

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

Review No. : 206/2008

In the review between:-

THE STATE

versus

ITUMELENG GODFREY KEMME AND 2 OTHERS

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

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 21 AUGUST 2008

REVIEW JUDGMENT

[1] The three accused appeared in the Magistrate Court, Botshabelo on a charge of housebreaking with intent to steal and theft. All three were convicted as charged. Accused 1 and 2 were sentenced to 2 (two) years imprisonment. Accused 3, a 16 year old young man, was sentenced to 18 (eighteen) months imprisonment wholly suspended for 3 (three) years on certain conditions.

- [2] I was of the view that the sentence was too harsh and sent a query to the presiding officer who has since responded. I thank him for the response.
- [3] In short the facts of the case are as follows: The three accused broke into a shop in Botshabelo by entering through the door. They stole a pair of All Star tekkies and groceries worth R1 070,00. The goods were recovered from them the next day, before they could sell them as they had intended.
- [4] All three accused pleaded guilty to the charge. They were then questioned in terms of section 112 of the Criminal Procedure Act 51 of 1977 (*“the CPA”*). They were convicted as charged based on their answers to the questions posed by the presiding officer. I am satisfied that their convictions are in order. However what has caused me serious consternation is the sentences which were imposed on the three accused. For the reasons which follow hereunder, I have found the sentences imposed to be shockingly inappropriate and disproportionate to the gravity of the offences for which they were convicted.

- [5] 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. It is an established principle that sentence must strike a judicious balance between the accused's personal circumstances, the seriousness of the offence and the interests of the society for which the trial court must strive. It follows therefore that it will be a misdirection for a presiding officer to overemphasise the seriousness of the offence and underemphasise the personal circumstances of the offender as this might result in a warped or inappropriate sentence which will warrant the court on appeal or review to interfere.
- [6] It is clear that the personal circumstances of accused 1 as set out in the reasons for sentence are eminently impressive. He pleaded guilty to the charge; the goods were recovered; the shop was not damaged as in other similar cases in order

to gain entry, in fact it is not even clear how the accused gained entry into the shop as they said that they opened the door. Of great importance accused 1 has no previous convictions; this proves that he has no propensity to commit crime; he is 20 years old and went up to Grade 11. He has no children or dependants. He is employed and earns R50, 00 to R60, 00 per day; it is clear he has a positive attitude towards self-improvement; there are prospects of rehabilitation.

- [7] The personal circumstances of accused 2 are equally impressive. He also pleaded guilty; thus showing remorse and insight into his conduct; the goods were recovered which implies that the complainant did sustained no loss; he is only 19 years of age and attended school up to Grade 8; he is not married and has no children or dependants. At the time of the commission of this offence he was employed although no further details in this regard were recorded or noted; he therefore shows no propensity to commit crimes; he has shown that he can be rehabilitated and converted into a useful member of society.

[8] Accused 3 is the youngest of the three; he is 16 years of age; having been born on 11 February 1991; understandably he has no dependants; he only went up to Grade 8 at school; he is the second child out of four children. A presentence report that was requested by the president officer indicated that accused 3 stayed with both parents and further that accused 3 was a good mannered child although he is said to be disobedient to his father; accused 3 has no previous convictions which like accused 1 and 2 means that he has no propensity to commit crimes; he has huge prospects of being successfully rehabilitated and saved from a new criminal path; all efforts should be made to transform him into a useful member of society; it is a real possibility that he acted under wrong influence by both accused 1 and 2 who are older than him.

[9] The presiding officer was of the view that the only appropriate sentence in respect of the three accused was direct imprisonment even if suspended in the case of accused 3, the youngest of the three. The presiding officer justified the sentence by stating that a court should not allow itself to be "*emotionally influenced*" by an accused's personal

circumstances. Although he accepts that the accused's personal circumstances should be weighed with all other relevant factors to sentence the presiding officer held the view that because of the seriousness of the offence and the prevalence of the offence a suspended sentence will not be appropriate in respect of all three accused. In motivating the sentence, the presiding officer stated the following:

“Alhoewel elke saak op eie meriete behandel word kan ek Haar Edele die Regter belas met die hersiening, gerusstel dat die vonnisse in ooreenstemming is met die vonnisse in die verlede opgelê,”

