

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the appeal of:

MARCELLE STEYN 1st appellant

and CRAIG PRICE 2nd appellant

versus

THE STATE respondent.

Coram: JANSSEN, SMALBERGER, JJA, et GALGUT AJA.

Date of Hearing: 9 May 1986.

Date of Judgment: 30 May 1986

J U D G M E N T

GALGUT AJA:

The two appellants were jointly charged in the
Regional Court for the division of Southern Transvaal with
committing three counts of robbery with aggravating

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circumstances. In addition second appellant was charged with a fourth count of robbery with aggravating circumstances and a fifth count of being in possession of a fire-arm, without a licence, in contravention of sec. 2 of Act 75 of 1969. They each pleaded guilty to the respective charges brought against them and after statements in terms of sec. 112(2) of Act 51 of 1977 had been handed in, they were each found guilty as charged. Sentences of imprisonment were imposed on each count. Details of the charges and sentences are set out later in this judgment.

The sentences imposed in each case were ordered to run concurrently. In the result the effective periods of imprisonment imposed were in the case of first appellant four years imprisonment, and in the case of second appellant five years imprisonment. Each appellant appeals only against the sentence.

The relevant dates and places at which the robberies were committed by the two appellants and the details

of the amounts taken are as follows:

Count 2: On 3 September 1972, R700 in cash from the
United Building Society, Linden.

Count 3: On 7 September 1982, R600 in cash from the
Netherlands Bank, Greenside.

Count 4: On 10 September 1982, R6 000 in cash from Barclays
Bank, Kensington.

In addition the second appellant (Price) on 6
August 1982 robbed Nedfin Bank, Randburg of R6 000 in cash.
This was count 1. He was also found guilty of being in
possession of a .22 Beretta Pistol without being the licen-
ced holder thereof. This was count 5.

The sentences imposed on both appellants were two
years imprisonment on count 2; two years imprisonment on count
3; and four years imprisonment on count 4. Second appel-
lant was sentenced to a further four years imprisonment on
count 1 and six months imprisonment on count 5.

/ In.....

In the case of first appellant it was ordered that the sentences on counts 2 and 3 were to run concurrently with the sentence on count 4. The effective period of imprisonment was therefore 4 years. In the case of second appellant it was ordered that the sentences on counts 2, 3 and 5, and three years of the sentence on count 1 were to run concurrently with the sentence on count 4. The effective period of imprisonment was, in his case, 5 years.

The appellants appealed to the Transvaal Provincial Division against the sentences only. Their appeals were dismissed. Leave having been granted by the Court a quo, they now appeal to this Court against the sentences imposed.

The robberies were committed in the following manner. In counts 2, 3 and 4 they made use of a motor-cycle which had been borrowed. They both wore crash helmets and dark glasses to prevent identification. First appellant

/ waited.....

waited outside the building on the motor-cycle with its engine idling, the purpose being to achieve a quick getaway.

Second appellant entered the building and handed a written note to the cashier or teller. One of the notes used was handed in at the trial. It reads:

"This is a robbery. Do not make any contact with anybody whatsoever. I am armed. If anybody tries to stop me, I will shoot without hesitation. If you press off any alarms, you will pay for it. Just put R6 000 in this bag, starting with the used notes. If you try to stop me when I leave, I will kill you."

In count 1 second appellant, who acted alone, followed a similar procedure in the bank save that he did not have the pistol on this occasion. The pistol in count 5 belonged to his father. It had no magazine or bullets. The pistol remained at all times in second appellant's pocket. First appellant's age at the time was seventeen years and three months and second appellant was seventeen years and one month.

/ After.....

After the appellants had been found guilty, evidence in mitigation was led on behalf of both appellants. In the case of first appellant a clinical psychologist, Mr Cumes, and a probation officer, Mr De Coning, testified. For reasons which will appear later, I deem it necessary to set out their evidence in some detail.

