

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 59/2008

In the case between:

THE STATE

and

MOSA GEORGE TSHOLO EN 2 ANDER

CORAM:

WRIGHT J *et* MOCUMIE J

JUDGEMENT:

MOCUMIE, J

DELIVERED ON:

8 MAY 2008

REVIEW JUDGEMENT

[1] The three accused appeared in the Magistrate Court Botshabelo on housebreaking with intent to commit an offence unknown to the prosecutor. On 8 October 2007 they were all convicted as charged. On 31 October 2007 they were all sentenced to 18 months imprisonment. They were unrepresented.

[2] My Brother **Wright J** forwarded a query in the following terms:

“1. Redes vir die vonnis word verlang, veral wat die
jeugdigheid vandie beskuldigdes betref.

2. Beskuldigde 3 se ouderdom is 28 jaar volgens die klagstaat, en 18 jaar volgens die uitspraak. Wat is die korrekte ouderdom van Beskuldigde 3?
3. Waarom is daar nie oorweeg om verslae te bekom t.a.v die Beskuldigdes nie?“

[3] The Magistrate has given reasons as requested and I thank her or him.

[4] The facts of the case are shortly as follows: The three accused were amongst seven people who broke and entered the complainant's shop on the night of 26 August 2007. The roof of the shop was damaged to gain entry. Nothing was removed from the shop. The damage caused to the roof amounted to R9 000,00.

[5] Accused 1's personal circumstances are set out as follows. He was 18 years old when the offence was committed. He was not attending school. He was unemployed. He was not married but had one dependent and was maintained by his mother. He had no previous convictions.

[6] Accused 2's personal circumstances are as set out. He was

18 years old when the offence was committed. He was unmarried, with no dependants. He was passed on in Grade II. His parents had passed on.

[7] Accused 3's personal circumstances are set out as well. He was 18 years old when the offence was committed and also has no previous convictions. He is unmarried with one dependant. He passed Grade II and was not permanently employed but earned R150,00 per available job. He was residing with his mother who was unemployed.

[8] In his response the Magistrate intimated that accused 3 was indeed 18 years old contrary to his initial view. In his response to whether it would not have been appropriate to have obtained a presentence reports in respect of all three accused persons, he held a different view basing his reasoning on **S v Erasmus, Stefanus Cloete en vyf hersieningsake, ongerapporteerd onder verwysing 2025/2002** gedateer 14 Oktober 2002.

[9] The issue which I think was raised by my Brother **Wright J** is whether the Magistrate exercised his or her discretion judiciously when (s)he sentenced the three accused to the aforementioned sentence taking into account the fact that the three were all 18 years of age and that they did not have any previous convictions.

[10] It is trite that sentencing is a function that lies within the discretion of the trial court. The accused are all 18 years old first offenders. Two are not attending school whilst one was attending school when he was sentenced. They all resided with their parents. One's parents had already passed on.

[11] The Magistrate correctly found that housebreaking is a serious offence and was rife. It is clear from the Magistrate's reasons for sentence and his or her comments that (s)he placed considerate weight on the interests of society.

[12] However serious the offence may be, it is irregular to proceed from the assumption that because the offence is serious, imprisonment was the only appropriate sentence. See **S v D**

1999 (1) SACR 122 (NC). In spite of the seriousness of the crime the court dealing with cases involving young children where moral culpability cannot be compared to that of an adult should approach appropriate punishment in principle and as far as possible with the view of the potential for rehabilitation and care. See **S v Nkosi en 'n ander** 2000 (2) SACR 94 (T).

[13] The Magistrate states, on reliance of **S v Erasmus** *supra* that (s)he decided not to request pre-sentence reports. It will be assumed that (s)he was of the view that it was not necessary as the three accused were already above 18 years of age when (s)he sentenced them.

[14] For instance correctional supervision (without imposing it on the trial Court) is one of the options for an alternative sentence provided for in the Criminal Procedure Act No. 51 of 1977 especially in the case of youthful offenders. See the extensive exposition and value of correctional supervision by Kriegler AJA in **S v R** 1993 (1) SACR 209 (A). It can be imposed in

the most serious of offences including murder. In obtaining a presentence report in this case the trial court was not obliged to impose correctional supervision. It is an option. The value of a presentence report is simply to give the trial court a better view of the accused person. To give the Court a picture of the different options and whether rehabilitation should come to the fore in the particular case. It is always desirable to obtain such in cases of youthful offenders.

[15] In my view the Magistrate misdirected himself or herself in concluding that a prison sentence without an option of a fine was the only suitable sentence to impose on 18 year old first offenders.

[16] I have considered remitting the matter back to the Court *a quo* to reconsider sentence afresh. However, in the light of what I have said above and his or her remarks I have decided against it because this Court is in as good a position to impose an appropriate sentence as the trial Court. I am of the view that a fine coupled with imprisonment wholly suspended, would be appropriated, taking into consideration that the accused have already been incarcerated for a considerable

period.

[17] In the circumstances I make the following order:

17.1 The convictions are confirmed.

17.2 The 18 months imprisonment imposed in respect of all three accused by the Magistrate is set aside and replaced with the following:

“R1 200,00 (one thousand two hundred rand) or 8 (eight) months imprisonment wholly suspended for 3 years on condition that the accused is not convicted of housebreaking with intent to commit any offence committed during the period of suspension.”

17.3 In terms of section 282 of the Criminal Procedure Act No. 51 of 1977, the sentence is antedated to 31 October 2007.

B. C. MOCUMIE, J

I concur.

G. F. WRIGHT, J

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