



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH, PRETORIA)**

TO: MAGISTRATE NELSPRUIT

High court ref no. 616

Magistrate serial no. 38/08

Case no. 1721/08

In the review matter:

STATE

VERSUS

BHEKI DLADLA

REVIEW JUDGMENT

LEGODI J,

The matter was initially laid before Ishmail AJ on automatic review when he raised issues with the trial court as follows:

"1. Why accused 1, who has no previous convictions, is sentenced in terms of section 276(1) (i) whereas accused 3 who has previous conviction has been sentenced in terms of section 276(1)(h)?"

The two accused referred to in the proceedings as accused 1 and 3, were found guilty in the magistrate court Barberton on a charge of house breaking with the intent to commit a crime unknown to the state.

Having been found guilty, the accused 1, who is a first offender was sentenced in terms of section 276(1) (i) of the Criminal Procedure Act. This sentence has the effect that, the accused 1 will have to go to jail, but that the Commissioner of Correctional Services will have the discretion to place the accused 1 under correctional supervision.

The accused 3, who has three previous convictions of theft, four previous convictions of house breaking with intent to steal and theft, and one previous conviction of being found in possession of suspected stolen goods, was sentenced to correctional supervision in terms of section 276(1) (h) of Act 105 of 1997, the effect of which being that the accused does not go to jail.

The Director of Public Prosecutions in his comments finds nothing wrong with the sentence imposed on the accused 1. The Director of Public Prosecutions, however, feels that the sentence on the accused 3 is shockingly lenient, but seeing that the matter has been brought before us on automatic review, nothing could be done about the sentence. Indeed such a sentence cannot be interfered with in terms of section 304(2) (c).

I am however, not in agreement with the Director of Public

Prosecutions regarding the accused 1 ' sentence. The trial court in justifying the accused 1 ' sentence responded amongst others as follows to the query which was directed to him by Ismail AJ;

"I had token Exhibit "B" attached to the record into consideration, especially paragraph 13, accused no 1 was found to be an unsuitable candidate for section 276(1) (hj. Such reasons being duly substantiated in the aforementioned paragraph. I agree with the recommendation that a more suitable sentence option for accused 1 would be section 276(1] (i) instead of direct imprisonment, thus allowing the Commissioner to exercise his discretion which will ultimately benefit the accused 1, thus blending in a measure of mercy in this sentence".

Exhibit "B" referred to in the statement is a correctional officer's report, paragraph 1.3 which is been referred to by the trial court in the statement reads as follows:

"The fact that the offender is monitored while under correctional supervision affords the community a measure of protection, but the fact that this accused does not have a suitable positive address information with no family who can take responsibility for him and not having employment, makes him a risky for correctional supervision. The accused can disappear at anytime and it will be very difficult to trace him which makes him becoming an absconder highly possible". The compiler of the report having said this, then concluded as follows: *" The accused does not qualify for community supervision in terms of Article 276(1) (h), of the Criminal Procedure Act 51 of 1977, but sentence in accordance with 276(1){It can be considered by the Honourable Court"*

I have very serious problems with the sentiments expressed in paragraph 1.3 of the report and the conclusion reached. Unfortunately, the trial court relied on the findings by the Social Worker or probation officer's report.

In 1.2(b) of the report the following is stated:

“According to the accused, he is resided with his mother who passed away during January 2008 and an older sibling who was in and out of prison for the past few years. The address was visited, but nobody was found at home and contact person is probationer currently on the system who is giving problems, thus the address cannot be viewed as a suitable or positive for monitoring”.

It is not like, the accused is not having a place of residence. His mother has passed away in 2004. His brother is said to be in and out of jail. However, I do not think that this should have been used against him.

There is no suggestion that the accused is not residing or staying at his home. Appropriate conditions to his correctional supervision, could be monitored by the correctional services officials.

Two things need to be emphasized. Sentencing is an exercise of a discretion. Such a discretion to be exercised judicially and fairly having regard to all relevant factors which had to be considered on an equal basis without over emphasizing or less emphasizing the one against the other. Whilst probation officers' reports are important, in truly considering correctional supervision as sentencing option, such reports and recommendations should not

substitute the court's discretion in deciding the appropriate sentence.

I am not satisfied that the trial court in the instant case found itself as been entitled to depart from the recommendations made by the Social Worker in her report. For example, accused 3, who was proved to have been a jail bird was given direct correctional supervision in terms of section 276(1)(h), because the Social Worker recommended so.

The second aspect which is of great concern to me is the disparity between the sentence imposed on accused 1 and that which is imposed on accused 3. It is like as a first offender, a good lesson and reform can be obtained from prison. It must be accepted that quite very often, those who go in jail for the first time, come out less reformed. The capacity to deal with first offenders and properly deal with reformatory programmes appears not to be effective or well enforced. Therefore, sending a first offender to jail hoping him or her to be reformed would not always be an ideal.

The Director of Public Prosecutions had suggested that we should not interfere with the accused 1 sentence. I do not agree with this suggestion. The disparity of sentence is so grave that, to allow the sentence to remain could bring the criminal justice system into a disrepute. I am sure it must be puzzling to the accused 1 as to how a person who is having so many convictions should find himself out of jail when he, as a first offender must go

to jail.

Two things must be said. Firstly, while the public is entitled to prosecution against any one individual, one cannot sacrifice the individual entirely in offering that protection to it. The most the court can do consistently with justice, is to protect the public for as long a period as seems commensurate with the accused 1 's deserts. **(See S v Mkhize 1973 (3) SA 284(N)**

I do not think that there was a need to sacrifice the accused in the circumstances of the case. The accused 1 is a first offender. Although there is no rule of law entitling a first offender, as of right to a suspended sentence, simply because, the accused is a first offender it has nevertheless been a consistent practice of our courts not to send first offenders to jail. **(See S v D's Este 1971 (3) SA 107 (E).** I don't think accused 1 really deserved to go to jail.

Secondly, imposition of correctional supervision in terms of section 276(1) (h) is not a sign of weakness or lenient sentence. It is now possible for a trial court to impose a very serious sentence without making use of imprisonment, which can destroy whatever good characteristics as far as the offender or prisoner is concerned. It is now possible to impose a severe punishment and to serve the interests of the community by imposing a deterrent and strict sentence other than imprisonment. **(See S v R 7993(7) SA 476(A) and 7993 (1) SACR 209 (A).**

The accused 1 was sentenced on the 2 April 2009, by now he has already spent four months in jail. This cannot be reserved.

Consequently, I would make an order as follows:

1. Conviction of the accused 1 is confirmed.
2. The sentence imposed on the accused 1 is hereby set aside and substituted with:
“The accused is sentenced to four months imprisonment antedated to the 2 April 2009 which is the date on which the accused was sentenced”.
3. The accused should therefore immediately be released from jail unless so detained in connection with other offences.

M F LEGODI
JUDGE OF THE HIGH COURT

I, agree it is so ORDERED

W L SERITI
JUDGE OF THE HIGH COURT