Mr Cumes was registered with the South African Medical and Dental Council; he was a lecturer in the department of psychology at the University of the Witwatersrand; he also carried on a private practice. He carried out a series of interviews with first appellant and his parents and prepared two reports which were read out and handed in at the trial. He testified and adhered to his reports and was cross-examined thereon. It appears from his evidence and reports that first appellant's parents had been divorced; that thereafter his mother married a Mr Harvey; that the latter marriage had also broken up; that as a result of the charges against first appellant his mother and Mr Harvey had come together again; that first appellant and

/ his.....

his stepfather had for some time prior to the break-up "been in conflict"; that first appellant's biological father showed no real concern for him and had not fulfilled his role as a father. Extracts from Mr Cumes's report made in November 1982 read:

"Conclusions and Recommendations

Marcelle Steyn is, at 17, a boy with problems on a number of different levels. These can be summarized as follows:

- (a)
- (b) Even without these charges, he has had difficulties with school adjustment and with adapting to work since leaving school. He has had no clear direction, being neither able to find it for himself, nor having been given satisfactory guidance by his parents in this regard.
- (c) His parents' marital difficulties have created a climate of tension and disunity in the home. His mother and stepfather have been too preoccupied with their own struggle and their own occupational involvements to recognize their son's difficulties, and take appropriate corrective action. Consequently Marcelle's problems have worsened and he has gradually withdrawn from his family and become one of a number of boys whose behaviour, lacking appropriate guidance, has deviated from
/ an.....

an acceptable standard.

- (d) There are indications of personality problems that could, in the future, express themselves in more severe form, not so much as delinquency but rather as psychiatric disorder.

The following recommendations are addressed to the parents:

Mr and Mrs Harvey need to put their house in order,

They will need in addition to give attention to Marcelle's future. In my view his leaving school was premature, and his parents should consider re-negotiating the issue of school attendance with him. They need to appreciate that he is not emotionally mature or stable enough to deal satisfactorily with the adult world, and that should he be obliged to do so prematurely, the consequences for him are likely to be most unfavourable.

The final recommendation is addressed to the Court:

Since I do not see Marcelle Steyn's primary problem as one of criminality, but rather one of emotional instability, immaturity and confusion, I do not see imprisonment as being either in society's or in the boy's interests. I would rather see Marcelle and his parents deal directly with the problems as they have been outlined above, recognizing that the behaviour that has led to this trial is, in Marcelle's case, a cry for help."

/ The.....

The following extracts from his second report, which was made in March 1983, are significant:

" The family responded to the recommendation that Marcelle return to school, and a small college was chosen which apparently supervises its pupils closely. Marcelle reports that he has adjusted well. He in fact took the issue of returning to school to his parents initially, and they support his wishes in this regard. Mr and Mrs Harvey agree that Marcelle has settled well, has made friends, and brings them home. They consider his progress satisfactory.

In a telephone conversation on 16th March, 1983, with Mr J.F. Burmeister, principal of Rand Tutorial College, I was told that he and his teachers are happy with Marcelle, and that there have been no complaints about him. He has co-operated both behaviourally and scholastically and is making satisfactory progress.....

In the interview with me, Marcelle appeared to have at the present a more open and communicative relationship with his parents. Despite the impending court case, he seemed to be a more settled and happier young man.

With regard to the noxious factors in the family, Mr and Mrs Harvey and Marcelle were all unanimous that certain changes had taken place. They spend more time together and the barriers between them appear to have broken down. Marcelle has 'returned', as it were, to the family and is more positively involved both with his parents and his brothers. He reportedly / now

now brings his friends home. My observations of the way the family members now related to one another supports their view that there is a greater coherence in the family

In summary, from the point of view of a clinical psychologist, Marcelle Steyn's serious contravention of the law emerged out of a situation that has to some extent now been rectified."

Mr De Coning, the probation officer from the Department of Health and Welfare had previously had three years service in the Department of Prisons. He handed in a report to which he adhered in evidence. He investigated the personal circumstances of first appellant and also had interviews with first appellant (five or six) and also with his parents. He had read Mr Cumes's report and testified that he agreed with everything there said. Extracts from Mr De Coning's report, which were repeated in his evidence, read:

"Die beskuldigde het slegs periodieke kontak met sy biologiese vader behou. Volgens die beskuldigde en sy moeder het die biologiese vader by verskeie geleenthede die kinders belowe dat hy hulle op 'n gegewe tyd sal kom haal vir besoek en dan net nooit opgedaag nie. Hierdie / situasie.....

situasie het die beskuldigde as verwerping beleef.....

