean (sic)**
that takes you of (sic) the brackets of minors totally.”

(record, p. 25: 21 – p. 26: 1)

The court *a quo* went further and said the following about the accused:

“I mean your personal circumstances, what stands out is the fact that you are a youth. **That only does not operate in your favour.”**

(record, p. 26: 15 – 18)

[11] I am of the view that the court *a quo* closed its mind to some important mitigating factors. The two quotations showed that the appellant was, on account of the gravity of the crimes, stripped off his childhood and elevated to the world of adulthood for the purposes of punishment. Such an approach to sentencing a child was flawed.

[12] As regards the status of the appellant as a first offender, the regional magistrate remarked:

“Yes, you are a first offender. It is our duty as the court to meet criminal behaviour on the (indistinct)”

(record, p. 26: 20 – 22)

Again, a strongly mitigating factor was fleetingly glossed over and quickly played down through reversion to the appellant’s criminal behaviour which formed part of the aggravating factors. The appellant had, by then, already heard that his criminal conduct totally disentitled him to be judicially treated and punished as a child and that being a child or rather youth, as the court *a quo* described him, alone did not operate in his favour.

- [13] The recurring manner in which the negative aspects of the appellant’s conduct were repeatedly accentuated rather indicated that the court *a quo* drastically extenuated the positive aspects of his person. The remarks indicated that the appellant’s personal profile was not properly and adequately individualised to ensure that the punishment fitted his person as well. In a case of a first offender, particularly a child offender, the devastating adverse impact of an inordinately long period of direct imprisonment should

never be overlooked and under-estimated. See **S v WOOD** 1973 (4) SA 95 (RA) at 96H – 97B per Macdonald JP.

[14] Besides his status as a child, 16 years of age, and his status as a first offender, (exhibit “c”) the appellant acknowledged he wronged and offended the community (p13 exhibit “e”); he expressed remorse for the crimes he committed (1.3 exhibit “d”); he came from a dysfunctional and broken family (1.2 exhibit “d”); his level of formal education, (grade 3) was extremely poor (exhibit “e”). Apparently, he has low intellect. Perhaps the divorce of his parents had an adverse impact on his immature emotions. The last two factors could also possibly explain why he dropped out of school so early when he was seemingly in grade 4.

[15] He was on addictive drugs (cannabis) and other dependence forming substances such as glue (exhibit “e”). Moreover, and this is a factor of vital importance, he was very high at the time he committed the misdeeds because he did so shortly following some heavy sniffing of glue. Of the vicious assault, he remembered very little.

[16] His vague memory or weak recollection of the incident tends

to show that he acted irrationally and impulsively as a result of his impaired capacity to rationally control his actions.

[17] Finally, he pleaded, with genuine remorse, guilty to both charges. Those who genuinely do so should receive credit **S v SEBATA** 1994 (3) SACR 319 (C) at 325F. The appellant was incarcerated for seven months before he was sentenced. The mental anguish of such a pre-sentence period of detention was held to be doubly worse than that of a post sentence imprisonment – **S v STEPHEN AND ANOTHER** 1994 (2) SACR 163 (W) at 168E per Shultz J. See also **S v NKOMOMDE** 1993 (2) SACR 597 (W). I share those sentiments.

[18] Those crucial mitigating factors should have been allowed to influence the trial court in its difficult task of determining an appropriate measure of punishment. They did not. None of them was considered. His status as a child and a first offender though mentioned, were not meaningfully considered. Instead, the value(s) which should have been properly attached to such significant factors were virtually watered down.

[19] The end result of all these was that the sentence component of the judgment revealed that certain relevant factors relative not only to the circumstances in which the crimes were committed, but also to the appellant's personal circumstances, were not fully explored, assessed and properly taken into account. In determining an appropriate punishment, no genuine attempt was made to individualise the child offender. The seriousness and the brutality of his actions should not be allowed to unduly overshadow his peculiar circumstances as an individual. Here, I am convinced that an error has been committed:

“A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard.”

S v KIBIDO 1998 (2) SACR 213 (SCA) at 216h – I per Olivier JA.

[20] In the circumstances, I am convinced that the regional magistrate materially misdirected herself. The misdirection

was of such a nature degree and seriousness that it can be said that the court *a quo* did not properly or reasonably exercise its sentencing discretion – **S v PILLAY** 1977 (4) SA 531 (A) at 535A-B per Trollip JA.

