

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

Review No. : 13/08

In the review between:-

THE STATE

versus

M G K

CORAM: HANCKE, J *et* MOCUMIE, J

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 26/06/08

[1] This matter came before me on automatic review in terms of section 302 read with 304 of the Criminal Procedure Act 51 of 1977 (*“the CPA”*). The accused, a 16 year old young man was charged with two counts of robbery and convicted of only one count on 31 January 2008 in the Magistrate court of Botshabelo, Free State. He was sentenced to 18 months imprisonment wholly suspended on certain conditions. The accused was unrepresented.

- [2] I was of the view that the sentence was too harsh and forwarded a query to the Magistrate requesting further reasons for sentence as the accused was 16 years of age at the time of imposition of the sentence. The Magistrate has since given reasons on two pages in which he indicates amongst others that “*ervaring leer dat hierdie vonnisse op hersiening bekragtig word.*”
- [3] The accused was correctly convicted of robbery. The issue is whether the Magistrate exercised his discretion judiciously when he sentenced the accused to the aforementioned sentence.
- [4] The Magistrate found that when imposing a sentence in offences such as this, the interests of the society should come forward strongly. He is of the view that because he sits with these type of offences day-in-and-day-out it is important for the court to bring home the message that this is a serious offence and also to protect the community of Botshabelo.

- [5] The Magistrate found that the fact that the accused was with four other people that could not be arrested, the complainant did not retrieve his articles and that the complainant was struck with a stone counted against him. He then on this basis found that other options of sentence including an option of a fine or correctional supervision were not appropriate.
- [6] The impression one gains from the reasons for sentence is that the Magistrate in this case has been inundated with this type of offences committed by youngsters in Botshabelo and is almost at the end of his wits on how to deal with them except through the only option he believes will solve the problem: direct imprisonment imposed consistently . In a society where crime is escalating at an alarming rate one can appreciate the difficulties he encounters in imposing appropriate and individualised sentences in almost similar cases that come before him every day.
- [7] In the same breath a Court dealing with a case involving young children whose moral culpability cannot be compared

to that of an adult should approach punishment as far as possible from a point of view of the potential for rehabilitation and care. In **S v Nkosi** 2000 (1) SACR 135 (W) guidelines were laid down for the sentencing of juvenile offenders for both serious and less serious offences. See also **S v Z en Vier Andere Sake** 1999 (1) SACR 427 (E) at 430f; **Commentary on the Criminal Procedure Act**: Du Toit *et al*

[8] In **S v Phulwane & Others** 2003 (1) SACR 631 (T) at 634h to 635a Bosielo J states:

“When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officer invested with the task of sentencing such a youth to ensure that she or he receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best suit the needs and interests of the particular youth. It is, after all, a salutary principle of sentencing that sentence must be individualised. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote rehabilitation of that particular youth and have, as its priority, the

reintegration of the youthful offender back into his or her family and, of course the community.”

- [9] It is clear in this case that the Magistrate did not even reflect on the appropriate sentence to impose. His starting point is that the only appropriate sentence in this case is that of direct imprisonment. As he spells it out in his additional reasons: *“As die beskuldigde in hierdie saak nie 16 jaar oud was nie ,maar bo die ouderdom van 18 jaar,sou ek nie gehuiwer het om hom tot 3 jaar direkte gevangenisstraf te vonnis nie,veral ...die bepalings van art 4 van die Wet op Gevaarlike Wapens in die distrik van Botsabelo geld.”*

- [10] It is important to reiterate what authors in Criminal law and the Courts have stated from time immemorial that imprisonment without an option of a fine even if suspended should be imposed after a careful consideration of all the facts of the case, the personal circumstances of the accused, the nature and prevalence of the offence and the societal purpose that can be served by the imposition of the sentence including its possible negative effect on the accused.

[11] It is clear from the Magistrate's reasons for sentence and his comments in his response to my query that he placed considerable weight on the interests of society and totally disregarded the socio-economic factors alluded to by the probation officer in the presentence report, the youthfulness of the accused and the fact that the accused was a first offender.

[12] However serious the offence may be, it is irregular to proceed from the assumption that because the offence was serious, imprisonment was the only appropriate sentence as stressed by the Magistrate in his two-paged response. See **S v D** 1999 (1) SACR 122 (NC) at 127a-b; **S v Du Toit** 1979 (3) SA 846 (A) at 857H-858A.