Ondersoek het aan die lig gebring dat die ouers (i.e. his mother and stepfather) so betrokke was by hul eie huweliksprobleme dat die werklike emosionele behoeftes van die beskuldigde nie geïdentifiseer en ontmoet is nie.

Hierdie ongebalanseerde gesinsituasie het die beskuldigde gelaat sonder 'n belewenis van emosionele sekuriteit. Weinig gestruktureerde dissipline is gevolglik deur die ouers toegepas wat tot gevolg gehad het dat die beskuldigde geen daadwerklike gestruktureerde verwysingsraamwerk opgebou het waarmee hy kon identifiseer en waarvolgens hy sy optrede kon rig nie.

..... Hy was egter geneig om homself emosioneel te onttrek van die gesin.

Hierdie gedragspatroon kan geëvalueer word in die lig van die beskuldigde se belewenis van verwerping van die biologiese vader en 'n gebrek aan emosionele sekuriteit van sy moeder en stiefvader.....

Gedurende Oktober tot Desember 1982 het die beskuldigde by 'n steenkoolmyn te Ogies gewerk waarna hy as voltydse student by die Rand Tutorial College ingeskryf het om sy st. 10 te voltooi. Volgens die skoolhoof is die beskuldigde se vordering bevredigend en word geen probleme ondervind ten opsigte van kollege bywoning en uitvoering van pligte nie. Die beskuldigde verbaliseer sy insig ten opsigte van die belangrikheid om homself skolasties verder te bekwaam na aanleiding van sy ondervindings in die werksituasie.....

/ Onderzoek.....

Ondersoek het aan die lig gebring dat die beskuldigde in wese nie krimineel geneigd is nie, alhoewel betrokke by 'n oortreding van so ernstige aard. Hy is nie geneig tot oneerlikheid nie wat ook deur bronne geraadpleeg bevestig is.

Sy basiese betrokkenheid by misdaad kan gesien word as 'n sameloop van ontwrigtende gesinsomstandighede en emosionele konflikte wat hom ontvanklik gemaak het vir misdaad, eerder as 'n wesenlike kriminele geneigdheid.

Tydens die ondersoek het dit duidelik geblyk dat die beskuldigde daadwerklike skuldgevoelens ervaar jeens sy onaanvaarbare misdaadgedrag....

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GEVOLGTREKKING

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Oorweging is geskenk aan gevangenisstraf aangesien die Gevangenisdiens oor professionele personeel beskik wat die beskuldigde kan bystaan.

Die beskuldigde se emosionele onvolwassenheid en problematiek op emosionele vlak laat twyfel of hy homself binne die gevangenisopset sal kan handhaaf, en word dit betwyfel of die beskuldigde as sodanig emosioneel sal ontwikkel dat hy na ontslag sy plek sinvol sal kan volstaan in die samelewing. 'n Verdere oorwegende faktor is die feit dat die beskuldigde nie in wese krimineel geneigd is nie. Dit is die mening van die proefbeampte dat die beskuldigde sinvol kan baat by professionele aandag binne die ope gemeenskap.

/ AANBEVELING

AANBEVELING

Indien die Hof in ooreenstemming is met die voorafgaande word dit aanbeveel dat die Hof oorweging skenk aan die volgende:

(a) Vonnis ingevolge art. 290 van die strafproseswet 51 van 1977 asook;

(b) Vonnis ingevolge art. 297(1)(b) op die volgende voorwaardes:

(i) dat die beskuldigde hom sal onderwerp aan die toesig van 'n proefbeampte en enige vorm van behandeling wat deur die proefbeampte nodig geag en voorgeskryf word;

(ii) dat die beskuldigde nie van woonplek mag verander alvorens die beampte vooraf in kennis gestel word nie;

(iii) dat die beskuldigde hom gedurende die tydperk van opskorting nie skuldig maak aan misdryf van oneerlike aard nie."

I do not find it necessary to detail the provisions of the said sections 290 and 297(1)(b), save to say that the latter provides for a suspended sentence.

The following extracts from Mr De Coning's evidence are significant.

/ "Edelagbare,.....