[21] Ms Kruger submitted that although correctional supervision in terms of section 276(1)(h) was not recommended as a sentencing option, the court *a quo* should, as a last resort, have considered sentencing the child offender to correctional supervision in terms of section 276(1)(i). This particular sentencing option was recommended by the probation officer, Ms L Morajane, the social worker who compiled the presentence social assessment report in respect of the appellant (vide par 15 exhibit “e”). The recommendation did not find favour with the trial magistrate. Hardly any reference was made to the positive recommendation.

[22] This brings me to the correctional assessment report made in terms of section 276(A)(1) by Ms C van Hads, a social worker by profession who was in the employ of the Department of Correctional Services. Her official designation was correctional officer. She wrote:

“Attempted murder as well as housebreaking with the intent to steal and theft are serious offences and this should therefore also be taken into account when correctional supervision as a sentence is considered. **This office is of the opinion that correctional supervision as a sentence would not be in line with the seriousness of these offences. The victim sustained serious injuries against (sic) crimes where the elderly is (sic) targeted. Correctional supervision is therefore not recommended in this instance.**”

- [23] It is obvious that the correctional officer’s opinion was, by and large, influenced by the seriousness of the victim’s assault. Admittedly, the attack was vicious. But the correctional officer’s negative recommendation against any form of correctional supervision was misplaced. Her opinion created the unfortunate and erroneous perception that correctional service, be it in terms of section 276(1)(h) or section 276(1)(i) cannot be imposed on offenders convicted of very serious offences. The correct legal position is that correctional supervision can be imposed as a meaningful alternative sentencing option to the direct imprisonment sentencing option in respect of any offence,

however, serious. See **S v M (CENTRE FOR CHILD LAW AS AMICUS CURIAE)** 2007 (2) SACR 539 (CC).

[24] The court *a quo* did not expressly accept Ms Hads' negative opinion and recommendation. However, it implicitly accepted her aforesaid recommendation. Similarly, the court *a quo* did not explicitly reject Ms Morajane's positive opinion and recommendation, but it implicitly rejected it. In **S v SNYDERS** [2011] WCC (11942) para [20] 30.09.2011 unreported Moses, AJ had this to say about the unexplained rejection of the recommendation of the probative assessment report and the correctional assessment reports:

"[20] The magistrate did not deal with the contents of both reports of the correctional official and the probation officer in respect of each of the accused, not in his reasons furnished nor in the court when he imposed the sentence as abovestated. No reasons are given, nor any basis laid or established why these recommendations were ignored and/or simply rejected, as he appeared to have done. Given the fact that all these reports were handed in, and admitted as

uncontested evidence regarding its content, **cogent reasons must exist for its rejection, especially given the circumstances of this particular case. No such reasons were furnished.**”

(see annexure to the appellant’s heads of argument filed by Mr J D Reyneke.)

- [25] The correctional officer, whose recommendation the court *a quo* appeared to have uncritically adopted, albeit silently, did not express a firm view as to the inappropriateness of correctional supervision as a sentencing option in this case. This was how she concluded her report:

“It is however still possible to administer a sentence of correctional supervision upon the accused as he has a positive address where he can be accommodated and if the court is of the opinion that such a sentence would be the most suitable sentence it can indeed be imposed. This office is however of the opinion that several risk factors exists in terms of the stability and behaviour of the accused.”

(record, p 42)

- [26] The opinion of the correctional officer against correctional supervision squarely rested on three cornerstones, which

were: that sentence in the form of correctional supervision would not be in line with the seriousness of the crimes committed; that there were several risk factors concerning the accused's social stability and similarly, that there were several risk factors concerning the accused's behaviour.

[27] As regards the first cornerstone, I have already expressed my views. I deem it unnecessary to elaborate any further. As regards the second, I am not persuaded that there are serious risk factors about the appellant's social stability. The mere fact that the appellant occasionally sleeps out coupled with the fact he does not attend school does not justify the conclusion that monitoring him would be impossible or very difficult. As regards the third cornerstone, a few incidents were cited by the correctional officer and the probation officer which indicated that the appellant was an angry child. His aggressive behaviour manifested itself on various social fronts such as home, school, street and even at the youth detention centre where he was held prior to the date on which he was sentenced.

[28] Ordinarily, his father said, the appellant was not a delinquent

and troublesome child. He attributed his deviant behaviour and occasional acts of aggression to addictive substance abuse. The appellant himself, when asked to comment about his violent and criminal actions at the elderly victim's home, told the correctional officer that he did not really know why he behaved as he did; that he acted out of character; that his deviant behaviour was occasioned by his abuse of addictive substances which he had smoked shortly before the incident and that he was remorseful about his behaviour. This was the other end of the spectrum. This positive perspective of the appellant's behaviour was never addressed or considered – not by the correctional officer or by the regional magistrate. Both dwelled on the one and only aspect of the spectrum – the unfavourable aspects of the appellant's behaviour but not its cause.

