

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape, Kimberley)

Case Nr: CA&R 21/09
Case Heard: 31/08/2009
Date Delivered: 18/09/2009

In the matter between:

CLIVE STREAK

Appellant

and

THE STATE

Respondent

Coram: Kgomo JP et Mjali AJ

JUDGMENT

KGOMO JP

- [1] I have read the judgment of my colleague Mjali AJ and concur therein. However, I wish to make a few remarks. It is a worrying feature which is recurrent when an accused pleads guilty in terms of s112 of the Criminal Procedure Act and the State signifies that it accepts the plea, usually on a lesser charge, that the accused would subsequently contend that the State or, like in this case, the presiding judicial officer was debarred at the sentencing phase from adducing evidence at variance with the facts set out in the

accused's guilty plea. If the State states unequivocally that the facts in the guilty plea accords with the information (evidence or documentation) at its disposal and it has no additional evidence extraneous to the accused's statement to present to the Court in aggravation or otherwise then the issue between the parties are sufficiently circumscribed. The State must then be held to its undertaking on the facts only.

- [2] However, if the State merely states that it accepts the plea all that it conveys to the Court is that it is satisfied that the accused has admitted all the elements of the crime with which the accused is charged or the lesser charge or the competent verdict he or she has pleaded guilty to. The State is in effect saying there is now no lis or dispute between them as far as the verdict is concerned. It would not only be wrong but also a sheer waste of time and resources to flesh out the sometimes skeletal facts set out by an accused in his guilty plea when all that remains is the sentencing phase. See **S v Sparks & Another** 1972(3) SA 396 (A) at 404 C-D where Holmes JA says:

"In that light, the words 'trial' 'verdict' and 'the issues to be tried', in their ordinary meaning, do not refer to any proceedings after conviction. In particular, 'verdict' is traditionally understood to refer to the decision whether the accused is guilty or not guilty. Indeed, on a plea of guilty being entered, the 'trial' ends, since there are then no further issues to be tried in regard to verdict---. This leaves the question of sentence, including facts relating thereto, exclusively within the jurisdiction of the Judge."

See also **S v B** 2003(1) SACR 51 (SCA) at 60e (para 7).

- [3] The foregoing view accords fully with the provisions of ss112(2) and (3) (particularly the latter subsection) of the Criminal Code which we need to remind ourselves of.

They read: *“(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under [subsection \(1\)\(b\)](#), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.*

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.”

- [4] In **Maroulis v The State** (240/2008) [2008] ZASCA 161 (27/11/28), unreported, this issue was left open but **Mpati P**, who wrote the unanimous judgment of the Court, had this to say:
- “[11] Mr Price, who appeared in this court on behalf of the appellant submitted, as he did in the court below, that the magistrate misdirected himself in certain respects. The first such*

*misdirection, it was argued, was that the regional magistrate allowed the prosecutor, after conviction, to lead evidence in aggravation, which was inconsistent with the contents of the appellant's statement in terms of s 112(2) of the Act. This inconsistent evidence relates to the assault described by the complainant after he had allegedly fallen on the pavement until he lost consciousness, and the object allegedly used in the assault. Mr Price submitted that the prosecutor ought not to have been allowed to lead such evidence. He referred in this regard to this court's decisions in **S v Ngubane** 1985 (3) SA 677 (A) at 683 D-F and **S v Legoa** 2003 (1) SACR 13 (SCA) paras 26 and 27.*

[12] The court a quo dealt with this submission as follows:

*'The evidence led by the state after conviction, in my view, did not contradict the appellant's version in any material respect. The evidence by the complainant regarding the use of his fists and a brick by the appellant is in my view not a contradiction of the version of the appellant. The appellant stated that he used an object but was not at all clear as to what it actually was. His reference to the lid of a dustbin was vague and he himself expressed uncertainty. The evidence of the complainant, therefore, does not contradict the appellant's but supplements it and fills in the detail of what occurred. This is admissible in terms of the provisions of section 112 (3) of the Act (see *S v Swarts* 1983 (3) SA 261 (C); *S v Moorcroft* 1994 (1) SACR 317 (T)). In any event the magistrate did not make a specific finding that it was a brick, but accepted, as he should have, that the attack was with a blunt object.'*

In the view I take of this matter, I find it unnecessary to enter into this debate. Suffice it to say that I agree with the last sentence of the passage just quoted. ”

- [5] In my respectful view there is a lot to be said for the views expressed by the court a quo with reference to what the SCA quoted in its para 12 of the Maroulis matter. My views are further fortified by what the Appellate Division stated in **S v Du Toit** 1979(3) SA 846(A) at 857H-858A that:

“Wanneer die aard van die misdaad en die belang van die gemeenskap oorweeg word, is die beskuldigde eintlik nog op die agtergrond, maar wanneer hy as strafwaardige mens vir oorweging aan die beurt kom, moet die volle soeklig op sy persoon as geheel, met al sy fasette, gewerp word. Sy ouderdom, sy geslag, sy agtergrond, sy geestestoestand toe hy die misdaad gepleeg het, sy motief, sy vatbaarheid vir beïnvloeding en alle relevante faktore moet ondersoek en geweeg word. En hy word nie met primitiewe wraaksug beskou nie, maar met menslikheid en dit is hierdie menslikheid wat in elke geval, hoe erg ook al, vereis dat versagtende omstandighede ondersoek moet word. Hierdie versagtende omstandighede, indien daar is, skep die genadefaktor waarna in hierdie Hof vantevore verwys is en wat dan na oorweging van alle ander relevante omstandighede, moet lei tot 'n gepaste vonnis.”

- [6] The State must therefore be vigilant not to render the provisions of s112(3) of the Criminal Code nugatory or to tie the Court's hands

behind its back. One cannot fight rampant crime in this way. When the State and the defence intends to enter into plea-bargain proceedings in terms of s105A of the Criminal Code they must go all the way to the sentencing phase and not stop at the verdict. Plea-bargaining is a specifically designed plea and sentence agreement to do justice and expedite the disposal of cases, which must be encouraged.

MJALI AJ:

- [7] The appellant, a 54 year old farm manager, having been initially charged with attempted murder in the Regional court, sitting in Kimberly, on the strength of a plea of guilty to assault with intent to do grievously harm, was convicted on his plea and sentenced to 24 months imprisonment. He now appeals against the sentence only.
- [8] The factual background is as follows. At the time of the offence (24 August 2006), the appellant was a farm manager at Al Drie Boerdery in Ritchie. The complainant, 20 year old Freddy Wolf, was a former employee at the farm. He had been expelled from the farm three weeks prior to the incident. He was then forbidden from re-entering the farm.
- [9] On the day of the incident the complainant visited the farm to collect his belongings from his girlfriend who was still staying on the farm. The appellant received a message that the complainant was assaulting his girlfriend and was a nuisance in the workers'

residential quarters.

[10] Being duty-bound to keep peace and harmony as a farm manager, the appellant proceeded to where the complainant was and ordered him to leave the premises. The complainant complied, but as he was in the process of leaving the angry appellant kicked him three times on his shin. The appellant then twisted his arm in an attempt to force the complainant to climb onto the van so that he could convey him off of the farm.

[11] The complainant broke loose and ran around the workers' residential quarters. The appellant fired what appears to be a warning shot in an attempt to stop complainant from fleeing. This did not deter the complainant. The appellant then enlisted the assistance of two farm workers, Messrs Moeng and Motloa, to recapture him by chasing after him with the van. They found the complainant in one of the fields hiding in bushes. Ostensibly angered by the fact that the complainant was not co-operating with him and in an attempt to force him to climb on the van as well as to stop him from fleeing, the appellant delivered one blow with an iron pipe to his head.

[12] The appellant then tied a noose with a rope around the complainant's neck and tied him to the rails of the van. According to the appellant the noose was not so tight such that the complainant would be strangled thereby. The complainant describes the rope as thick and made of nylon, similar to the ones that are used to tow vehicles. The complainant was loaded onto the van and was driven to the workers residential quarters to collect his goods. When the

complainant indicated to the appellant that he wanted to leave the premises on his own, the appellant drove behind him to ensure that he was indeed leaving the farm.

[13] The complainant was seen by a doctor a day after the incident. According to the medical report the complainant had a lump on the forehead and some neck bruises. The doctor further concluded that the lesions observed on the complainant were not life threatening.

[14] Concerned about the age of the complainant and some gaps in the plea-explanation, the Court called the complainant to testify on the extent of his injuries. Apart from the injuries mentioned in the medical report, the complainant suffered injuries to his fingers, was punched on his stomach and his private parts were trampled on by Motloa on the instruction of the appellant.

[15] Contrary to version of the appellant, the complaint testified that the rope around his neck was tight and it strangled him. He testified further that when the van started moving, Moeng and Motloa pushed him off the van.

[16] Counsel for the appellant, Ms Erasmus, submitted that the sentence imposed is shockingly inappropriate and that the magistrate erred by not according sufficient weight to appellant's personal circumstances. She further submitted that the magistrate erred in taking into account evidence outside the plea of the appellant when considering sentence. I deal with the latter question first.