"Edelagbare, soos ek ook in die verslag tereg aan die Hof probeer dit uitspel het, is die beskuldigde emosioneel 'n onvolwasse persoon op hierdie stadium, en sien ek hom nie as 'n persoon wat homself emosioneel toereikend sal kan handhaaf binne 'n gevangenisopset nie, en ook maklik misbruik sal kan word, na aanleiding van sy emosionele problematiek. Emosioneel gesproke Edelagbare, het die beskuldigde beslis 'n emosionele agterstand wat sy ouderdom betref.

So, hy is so te sê 'n baie jong sewentien?--
Dis korrek Edelagbare.

.....

Het u enige ander vorm van straf oorweeg, soos die oplegging van houe, of vonnis tot aanhouding in 'n verbeteringskool of iets van dié aard?-- Edelagbare, ek het in my aanbeveling het ek lyfstraf aanbeveel ingevolge, onder punt (a) 8(a) (sic!), Artikel 290. Tweedens het ek verder aanbeveel ingevolge art. 297, 'n opgeskorte vonnis op voorwaarde dat hy onder toesig geplaas word, met gevangenisstraf oorweeg soos uiteengesit in die verslag. Wat 'n verbeteringskool betref Edelagbare, in die verslag het ek uitgespel dat ek nie kon waarneem of feitegegewens kon versamel wat daarop kon dui dat die beskuldigde krimineel geneigd is nie, en om daardie aspek is hy nie 'n kandidaat vir 'n verbeteringskool nie, waar daar spesifiek gespesialiseer word in die hantering van die kinders met kriminele geneigdheid. So ek het die vonnisse oorweeg. "

/ Mr De Coning.....

Mr De Coning was also of the view that first appellant took part in the robberies because his friend, the second appellant, had problems which arose when second appellant's motor-cycle was stolen. As to this aspect more later.

In the case of second appellant a clinical psychologist, Mr Christodoulou, and a probation officer, Mr Cairns, gave evidence. The second appellant's father had two sons by a previous marriage. Second appellant was born of the present marriage and was the youngest child in the home. The evidence is to the effect that conditions in the home were far from satisfactory and at one stage the marriage nearly broke up. Very little attention was given to appellant (and his brother and stepbrothers). There was no discipline in the home. Second appellant had been expelled from school. He went to work and saved money to pay for a motor-cycle. His father had warned

/ him.....

him that it might be stolen. A week after it had been bought it was in fact stolen. Second appellant was afraid to tell his father of the theft and said it was being repaired. He thereafter acquired another motor-cycle, identical to the stolen one, with the money acquired from the robberies. He later attended the same tutorial college as the first appellant, where he passed standard 8. It is against the above background that the extracts, set out below, from the evidence of the probation officer, Mr Cairns, and of the clinical psychologist, Mr Christodoulou, must be weighed.

Mr Cairns was a probation officer from the Department of Health and Social Welfare. He investigated the circumstances of second appellant. He had had interviews with second appellant's father and stepmother and had also on four occasions had interviews with the second appellant. He had thereafter prepared a report which was read out and handed into the court. I quote

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the following extracts from the report:

"The accused is the youngest of 4 children, the two elder sons being from Mr Price's previous marriage.

.....

Mrs Price has previously received treatment for depression and hypertension and has on one occasion taken an overdose of sleeping tablets.

During a period of frequent arguments (with her husband) the accused was sent to stay with his elder brother. On another occasion he would stay with friends.....

.....

Business pressure upon the marriage has at times been so great that separation has been contemplated.

.....

However, at High School he came into conflict with the headmaster with regard to type of sport. Instead of playing rugby at school he would excell at soccer privately. He also participated and excelled in non-school sports such as baseball and boxing. Such a behaviour indicates an alienation from school activities whereby he was unable to influence his acceptability amongst his school peers via sport.

He was regarded by the headmaster as a misbehaved boy and a bad influence upon the other children. He was noted to be disrespectful to female teachers, ultimately he was expelled from the school

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/ Of.....

Of paramount importance was the fact that the school secretaries viewed Craig as a well behaved boy. Based on their relationship with him they found it difficult to believe in his misbehaviour. Thus he exhibited pro-social behaviour in the presence of non-authority figures. The initial attitude of the school forcing the accused to participate in sport types against his own will precipitated non-conformist behaviour, gradually gaining momentum through confrontation with teachers.....

Rand Tutorial College, where he completed his St. 8 in 1982, report that his behaviour was fairly good and his work was satisfactory considering pressure related to the crime.