[29] If we accept, as did the probation officer and the correctional officer that this boy was highly doped at the time he savaged the victim, then we inevitably also have to accept that as a result of his impaired mental faculties he could not think straight. The appellant diminished capacity to will and to control his criminal actions reduced the moral

blameworthiness of his crimes. This factor significantly augmented the mitigating factors.

- [30] The trial magistrate, in one sweeping remark, commented as follows, not about one but two professional assessment reports:

“According to the reports you are predisposed to violence, ...”

(record, p. 26: 19 – 20)

I am not so certain whether one can, in the absence of a well defined pattern discerned from a series of similar acts of violence, but merely on the strength of a single isolated incident, assert that an offender is genetically predisposed to committing violent acts. My understanding of the two reports was that the appellant was aggressive towards others. He bullied his peers and even abusively defied adults at times. His socially deviant and offensive behaviour was attributed to his frequent abuse of addictive substances and not his natural inclination to violence.

[31] On the contrary, Ms Morajane observed that the appellant's level of education did not match his age. In her evaluation of the appellant, she concluded that such disparity could be explained on the basis of the appellant's rather slow intellectual development. In the final analysis, she observed that the offender accepted responsibility for his actions. She stated that such an acknowledgement was a positive sign that he was rehabilitable. He now has insight of the wrong he did and the legal consequences thereof. The probation officer made a substantive and not cosmetic evaluation of the matter and recommended correctional supervision in terms of section 276(1)(i) on conditions that the accused attended anger management and detoxification programmes.

[32] Ms Morajane's probation assessment report constituted important presentencing evidentiary material concerning the appellant.

"It has been placed before that court, not to fetter its sentencing discretion, but to serve as a useful, and indeed, an important guide and assisting mechanism, for that court to use

in the exercise of its sentencing discretion. Its contents and recommendations were not contested nor contradicted by any other evidence which was led and/or admitted by that court. The magistrate could have indicated to any of the parties, the State and the defence, which aspects of these reports and/or recommendations, if any, the court would like to hear evidence on, to further clarify any aspect thereof, including its recommendations. This would obviously have enabled the parties, including the defence, the prosecutor or the relevant compiler/author of the report to address such aspect and/or concern. It would also have afforded an opportunity to these parties to reply to such queries. The magistrate did not do so.”

(S v Snyders, *supra*, para [20]) That is precise what happened here.

[33] Still at para 20 of the same decision Moses AJ continued as follows:

“The magistrate as the sentencing court, and in his subsequent reasons, failed to deal with correctional supervision in respect of all three accused as a sentencing option, as he was required to do so. In the circumstances of this case, it is clear that the sentencing court did not truly

consider correctional supervision in respect of these accused as a sentencing option. **It is therefore clear, that, in the circumstances the magistrate closed his mind to anything other than direct imprisonment. This is an irregularity. (See *S v Kotze* 1994 (2) SACR 214 (O)."**

- [34] The appellant was entitled to know, firstly why the probation officer's recommendation which was favourable to him was unacceptable and disregarded. Secondly he was also entitled to know why the correctional officer's recommendation which was unfavourable to him was apparently preferred to that of the probation officer. None of the two professionals were called to debate the issue. This was an unfortunate oversight. By the look of things, and merely judging by the contents of the assessment reports, the correctional officer would probably have conceded that correctional supervision was not absolutely inappropriate sentencing option in this case. Important evidence was regrettably overlooked. The contributions of the professionals were not meaningfully explored, digested and used. An error was committed and it cannot be allowed to stand. The appellant is entitled to the benefit of that error.

(**S v ZWANE** 2004 (2) SACR 291 (N) per Msimang JP)

[35] The appellant was deprived of the optimal benefits of the professional evidence favourable to him. He was seriously disadvantaged by the omission. As judges, we have to ensure that justice is properly done. It was not done in this case.

[36] Ms Bester was of the opinion that a sentence of 7 (seven) years imprisonment of which 2 (two) years imprisonment were conditionally suspended would have been an appropriate sentence here. She urged us to adjust the sentence of 12 (twelve) years imposed by the regional court accordingly. The submission failed to persuade me. Counsel did not at all argue why the correctional supervision sentence in terms of section 276(1)(i) as recommended by the probation officer, would not be an appropriate punishment for the boy. She merely commented that the boy did not commit the crimes at the spur of the moment.