[13] Correctional supervision is one of the options for an alternative sentence provided for in the CPA. It is a severe sentence that has rehabilitation and retribution compacted into one. It gives results required if the aim of the presiding officer is amongst others to ensure that this young offender is

brought in line with the correct way of living where he can serve punishment amidst the society he has wronged. It can even be imposed in the most serious of offences including murder. See the exposition and value of correctional supervision by **Kriegler AJA** in **S v R** 1993 (1) SACR 209 (A). The presentence report that the Magistrate was furnished with was to assist the Court in weighing all the options and then imposing an appropriate sentence. Not to impose the sentence which in the view of a probation officer is the appropriate sentence.

- [14] When imposing sentence a presiding officer must blend the sentence it has in mind and eventually imposes with mercy. Mercy is not a sign of weakness or fear for the criminals. In **S v Groenemeyer** 1974 (2) SA 542 (C) at 544A-B the Court states:

“Die Howe is nie hier om wraak te neem nie. Die Howe sink nooit, ooit, tot die peil van die misdadiger nie. Straf moet onder alle omstandighede menslik wees, en, wat meer is, straf is nie iets wat jy uit 'n slotmasjien

haal nie. Jy druk nie 'n misdaad in die masjien en haal 'n

straf uit nie. Dit is die kenmerk van ons regstelsel dat mense gestraf word as hulleself, as mense. Dit is altyd die mens self wat die reg mee te doen het, en die landdros het dit uit die oog verloor in hierdie vonnis. Hy het nie reg gehandel nie toe hy gesê het die Hof het nie genade nie. Die Hof het genade, - ek neem aan by 'genade' hier meen hy die Engelse woord 'compassion' - vir elke persoon wat voor hom verskyn. Daar kan geen geregtigheid wees sonder genade nie."

[15] A year later in **S v J** 1975 (3) SA 146 (O) at 159F-G **Steyn J** (as he was then) echoed the same words when he stated:

"Die Hof is nie 'n pynbank nie. Dit is nie 'n instrument van pyniging waarop 'n beskuldigde gebreek moet word omdat hy 'n weersinwekkende misdaad gepleeg het nie. Die Hof is die instrument waardeur die samelewing handel beide om homself te beveilig sowel as om die beskuldigde, indien moontlik, deur middel van straf te red as mens en te verbeter wanneer hy

homself so gedra het dat hy die samelewing onwettiglik leed en skade aangedoen het. Wanneer 'n mens 'n lid

van die samelewing op onwettige wyse onregmatiglik leed of skade aandoen dan doen hy die samelewing self ook leed en skade aan. Maar, ons is 'n beskaafde Westerse gemeenskap met die Christelike geloof as die grondslag en die hoeksteen waarop ons Staat en ons samelewing gebou is. Dit moet altyd in gedagte gehou word en die goue boodskap van die Bergprediking moet ook nooit uit die oog verloor word nie. Wanneer 'n Hof moet besluit watter straf opgelê moet word, moet hy derhalwe aandagtig daaraan wees dat die doodstraf die onbeskryflik-uiteerste stap is wat die samelewing kan doen en dat 'n menslike lewe uitgewis behoort te word alleenlik wanneer dit onder die omstandighede van die besonderesaak algeheel onvermydelik is en daar dus in werklikheid vir die Hof geen ander keuse is nie."

In our context the values underpinning our Constitution will be the cornerstone where Steyn, J refers to the Bible and the death penalty. But the message still resonates well today.

[16] I am of the view that the Magistrate misdirected himself in concluding that a prison sentence without an option of a fine, or correctional supervision, was the only suitable sentence to impose on a 16 year old first offender in these circumstances. A suspended term of imprisonment remains direct imprisonment.

[17] 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 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 in view of the investigation done by the probation officer indicating that the accused is not a candidate for correctional supervision a fine coupled with imprisonment wholly suspended, would be appropriate.

In the circumstances I make the following order:

- 1. The conviction is confirmed.**
- 2. The sentence of 18(eighteen) months imprisonment wholly suspended for 3 years on certain conditions imposed by the Magistrate is set aside and substituted with the following:

“R1200.00 (one thousand and two hundred rand) or 8 (eight) months imprisonment which is wholly suspended for 3 (three) years on condition that the accused is not convicted of robbery, theft, assault or attempt thereto committed during the period of suspension.”**
- 3. The Clerk of the Court, Botshabelo should bring this judgment to the attention of the accused.**

I concur.

B.C. MOCUMIE, J

S.P.B.HANCKE,J