

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 681/2009

In the review between:-

THE STATE

versus

QHOLANI FIKWENI

CORAM: MOCUMIE et MOLOI JJ

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 20 MAY 2010

MOCUMIE, J

[1] This matter was placed before me on review in terms of section 302 read with 304 of the Criminal Procedure Act, 51 of 1977 ("the CPA"). The accused appeared in Bethulie Magistrate Court on one count of assault with intent to do grievous bodily harm on 3 June 2009. He pleaded guilty and was convicted on his plea. On 3 June 2009 he was sentenced to eighteen

months imprisonment wholly suspended for five years on certain conditions.

[2] It is not clear from the record why this matter was only placed before this Court on review on 30 December 2009. Six months later. Although the presiding officer was not given an opportunity to respond this issue this is a great concern which has caused serious prejudice to the accused in this matter as it will be shown hereunder

[3] When the matter was placed before me I was of the view that even if wholly suspended, the sentence was too harsh in the circumstances. I forwarded a query to that effect. The presiding officer has since responded and I thank her.

[4] I also sought the opinion of the Director of Public Prosecutions, Free State on this matter. A comprehensive and elucidating opinion in this regard was provided by Advocate Mogale whose views the Deputy Director of Public Prosecutions, Free State, Adv J W Roothman, agrees with. I thank both of them.

[5] The personal circumstances of the accused as gleaned from the questions and answers in terms of section 112(1)(b) of the Criminal Procedure Act are the following: The accused was born on 16 December 1993 which made him 16 years of age when this offence was committed. He was raised by his parents who have since passed on in 2006 when he was 12 years old. As a result of his parents' death he, with his 3 year old brother, was raised by his paternal aunt who is their foster parent. He started to stay with his paternal aunt when he was in grade 9. He was attending school at Wongalethu Secondary school in Bethulie and doing Grade 9 at the time of the commission of this offence. He pleaded guilty. He has no previous convictions.

[6] What counted against the accused are the following factors as recorded. The accused was at a dancing competition in the evening which ended in the early hours of the day in question. Whilst drunk he stabbed the complainant on his back after he had reprimanded the accused and his friends and even hit the

accused with an open hand for unruly behaviour. The complainant was injured.

[7] Assault with intent to do grievous bodily harm is indeed a serious offence. It is one of the most prevalent offences in the country and in this province in particular. There is no need to refer to statistics to highlight this point. It is a principle of our law that when an offence is of prevalence courts must impose sentences which are commensurate with the seriousness of the crime.

[8] The imposition of sentence is a very delicate stage of the criminal trial. It entails a balancing of the three basic elements of sentencing, the basic *triad* propounded in **S v Zinn** 1969 (2) SA 537 (A) at 540 f-g, *viz*: The offender, the offence and the interests of society. In line with our Constitution and in view of the rights the Constitution provides children sentencing of young offenders has since been reappraised and developed as first indicated by **Van Heerden J** in **S v Kwalase** 2000 (2) SACR 135 (C). In fact it has long been recognised even in the

pre-constitutional era that a different approach should be followed when juvenile offenders are to be sentenced. In **R v Smith** 1922 TPD 199 at 201 the court stated that: “[the] state should not punish a child of tender years as a criminal and stamp him as such through his after life, but should endeavour..... to educate and uplift him”. In **S v Kwalase** supra at 138e the court re-stated the responsibility of the sentencing court with specific reference to youthful offenders in the following words:

“The post 1994 constitutional and international legal dispensation in South Africa must of necessity also be borne in mind by South African courts in the determination of appropriate sentences for youthful offenders. Section 28(1)(g) of the Constitution of South Africa Act 108 of 1996, provides that every child has the right ‘not to be detained except as a measure of last resort’ and then only for the shortest appropriate period of time’. This constitutional provision applies to all persons under the age of 18 years (see s28 (3).)

Furthermore, on 16 June 1995, South Africa ratified the United Nations Convention on the Right of the Child (1989) (“the CRC”) and, by so doing, assumed an international legal obligation to put into effect in its domestic law the provisions of the Convention (see Article 4). Various provisions in CRC ‘underline the policy that children under the age of 18 years who are accused of committing offences should,

as far as possible, be dealt with by the criminal justice system in a manner that takes into account their age and special needs'. See Van Heerden et al Boberg's Law of Persons and the Family 2nd ed (1999) 865 in notis). Thus, article 40(1) embodies the right of a child in conflict with the penal law 'to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'

Further on page 140b the court stated:

"In line with the Constitutional and international law relating to youthful offenders, the Discussion Paper 79, recommended that custodial sentences should be the last resort in children's matters and, where such sentences are passed, they should be for a minimum period and should be conducive to the return of children to society. Non-custodial measures should be explored and used as much as possible, in line with the policy of the Inter - Ministerial Committee on Young People at Risk concerning residential care (see paras 11.63-11.66 of the Discussion Paper and clauses 77 and 78 of the draft Child Justice Bill). It was also recommended that the

consideration by the court of a pre-sentence report prior to the imposition of sentence upon a juvenile offender should be mandatory (see paras 11.90-11.95 and clause 70 of the draft Bill). (On the recommendations contained in the Discussion Paper, see further Sloth - Nielsen & Muntingh 'Juvenile Justice Review 1998' (1999) 12 SACJ 65-7.”