..... He has however been confused about his future and at present is best motivated to apply for an apprenticeship with the Defence Force for whom he has now become eligible. The structure in such circumstances would be ideal for the accused and would afford him greater direction in his career.

..... When his parents' car was stolen they responded with fury and intentions of revenge. The theft of the accused's motorbike instilled in him similar emotions and in fact he proceeded to implement the feelings of revenge against society.

.....

The accused worked industriously for a year in odd jobs for friends' parents in order to save for the purchase of the motorbike. Two weeks after its purchase the motorbike was stolen

A strong promulgating factor on the part of

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the accused is not so much that he wished to strike out at his parents but rather to avoid rejection by his father by replacing the bike that was stolen. His father had warned him against its theft. With most of the stolen money he replaced his stolen bike identically - his father remained under the impression that it had been in for repairs.

.....

It would appear that the crime was not so much committed by a potential habitual criminal but rather a youth seeking a form of acceptance initially from his family."

Mr Cairns concluded his report (and repeated this in evidence) as follows:

"Committal to a reform school may well be unsuitable to his character. It could well be a turning point in his life whereby he would manipulate and learn from other deviants. He does not normally tend in a criminal direction, for his present crime, however, he requires his first major deterrent.

Imprisonment would provide a similar effect to that of reform school. It would be more advantageous to society to attempt to utilize other forms of deterrent rather than place him in a situation wherein he would be directed more fully in deviancy.

A whipping to be supplemented by a suspended sentence could function as a deterrent for any similar repetition. Super-

/ vision.....

vision under a probation officer could provide the necessary guidance and counseling to both the accused and his parents.

RECOMMENDATION

In view of the abovementioned factors it is recommended that Craig Sutherland Price be dealt with in terms of Section 290 and Section 297(1)(b) of the Criminal Procedures Act of 1977 and that he be placed under the supervision of (a) probation officer."

Mr Christodoulou is a qualified clinical psychologist and registered as such with the South African Medical and Dental Council. He holds a Master's degree in clinical psychology and has been in private practice since 1974. He has dealt extensively with maladjusted adolescents and in particular with ones who have had criminal tendencies. His report was read out and handed in at the trial. He adhered to it in his evidence. It is very short and adds little to what was said by Mr Cairns. He stressed in evidence that second appellant is "still a very immature person" and added:

/ "I would.....

"I would say that the precipitating factor was the loss of the motorbike, which generated an emotional, emotionally immature revenge feeling at that specific point in time. It started a series of fantasy reaction which lead to a negative behaviour. I would say that there was a loss of control because of his emotional immaturity which lead to the various criminal acts being performed, but I don't see that they will continue if Craig is allowed the opportunity to learn to check his behaviour."

The following question and his answer thereto is significant.

"Should a period of imprisonment be considered in this, in this kind of case, what effect would you think that would have on Craig?-- Taking into account his ability to be influenced, purely because of his emotional immaturity and his age, I'd say it will have a more detrimental effect than a positive effect on him.

Would it have any positive effect at all?-- None whatsoever in my view."

Mr Christodoulou's report ends as follows:

"For any form of punishment to be effective in this situation, it would appear that the punishment and its immediate reactions would be the most successful in the form of caning followed by a form of suspended sentence, as he would be able to relate to these on his immature schoolboy level of thinking."

/ There.....

There was but little investigation as to what happened to the stolen money. It was not suggested that either accused still had any of it when they were arrested shortly after the last robbery. What does appear from the record is that second appellant told Mr Cairns that of the R6 000 which was taken on 6 August he took R100 and hid the balance in a sluit; that when he returned on the following day to pick it up, it had disappeared. It also appears from the evidence of the investigating officer that he was told that of the R6 000 taken on 10 September some fell out of the container while it was being held on the pillion of the motor-cycle and that the appellants did not stop to pick it up because there were many blacks in the vicinity. It appears that first appellant received approximately R1 100 of the stolen money with which he bought clothes for himself; that second appellant bought a new motor-cycle, which was identical to the stolen one and that the cost thereof was approximately R3 000.

/ I pause.....