- [10] To my mind such a judicial approach to sentencing shows a clear misdirection. Although it is permissible for a presiding officer to have regard to previous sentences in similar cases, it would be a serious misdirection for presiding officers without much reflection or independent thoughts, to accept such previous sentences as a norm or decisive. Self evidently such an approach would militate against the equally important principle of individualisation of sentences to meet peculiar merits of each individual accused. I would readily concede that the notion of the norm or previous

sentence in similar cases is meritorious as it addresses the equally valid considerations of consistency, predictability and uniformity. However uniformity should not be elevated to a principle at variance both with a flexible discretion of the trial court and with the accepted limitation of appellate interference therewith. Failure by the trial court to exercise its discretion would, I fear, result in sentences which are warped. See **S v Giannoulis** 1975 (4) SA867 (A) at 873E-H

[11] Reverting to the facts of this case, it is clear that notwithstanding the different circumstances of each case and saying so, the presiding officer imposed one and the same sentence without exception in his court because “... *die*

vonnisse in ooreenstemming is met die vonnisse in die verlede opgelê.”,

[12] The presiding officer creates an impression that this High Court has previously confirmed this type of sentence without questioning and thereby giving some kind of judicial approval to the arbitrary imposition of sentences. The impression so created cannot be correct judging from the number of similar sentences which have been set aside previously.

[13] The impression one gains from the reasons for sentence is that the presiding officer in this case has been inundated with these types of offences in his court committed by youngsters in Botshabelo. It is clear that the presiding officer is at the end of his wits on how to deal with them and believes that the only effective solution to the problem is 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. It would however be wrong to sacrifice youthful offenders who have prospects of being rehabilitated on the alter of general deterrence.

[14] It remains a trite and salutary principle that a court dealing with a case involving a young offender 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) very important and useful 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; Du Toit et al Criminal Procedure Act: Commentary.

[15] I have found the *dictum* of **Bosielo J** in **S v Phulwane & Others** 2003 (1) SACR 631 (T) at 634h to 635a particularly apt where he states: “ *When a youth or juvenile strays from the path*

of rectitude to criminal conduct, it is the responsibility of judicial officers 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 the 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.”

[16] It is particularly disconcerting to me that it is clear that the presiding officer failed to consider alternative sentencing options, like a fine or correctional supervision. The value of

correctional supervision as a strong but yet constructive and corrective alternative sentencing option cannot be overemphasised. See **S v R** 1993 (1) SACR 209 (A) at 220g-h; **S v Omar** 1993 (2) SACR 5 (C) at 13d-e; **S v Volkwyn** 1995 (1) SACR 286 (A) at 289d. To my mind this is a typical case in which correctional supervision in respect of all three accused could and should have been considered and imposed within the limitations of section 276(1)(h) including the suitability of the accused as candidates for correctional supervision.

- [17] It is clear that the presiding officer overemphasised the interests of the society at the expense of the personal circumstances of all three accused especially accused 3. In my view he adopted a completely incorrect approach. That on its own is not just a mere misdirection but of the nature and extent alluded to in **S v Pillay**, at 535E-G which vitiates the decision on sentence. This Court thought of remitting this matter for reconsideration of sentence. However in view of what I have said above this Court is in a good position as the trial court to impose an appropriate sentence as the trial

court in respect of accused 1 and 2 as all facts relevant to sentence are on record.

[18] In respect of accused 3, the pre-sentence report that is attached to the record is scanty and has no details that would assist any court to consider *inter alia* the different types of rehabilitative programmes that the accused would benefit from. Nor does the report show whether the accused attends school, church or any recreational activities in order to formulate the time for house arrest and community service appropriately.

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

ORDER

In respect of accused 1

19.1 The conviction is confirmed.

19.2 The sentence of 2 (two) years imprisonment imposed on 19 March 2008 is set aside and substituted by the following:

“R900, 00 or 8 months imprisonment”

In respect of accused 2

19.3 The conviction is confirmed.

19.4 The sentence of 2 (two) years imprisonment imposed on 19 March 2008 is substituted by the following:

“R900, 00 or 8 months imprisonment”

In respect of accused 3

19.5 The conviction is confirmed.

19.6 The suspended sentence of 18 (eighteen) months imprisonment imposed on 19 March 2008 is set aside and the case is remitted to the presiding officer to consider imposition of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977.

19.7 The presiding officer should obtain an updated and fully detailed pre-sentence report from Social Development and Correctional Services.

19.8 All three accused should be brought before the court to be informed of this order within 7 days of this order.

B.C. MOCUMIE, J

I concur.

C. VAN ZYL, J

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2008/07/22 04:18 PM
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