[37] There was no force in her contention. In saying so, I am

fortified by two facts. In the first place, it was not her initial case that the appellant had planned the crimes long in advance – *vide* paragraph 4 of the respondent's heads of argument where the aggravating factors were diligently tabulated. In the second place, counsel's comment was not proactive but reactive in nature. It was elicited by a question posed by my brother, Mthembu, AJ, from the bench. I hasten to say nothing significant turns on this point. It was not Ms Bester's contention that prior planning ruled the appellant out for the imposition of correctional supervision sentence in terms of section 276(1)(i).

- [38] It is indeed trite, as Moses AJ correctly observed in **S v SNYDERS AND OTHERS**, *supra*, paragraph 21 that punishment in the form of direct imprisonment for child offenders must only be imposed where there is no other legitimate sentencing option available other than direct institutional detention. I am mindful that in practice there would always be crimes by children so serious that imprisonment would be the only appropriate punishment. Serious though this case was, I am of the firm view that to have this child caged for even 5 (five) years would amount

to failure to take into account not only his age, but his low intellect, his doped mind, the possible impact of a family breakdown on his emotions and other favourable attributes of his person as an individual. On the facts, I find myself unable to clearly give this child sound reasons for not sentencing him in accordance with the probation officer's recommendation.

[39] In **S v B** 2006 (1) SACR 311 (SCA) paragraph [18] Ponnann AJA, as he then was, said:

“[18] The principle that detention is a matter of last resort (and for the shortest appropriate period of time) is the *leitmotif* of juvenile justice reform. Those principles are articulated in international law and are enshrined in s 28(1)(g) of the Constitution which reads:

'(E)very child has the right not to be detained except as a measure of last resort, in which case . . . the child may be detained only for the shortest appropriate period of time. . . .’”

See also **S v SNYDERS AND OTHERS**, *supra*, paragraph 21 and the authorities there cited.

[40] It is my considered view that, in the peculiar circumstances of this case, any direct imprisonment will be disproportionate and therefore excessively retributive. I am persuaded that there is meritorious substance in the probation officer's recommendation. I am convinced that placing the appellant under the care of the commissioner in terms of section 276(1)(i) will serve a dual purpose. By imposing this particular sentence option, the rehabilitative as well as the retributive objectives of sentencing will be promoted. It is, of course, in the interests of justice that the guilty should be appropriately punished.

[41] In his free and unfettered discretion, the commissioner will decide how long the appealing will institutional supervision, when and how long he may be placed under residential supervision. The exercise of such discretion is, of course, subject to legislation prescripts and regulations.

[41] We have to remind ourselves that this child has already served 28 months of the sentence imposed on him on 30 June 2006. By then he had been incarcerated for almost 8

months. He has effective been inside for 36 months since 6 November 2008 when he was arrested. Having considered all the relevant factors and the circumstances of this case I am convinced that this sentence in option will be the least restrictive the privation of the child's liberty. It is in the best interest of this child to and indeed of the society that he be so punished.

[42] There are two more things. It is undesirable to impose one sentence in respect of two charges, as was done here. Where, for instance, an appeal succeeds in respect of one charge but fails in respect of the other, the composite sentence does create an unnecessary practical problems. Instead of taking two offences together and treating them as one for the purpose of sentencing, it is advisable to rather impose a separate sentence in respect of each separate offence and direct that the two sentences should run concurrently. This is the one thing.

[43] The other thing is this: The accused was charged housebreaking with intent to steal and theft. In my view he was wrongly charged. The correct charge, on the facts,

should have been housebreaking with intent to rob and robbery with aggravating circumstances. The latter attracts a prescribed minimum sentence but the former does not. The appellant is entitled to the less severe of the two. Seeing that the error favours the accused and not the state the error cannot be revisited and rectified. Let it be.

[44] Accordingly, I make the following order:

44.1 The appeal against the sentence succeeds.

44.2 The conviction stands.

44.3 The sentence of 12 (twelve) years imposed on the appellant on 30 June 2009 is set aside and substituted with the one below.

44.4 The appellant is sentenced to correctional supervision in terms of section 276(1)(i) Act 51 of 1977 in respect of each of the two crimes.

44.5 The sentence shall be deemed to have been imposed on 30 June 2009.

44.6 The sentences shall run concurrently.

M. H. RAMPAL, J

I concur.

J. B. MTHEMBU, AJ

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