I pause to point out that the crimes in counts 2, 3, 4 and 5 were committed within a period of 7 days and that the evidence suggests that the reason why second appellant committed the robberies in counts 2, 3 and 4 was because he had lost the money taken earlier in count 1.

The Magistrate in his reasons for sentence referred to numerous decided cases and set out the factors which have to be considered when deciding what is a proper sentence, viz., the seriousness of the offence, the interests of society, the personal circumstances of the accused as also the following two aims of sentence, namely deterrence and reformation of the transgressor. He then went on to say (I quote relevant passages from his reasons for sentence. The lettering is mine.):

(a) "Robbery, especially where aggravating circumstances are present, is a serious crime. It is also a crime which is very prevalent in the jurisdiction of this Court."

.....

(b) "This has lately become, what I will term, the popular method of robbing building societies and

/ banks.....

banks."

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- (c) "The Court has more specifically considered the views and the recommendations, not only by the two probation officers, but also the two clinical psychologists, and the evidence given by the investigating officer. The Court has inter alia seriously considered those parts that cover information about your social and domestic background. Information about you, the offenders, and especially the opinions regarding sentence, and the opinions as to the likely effect on you of imprisonment, probation, or some other form of punishment."
- (d) "The Court has considered the possible negative effect which imprisonment could have upon you, and has considered the various alternatives to imprisonment, such as postponement of sentence, and/or that you be placed under the supervision of a probation officer, or in the custody of a suitable person, reformatory, corporal punishment, a fine, or a suspended sentence, and the Court does not lose sight of the beneficial effects of a suspended sentence, especially a sentence suspended for example on condition that you submit yourself to the supervision or control of a probation officer,
- / or.....

or any other condition referred to in sub-section 1(a)(i) of Section 297 of Act No 51 of 1977."

- (e) "The purpose of a probation officer's report is to provide the Court with all available information which will assist in understanding the problems of the juvenile being dealt with, thereby enabling the Court to determine an appropriate punishment in all the circumstances."
- (f) "However, as was stated in the case of the State v H and Another 1978 (4) SA p 385, the probation officer's recommendation is merely an expression of opinion for the guidance of the Court."
- (g) "He (the judicial officer) must not slavishly follow the recommendation of the probation officer, and merely substitute the latter's view for his own."
- (h) "The Court is convinced that the sentences recommended by the probation officers and by defence counsel will be ineffective and will amount to an over-emphasising of your personal circumstances and of your age."

/ (i) "The....."

(i) "The Court is also convinced that in all the circumstances, you deserve to be sent to prison. The shock of a prison sentence may reform you, and the prison psychology department may be able to treat you."

I find myself in agreement with what is said in (a), (b), (c) and (g) above.

Ad (c), (d) and (f) above

It is correct that the recommendations of probation officers and clinical psychologists (and of course qualified psychiatrists) are expressions of opinion. However, as was said in the very case quoted by the Magistrate (S v H and Another 1978 (4) SA 385 (E) at p 386), where necessary such opinions "must be tested and subjected to critical analysis." Cf. also S v Mngomezulu 1972 (1) SA 797 (A) at 798G to 799H. The necessity for and importance of a probation officer's report when dealing with a juvenile offender appears from what is said in S v Jansen and Another 1975 (1) SA 425 (A) at p 427 H to 428 A and the

/ cases.....

cases there cited. As to how a psychiatrist's report is to be used, and this would apply also to reports by clinical psychologists and probation officers, appears from what is said in Mngomezulu's case cited above at p 798G to H.

In the present case the facts on which the psychologists and probation officers based their opinions were not in dispute. These were that the appellants came from disrupted homes in which there was no discipline and in which little attention was given to these youths; that they were immature even for youths of seventeen; that they were truthful youths and did not have criminal tendencies; that during the period from September 1982 till 30 June 1983 (the date on which sentence was passed) first appellant was at a tutorial college where his behaviour was good and it was expected that he would matriculate; that second appellant had continued to work and was behaving well and was in fact expecting to go into the Defence Force. It was

/ on.....

on these undisputed facts that these highly qualified psychologists who had had much to do with immature adolescents, based their opinions and stressed that the appellants should not be sent to gaol. The probation officers were from the Department of Health and Social Welfare. Both were experienced men. They were each of the view that the respective appellants did not need, nor would they benefit by, the discipline and teachings of a reform school. And certainly it was their view that appellants did not need a period in gaol to reform them. On the contrary, as I read De Coning's evidence, it suggests that emotionally immature adolescents (such as appellants were) might well, if sent to gaol, be returned to society with warped personalities.

