

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

Case No.: 209/2008

In the case between:

THE STATE

and

JIM HENDRICKS

CORAM: VAN ZYL, J *et* MOCUMIE, J

JUDGEMENT: MOCUMIE, J

DELIVERED ON: 5 AUGUST 2008

REVIEW JUDGEMENT

[1] This matter came before me on automatic review in terms of section 302 read with 304 of the Criminal Procedure Act, No. 51 of 1977 (*“the CPA”*). The accused, a 29 year old man was charged with robbery in the Magistrate Court, Botshabelo. He pleaded guilty. He was convicted as charged and sentenced to 2 years imprisonment.

[2] I was of the view that the sentence was too harsh and forwarded a query couched in the following terms:

“Taking into account factors enumerated on page 11, lines 15 – 25 and page 12, lines 1 – 5 is the sentence not too harsh?”

[3] The Magistrate has given his reasons *inter alia* he states:

“Ek is steeds van oordeel dat die vonnisse onder die omstandighede heel gepas is en volstaan met my extempore uitspraak. Dit mag wees dat ek die persoonlike omstandighede oorbeklemtoon het. Alhoewel elke saak op eie meriete behandel word, kan ek Haar Edele die Regter belas met die hersiening, gerustel dat die vonnis in oorstemming is met die vonnisse in die verlede opgelê.” (Own underlining.)

[4] The accused was correctly convicted of robbery. The issue is whether the presiding officer exercised his discretion judiciously when he sentenced the accused to the aforementioned sentence. It is trite that sentencing is a function that lies within the discretion of the trial court. See **Rex v Mapumulo and Others** 1920 AD 56; **S v Rabie** 1975 (4) SA 855 (A); **S v Barnard** 2004 (1) SACR 191 (SCA). A Court of Appeal or review is not entitled to interfere with the

imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably. See **S v Pillay** 1977 (4) SA 531(A) at 534H–535G. Amongst other varying factors depending from one case to another it may be a misdirection for the presiding officer to overemphasise the seriousness of the offence or the interest of the society and underemphasise the personal circumstances of the offender which would then warrant the court on appeal or review to interfere.

- [5] The accused's personal circumstances are as set out by the presiding officer in his judgment. He pleaded guilty to the charge. The cellphone was recovered. The accused's two previous convictions are more than 10 years old and the presiding officer indicates correctly so that he considered him a first offender. The accused is 29 years old and married with a child who is a year and a half old. The wife is unemployed. The accused is the sole breadwinner. He is employed by White Car for a year and earns R1 500,00 per month. Prior to his current employment he was working for Hamilton Glass

Windows. He went up to standard 9 (the current Grade 11).

[6] The presiding officer found that a suspended sentence is not appropriate because no court should allow itself to be “*emotionally influenced*” by the accused’s personal circumstances. The presiding officer found that an option of fine is not appropriate because of the seriousness of the offence regardless of whether the accused can afford to pay a fine. He found further that correctional supervision was not appropriate as the accused fell in the category of criminals that ought to be removed from the society. On these bases he found that the only appropriate sentence was that of direct imprisonment.

[7] The impression one gains from this response is two fold. One, the presiding officer has not distinguished or treated the accused as an individual who has his own personal circumstances and who has committed a robbery not exactly the same as the robberies that come before him every day. Two, the presiding officer has told himself that he will treat all robberies alike and impose the same sentence – direct

imprisonment irrespective of the different circumstances of the individuals appearing before him. 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. More so that he has been doing so for many years.

- [8] In the same breath the sober impartiality of a presiding officer is measured *inter alia* by the manner in which (s)he is capable of imposing sentences which are punitive but yet rehabilitative in nature. The type of sentence that an accused person can learn from which should not as far as possible include amongst others loss of employment, temporary or permanent. See **S v D** 1995 (1) SACR 259 (A) at 264e.

- [9] It is clear that the presiding officer did not reflect on the appropriate sentence to impose. The passage in which he indicates that he considered other options of sentence flies in the face of the type of sentence he subsequently imposed. It is misdirection for the court in this case to have overemphasised the seriousness of the crime and

underemphasised the personal circumstances of the offender. See **S v Zinn** 1969 (2) SA 537 (A) at 540 F–G. The sentence imposed in this case and in these circumstances is manifestly inappropriate taking into account that the accused was employed and earning R1 500, 00 and could afford to pay a fine. This is not the type of case where the accused ought to be removed from society yet. In my view a fine coupled with imprisonment would have sent the right message to the accused and to the society. See **R v Tshabalala en Andere** 1960 (2) SA 35 (O); **S v Bekilifa**; **S v Gonya**; **S v Tshesi**** 1968 (4) SA 369 (O); **S v Dimbe** 1981 (1) SA 994 (O).

- [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 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 importantly 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 presiding officer's *ex tempore* reasons and his comments to my query that he placed considerable weight on the interests of society and totally disregarded the fact that the accused was a first offender, he pleaded guilty, was employed and many other mitigating factors in his favour.

[12] I am of the view that it is important to re-emphasise that, however serious the offence may be, it is irregular to proceed from the assumption that imprisonment was the only appropriate sentence as is clear from the presiding officer's reasons. See **S v Du Toit** 197 (3) SA 846 (A) at 857H – 858A.

[13] When imposing sentence a presiding officer must blend the sentence it has in mind 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.'"

[14] **Steyn** J (as he was then) in **S v J** 1975 (3) SA 146 (O) at 159F-G 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.

[15] I am of the view that the presiding officer misdirected himself in concluding that in this case a prison sentence without an option of a fine, was the only suitable sentence to impose on a 29 year old first offender in these circumstances.

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

ORDER:

- 17.1 The conviction is confirmed.**
- 17.2 The sentence of 2 years imprisonment imposed by the presiding officer on 27 August 2008, is set aside and substituted by the following:**

“R1 200,00 (One thousand two hundred rand) or 8 (eight) months imprisonment.”

- 17.3 The Clerk of the Court, Botshabelo should bring this judgment to the attention of Correctional Services, Mangaung Correctional Services and the accused immediately.**

B. C. MOCUMIE, J

I concur.

2008/07/31 3.25
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