[9] I may mention that the Children’s Act No. 38 of 2005 has since been promulgated and put into effect since 2005. The relevant sections pertaining to the sentencing of youthful offenders were however not implemented until on 1 April 2010. All presiding officers are henceforth bound to comply with the sentencing regime prescribed in terms of the Children’s Act which promotes children’s rights and the rehabilitation of youthful offenders outside the confines of prison.

[10] In my view the reasons given by the presiding officer in her *ex tempore* judgment reflects that firstly, the presiding officer started off on the premise that the offence for which the accused had been convicted, was a serious offence which

warranted imprisonment even if suspended. She therefore restricted herself to this notion that if an offence is serious it must be met with a severe sentence. Secondly, the presiding officer having convinced herself that imprisonment was the only option available in this case in turn totally disregarded all other options available in terms of section 276(1) of the CPA even those similarly severe as imprisonment.

- [11] Even in her *ex post facto* reasons for sentence the presiding officer with reference to the question whether the sentence she imposed is not too harsh, stated:

“Under normal circumstances and in cases where the accused is not a minor, to even consider a wholly suspended sentence would most definitely send out a distorted and wrong message to the community. The message the court will be sending out in such instances will be one of condonation of the cruel and inhumane dispute resolution the community is held at ransom to...”

- [12] It is clear from her reasons for sentence (the transcribed record and her *ex post facto* reasons) that the presiding officer was

and is still of the view that once an offence is serious and of prevalence it must be met with severe punishment irrespective of the circumstances of the case. This approach cannot be correct.

INDIVIDUALISATION

[13] The notion of individualisation is part of our sentencing regime from time immemorial. **Viljoen AJA** in **S v Scheepers** 1977 (2) SA 154 (A) at 158 F – H stated that (translated):

“Individualisation is a set principle in our law... Through individualisation sight cannot be lost of relevant circumstances surrounding the criminal, such as sociological circumstances, experience of punishment and potential for rehabilitation.”

See also **S v Maxaku**; **S v Williams** 1973 (4) SA 248 (C) at 254 F; **S v Rabie** 1975 (4) SA 855 (A) at 861D. By this notion it is meant that the sentence in each case should be determined individually. See too **S v Serabo and Five Similar Cases** 2002 (1) SACR 391 (E). Individualisation not only indicates

fairness but ensures that a presiding officer should not mechanically impose what is loosely referred to as “cookie-cut” type of sentence; regardless of the unique circumstances of the offender before the court.

CORRECTIONAL SUPERVISION

[14] In the *locus classicus* on correctional supervision: **S v R** 1993

(1) SACR 209 (A) **Kriegler AJA** (as he was then) stated:

“In particular it should be realised that appreciable punishment can now be inflicted without imprisonment, with all its well known disadvantages for both the prisoner and the broad community.”

[15] Our courts have emphasised the rehabilitative value of correctional supervision from the onset. Correctional supervision has variously been described as an “appreciable suitably severe sentence even for serious offences” (**S v Ingram** 1995 (1) SACR 1 (A) at 9 e-f); as “substantial and effective punishment”. (**S v Flanagan** 1995 (1) SACR 13 (A) at 16 b-c) and as “having a high punitive value” (**S v R** 1993 (1) SACR 209

(A) at 221 g-h.) The main thrust and aim of correctional supervision, as I see it, is not only to punish the accused but also to give him a chance to rehabilitate and mend his ways within the community he has wronged. It may even be more severe than imprisonment but has the correct aim as a basis.

[16] I highlight these principles in this context of a suspended sentence well aware that the presiding officer imposed a suspended sentence but am of the view that a suspended sentence is even more onerous in that it gives an offender a sense of false freedom whereas in reality it is simply a postponed term of imprisonment. Moreso in instances of youthful offenders who in the most likelihood do not understand the meaning of the sentence or even if they do understand are just happy not to go to prison for the moment thus failing to appreciate the consequences of a suspended sentence.

[17] In my view to disregard the approach adopted by the presiding officer in this case on the basis that in general the

proceedings are in accordance with justice or that a review court should not be seen to be eager to replace the sentence of the trial court simply because it believes it would not have imposed the same sentence will not only be fallacious but would send a wrong message on sentencing in our courts especially with regard to youthful offenders.