Ad (h) above

The Magistrate gives no reason for coming to the conclusion that the sentences recommended will be ineffective. If one has regard to the experience and qualifi-

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cations of the probation officers and the psychologists and the facts on which they based their firm views, one would have expected that he would give reasons for differing from them.

Ad (i) above

The issue before the Magistrate was not whether appellants deserve to be sent to prison but what was a proper sentence. Moreover, as stated above, it was the view of the probation officers that a prison sentence might well have an adverse effect and that they did not need reform. They were emotionally immature adolescents; they did not need the benefits of a reform school. It must also be remembered that Mr De Coning did not overlook the fact that the prisons had a psychological department for long term prisoners, but despite this urged, and gave reasons why, gaol would not be beneficial.

To sum up what has been set out above. The

/ Magistrate.....

Magistrate gave no reason for differing from the psychologists and the probation officers who were experienced in their respective fields and who based their opinion on facts which were not disputed; he gave no reason for saying that the suggested sentences "will be ineffective"; he did not explain why he formed the view that by not sending them to prison "will amount to an over-emphasizing of your personal circumstances and of your age".

It follows that I am of the view that the Magistrate erred in the following respects. He did not attach sufficient weight to the evidence of the probation officers and the psychologists. Their opinions were based on undisputed facts. They were all experienced in their field; he failed to realise that the issue was not whether the appellants deserved to go to prison but what was an appropriate sentence. He did not have sufficient regard to the immaturity of the two appellants; he did not give due consideration.....

sideration to the evidence that these two youths would probably not benefit, in the sense of being reformed, from a period in gaol but might be ruined thereby.

No good purpose can be served by setting out the reasons given by the Court a quo for not interfering with the sentences imposed by the Magistrate. It is sufficient to say that it appears from the judgment of the Court a quo and the reasons given for granting leave to appeal to this Court that the learned Judges a quo were of the view that another Court might well find that the prison sentences were inappropriate.

On all the facts, and having regard to the recommendations of the psychologists and probation officers and their reasons therefor, this is a case where the future control of the appellants outside the walls of a prison will probably lead them back to be useful members of society, whereas long periods of imprisonment would have

/ the.....

the opposite effect.

For the reasons set out above this Court is free to interfere with the sentences imposed on the appellants. Due regard being had to the opinions and recommendations of the psychologists and probation officers and their reasons therefor, I am of the opinion that the prison sentences imposed should have been suspended on appropriate conditions, one of which would have been to place them under the supervision of a probation officer. A difficulty arises because almost three years have elapsed since the passing of sentence by the Magistrate on 30 June 1983. The fact that it has taken so long for the appeal to reach this Court is not due to any fault of the appellants. This Court must now impose a sentence which would have been appropriate on 30 June 1983. On that date both appellants were under eighteen. Had they then been placed under the supervision of a probation officer the provisions of sec.

/ 291(1)(b)

291(1)(b) of Act 51 of 1977 would have applied.

Hence the period of supervision would have expired when each appellant turned 21. They will, however, both turn 21 shortly. In the special circumstances of this case it would not be wrong to now order that the period of supervision be extended till each appellant reaches the age of 23.

In the result the appeals of both appellants succeed.

It is ordered that the following be added to the order made by the Magistrate:

- "A. The above effective period of four years imprisonment imposed on accused number one is suspended for five years on the conditions set out in paragraphs C and D hereunder.
- B. The above effective period of five years imprisonment imposed on accused number two is suspended for five years on the conditions set out in paragraphs C and D hereunder.
- C That the accused is not found guilty of
/ theft.....

theft or robbery committed during the said period of 5 years and for which he is sentenced to imprisonment without the option of a fine.

D. That each accused submits himself to the supervision of a probation officer until he reaches the age of 23. The Department of Health and Welfare is asked to allocate a probation officer for this purpose.

E. The Registrar of this Court is directed to send a copy of this judgment to the Department of Health and Social Welfare.

O. Galgut

O. GALGUT

JANSEN, JA)
SMALBERGER, JA) CONCUR.