[17] The evidence of the complainant was called after the conviction of the appellant on his guilty plea. It was intended to place evidence before the court to impose an appropriate sentence. Section 274 (1) of the Criminal Procedure Act No. 51 of 1977 provides that, “ a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed”

[13] **Farlam JA** in **S v Rasengani 2006 SACR 431 (SCA) at 437g** stated; “ In my view the Judge should have called one or more of the psychiatrists who interviewed the appellant so as to obtain information on the matters I have set out above. That he had the power to do so appears clearly from s 274(1) of Act 51 of 1977 which provides as follows:

“ a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed”

In this regard it is also helpful to call to mind what **Curlewis JA** said in **R v Hepworth 1928 AD 265 at 277**, viz

“ A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done”. See also **S v Sanei 2002 (1) SACR 625 (W) at 628 f-i.**

[18] In the Rasengani matter the sentence imposed was set aside and

the matter remitted to the trial court to hear evidence so as to be able to impose a sentence which is in accordance with justice. The Sanei and Rasengani decisions are applicable in this matter and as such I am of the view that the magistrate was entitled to hear any evidence to arrive at an appropriate sentence in this matter. He did not commit any misdirection by having done so.

[19] I come now to the issue of the harshness of the sentence imposed by the magistrate. It is a trite principle of our law that sentencing is within the discretion of a trial court and a court of appeal may only interfere in certain limited circumstances.

In S v Sadler 2000 (1) SACR 331 (SCA) Marais JA at 334H–335A stated:

“The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a ‘striking’ or ‘startling’ or ‘disturbing’ disparity between the trial court’s sentence and that which the appellate Court would have

imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised."

[20] I am of the view that the trial court did commit an irregularity in evaluating all the relevant factors with regard to sentence. The learned Magistrate failed to attach sufficient weight to the fact that the appellant at 54 years was regarded as a first offender. Although it appears from the case law that a first offender cannot expect as a matter of right to receive a sentence that does not involve direct imprisonment, it is nevertheless a salutary and important principle of punishment that, wherever possible, a first offender should not be sent to prison. See, for example, **S v Kulati 1975 (1) SA 557 (E) at 559A–560H, S v Sakabula 1975 (3) SA 784 (C) at 786H–787H, S v Ceylon 1998 (1) SACR 122 (C) at 123j–124b** .

[21] It is true that the crime committed by the appellant in this case is a serious one. One certainly cannot take a supine view of the manner and the circumstances in which the assault on the complainant was perpetrated. The complainant was treated in a most degrading manner. He found himself at the mercy of the appellant. However, having regard to the personal circumstances of the appellant, the question is whether the magistrate imposed a sentence which appears to be in accordance with justice or whether the sentence is such that it calls for interference.

[22] The community expects that a serious crime will be punished, but

the law enjoins at the same time that mitigating circumstances must be taken into account. For these reasons, I am satisfied that the magistrate did misdirect himself by not attaching sufficient weight to the fact that the appellant is a first offender. This court is accordingly at liberty to assess sentence afresh and impose an appropriate sentence.

[23] In my view, this is a case where the imposition of direct imprisonment should be avoided. A fine with an alternative term of imprisonment, coupled with a suspended sentence as well as an order for a compensatory fine in favour of complainant in terms of s300 of the Criminal Procedure Act No. 51 of 1977 would, in the circumstances of this case, have been much more appropriate. The compensation would ameliorate the hurt feelings of the complainant, whose civil claim would in any event be prescribed by now.

[24] We enquired from appellant's counsel whether the appellant, who was present in court with his attorney, would be able to pay a fine of R10 000,00 (ten thousand rand) and a compensatory fine of R5000,00 (five thousand rand) in favour of the complainant. This was confirmed. Appellant's attorneys volunteered that the compensation be paid into their trust account for remittance to the complainant. State counsel signified that the State had no objection to this sentence option being exercised by the Court. This approach has obviated the remittal of the case to the Magistrate to inquire into the appellant's ability to make payment, alternatively for the adducing of such evidence before us, which an

appeal court is authorised to do.

[25] In the result the appeal is upheld and the sentence of two years imprisonment imposed on the appellant is set aside and substituted with the following.

1. The appellant is sentenced to pay a fine of R10 000 or in default of payment to serve one year to imprisonment and a further one year imprisonment which is suspended for a period of 5 years on the following conditions:

1.1 That the appellant is not convicted of an offence involving violence to the person of another which is committed during the period of suspension;

1.2 That the appellant is to pay an amount of R5000,00 (five thousand rand) as compensation to the complainant, Mr Freddy Wolf, in terms of section 300 of the Criminal Procedure Act No. 51 of 1977 within 10 (ten) days of this order. This amount is to be paid into the trust account of Engelsman Magabane Incorporated, the appellant's attorneys, who will pay it over to the complainant and submit proof thereof to the registrar of this court.

2. The R 10 000-00 fine is deferred to 16 October 2009.

G N Z MJALI

ACTING JUDGE

NORTHERN CAPE DIVISION

I concur.

F DIALE KGOMO

JUDGE PRESIDENT

NORTHERN CAPE DIVISION

On behalf of the Appellant:
On behalf of the Respondent:

Adv. S.L Erasmus
Adv K. M Kgatwe