[18] The presiding has to be commended for obtaining a fully detailed presentence report in this case as the law prescribes even if she totally disregarded the recommendation made by the expert in the field of youthful offenders without giving any reason why she did so. I am not in the least suggesting that she should have sluggishly followed the recommendation. The report has however been most useful to this Court in bringing out the background of this accused. **Erasmus J** in **S v Z en Vier Ander Sake** 1999 (1) SACR 427 (E) at 438j-439b illustrates the importance of having to have regard to “die belangrikheid van opvolgwerk by jeugdige oortreders. Die pleging van ‘n misdryf deur ‘n jeugdige is ‘n duidelike teken dat daar fout is in sy karakter of dat daar iets in sy gesinsomstandighede skort. Dit is dus

kennelik aangewese dat daar behoorlike ondersoek na hom en sy agtergrond gedoen word en dat sy verder gedrag en sy gesinsomstandighede gemonitor word. 'n Vonnis van 'n jeugdige wat effektiewelik eindig wanneer die veroordeelde by die hof uit stap, is selde gepas. Dus, wanneer die vonnis uitgestel of opgeskort word, is dit paslik dat die beskuldigde in die sorg of die toesig van 'n gepaste instansie of persoon geplaas word.”

[19] I am of the view that despite the condition that the accused subjects himself to the supervision of a probation officer the first part of the sentence imposed, that of imprisonment, *albeit* suspended, has far reaching consequences for the accused and does not give him an opportunity to correct his mistakes because the slightest breach of any of the conditions even in instances not of his doing will bring the suspended sentence into operation. I am certain that is not what the presiding officer intended.

[20] I am also of the view that the sentence is too severe. In addition to the youth of the accused (who was as only 16 years of age

when he committed this offence), it must be borne in mind that the accused pleaded guilty; the State did not prove that the complainant was seriously injured; the accused was under the influence of intoxicating liquor and after committing this offence he ran away which indicates his level of immaturity. The moral culpability of the accused is judged by having regard to, *inter alia*, his or her age and level of maturity at the time when the offence is committed. (See **Kwalase** supra at 141i-j-142a.) The accused and the complainant are from the same community and have to live with each other in the same community for probably the rest of their life times. As **Rheenen J** in **S v J and Others** 2000 (2) SACR 310 (C) at 312 observed the suspended sentence and, in this case, supervision by a probation officer, in my view, 'will not do much if anything to promote the accused to reintegrate and assume his constructive role in society.' (as required by article 40 (1) of the Convention to the Rights of the Child.)"

- [21] Correctional supervision as a stand alone sentence as provided for in terms of section 276(1)(h) of the CPA has all the facets

of addressing the seriousness of the offence yet correcting the accused within the very community he has wronged. Through the co-operation of other institutions such as NICRO the accused and the complainant can be brought together to address the cause of this conflict. The accused can accept responsibility properly and in the presence of the complainant and relevant role players and even apologise to the complainant for the wrong he has committed. This is or can be acceptable in a society even as distorted as the one presented by the presiding officer in this case.

- [22] This will also auger well with the principles of restorative justice which are now well recognised and are commonly applied in our courts in appropriate cases. Through the application of restorative justice principles not only will the offender be punished but the underlying problems that caused the conflict will be resolved. The complainant as a victim of crime will be given recognition through direct participation in the criminal justice system. The imbalance caused by this transgression will be corrected. See **S v Shilubane** 2008 (1) SACR 295 (T);

S v Maluleke 2007 JDR 1143 (T); **S v M** 2008 (3) SA 232 (CC). See too **SS Terblanche Guide to Sentencing in South Africa** 2nd Edition, 174 - 178.

[23] I am of the view that the presiding officer's view of the community that she serves, that it is barbaric and believes in violence to sort out its problems, comes out strongly in her sentence in this case which creates the impression that she is not only biased but overemphasises the interests of the society and generalises too much because of her own personal views. In this case, as I have indicated above, this warrants an interference with the sentence imposed by her.

[24] Lastly Bloemfontein Magistrate court held at Batho has, in its innovative initiative to decrease the number of young offenders in prison, developed a set of forms of alternative sentencing which I believe can go a long way to give guidance on sentencing of youthful offenders as specifically catered for in terms of section 290, 276(1)(h) and 297 of the CPA. It will be

advisable to have this form and guidelines spread throughout the province in its entirety for guidance in appropriate cases.

[25] In the circumstances I make the following order.

ORDER:

- 1. The conviction is confirmed.**
- 2. The sentence imposed on 26 November 2009 is set aside and substituted by the following:**

“In terms of section 297 (1) (a)(i)(cc) of the Criminal Procedure Act 51 of 1977 the imposition of sentence is suspended for a period of 1 (one) year subject to the following conditions:

- 2.1 The accused is placed under the supervision of a probation officer in terms of section 290(1)(a) of Act 51 of 1977.**
- 2.2 The accused should attend and participate in programmes as determined by the probation officer, aimed at rehabilitation of youthful offenders in liaison with NICRO and Department of Social Development.**

- 2.3 The accused should attend responsibility learning and crime prevention programmes as structured by the probation officer in liaison with his aunt, class teacher NICRO and Department of Social Development.
3. The sentence is antedated to 26 November 2009 to include the period already served.
4. The accused must be brought before the Magistrate court Bethulie, to appear before the same presiding officer who finalised this matter, to be informed of the sentence imposed and to subject himself to supervision by a probation officer as set out in para 2 of this order.

B.C. MOCUMIE, J

I concur.

K.J MOLOI, J

/BCM