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IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

High Court Case No: CA&R 66/06

Magistrate Case No: RC 38/04

Date heard: 30/10/2006

Date delivered: 3/11/2006

In the appeal matter of:

KOOS LOUW

APPELLANT

versus

THE STATE

RESPONDENT

Coram: **MAJIEDT, J et WILLIAMS, J**

JUDGEMENT ON APPEAL

MAJIEDT J:

1. The appellant appeals against his sentence of 10 years imprisonment of which 2 years were conditionally suspended for 5 years, on a conviction of attempted

murder.

2. The conviction followed upon a plea of guilty expounded in a written statement in terms of sec 112(2) of Act 51 of 1977.

The salient features of the plea of guilty are the following:

2.1 The appellant admitted that he had unlawfully and intentionally assaulted the complainant, an eight year old girl, with a thick vine-shoot (“wingerdloot”).

2.2 The aforesaid assault had been perpetrated on the hapless child due to her refusal to fetch wine for the appellant as instructed by him (there does not appear to be any family relationship between the appellant and the complainant).

2.3 The appellant averred that he had lost his temper due to the complainant’s insolence and he had beaten her repeatedly and uncontrollably until two of his friends had intervened and stopped him.

3. The trial magistrate described the appellant’s physique in

his judgment on sentence as “*well-built*”. The doctor who had examined her, described the complainant in his medical report as a “*slender built eight year old girl.*” The doctor noted the following injuries in his report:

- (a) an abrasion under the left eye and he noted that the complainant had complained of pain at the back of her head where the appellant had pinned her head down on the ground;
- (b) multiple soft tissue bruises over her torso, purple-blue in colour and caused by a long hard object; the bruises were particularly prominent over her back and underneath her shoulder blades;
- (c) the doctor counted six welts in total over her back and left flank and two over her left upper arm;
- (d) quite significantly the doctor added the following

conclusions (translated from Afrikaans and reproduced exactly as the doctor had written same):

“Brutal violent and unnecessary assault of an eight year old girl!!! Barbaric!!”

4. The abovementioned observations, contained in the standard J88 medical form, were supplemented by the doctor’s notes on the patient record and which formed part of the medical report handed in as an exhibit. The most important additional observations are the following:

- (a) the complainant had difficulty breathing during the examination, due to pain;
- (b) she had suffered a fracture of the right upper arm which he had set in a splint;
- (c) the bruises varied in width between 2 to 3 cm;
- (d) the bruises were typical railway line bruises normally caused by an object like a stick, kerie or sjambok.

5. These injuries were captured on photographs handed in as exhibits at the trial. The original photographs depict the injuries quite vividly and accords with the doctor's above-mentioned observations, namely purple discoloration of the skin along the prominent welts all over the front and back upper body and stomach and showing the complainant's right upper arm in a splint.

6. I have described in great detail the complainant's injuries to demonstrate that this had been a horrific, senseless and quite disturbing attack on a vulnerable eight year old child. I have no doubt that, sans the intervention of the appellant's two unnamed friends the consequences for the complainant would have been extreme. The force with which the blows had been inflicted, is quite graphically demonstrated by the fact that her right upper arm had been fractured in the process.

7. The trial magistrate approached the sentencing of the appellant on the basis that the provisions contained in Act 105 of 1997 ("*the Act*") are applicable and that a minimum sentence of 10 years is statutorily prescribed in respect of the present offence. This is obviously incorrect. Sec 51(2)(b)(i), read with

sec 52(1) of the Act and Part III of Schedule 2 to the Act, provides that a minimum sentence of 10 years imprisonment is prescribed ***inter alia*** for assault with intent to commit grievous bodily harm perpetrated on a child under the age of 16 years.

Attempted murder of a child under 16 years, as in the present case, is not included in Part III of the Schedule.

Having discovered his mistake afterwards, the trial magistrate readily granted the appellant leave to appeal to this Court against the sentence.

8. Mr Fourie, who appeared before us for the appellant, has quite correctly and properly pointed out that, while it is technically correct that attempted murder of a child under 16 years is not included in the minimum sentence provisions, it is utterly inconceivable that the Legislature had intended that it should be visited by a lesser sentence than the 10 years minimum sentence prescribed for assault with intent to commit grievous bodily harm perpetrated on a child under 16 years.

I share Mr Fourie's view that the present offence is in fact a more serious offence than the one listed in Part III of Schedule 2 to the Act, namely assault with the intent to commit grievous bodily harm on a child under 16 years.

9. The aforementioned omission of the offence of attempted murder committed on a child under 16 years involving the infliction of grievous bodily harm from the list in Part III of Schedule 2 is to my mind a serious oversight on the part of the Legislature. It should be corrected without delay. This case serves as a vivid illustration of the miscarriage of justice which may occur due to this lacuna in the statute.

10. Having laboured under this misapprehension, the trial magistrate found as compelling and substantial circumstances the appellant's plea of guilty, the fact that he had been under the influence of liquor and the fact that no previous convictions had been proved against him, consequently warranting a departure from the statutorily prescribed minimum sentence.

But for the aforementioned lacuna in the Act, it is quite conceivable that a sentence exceeding that prescribed for assault to commit grievous bodily harm on a child under 16 years would have been prescribed for an offence such as the present one.

In the premises, it can never be said that a sentence of 10 years imprisonment of which 2 years is conditionally

suspended, imposed in this case, is appealable on the basis of the magistrate's aforementioned misdirection on the law.

11. Quite apart from the aforementioned, the sentence cannot be said to be so severe that it induces a sense of shock; on the contrary I hold a strong view that the sentence is too lenient. I say so, because this young girl had been severely assaulted and the appellant's reason for doing so is an aggravating factor. To my mind there would have been good grounds for the Director of Public Prosecutions to have asked on appeal for an increase in sentence.

12. To conclude on the merits of the appeal: notwithstanding the trial magistrate's misdirection on the applicable legal prescripts, the appeal against sentence is devoid of any merit as Mr Fourie has correctly conceded.

13. A final disturbing aspect requires mention.

13.1 After conviction, the prosecutor led the evidence of

the investigating officer, Inspector Majere. He testified to the effect that the appellant's record of previous convictions was not available as yet, due to the fact that it had been discovered that the appellant had been operating under two different names, Koos Tieties and Koos Louw and under two different identity numbers. Inspector Majere testified further that to his knowledge, the appellant not only had a criminal record, but had also previously been declared a habitual criminal.

13.2 At its request, the State was granted an adjournment of some two weeks to obtain a full criminal record from the National Criminal Records office in Pretoria. At the commencement of the hearing two weeks later, the prosecutor again called Inspector Majere who testified that he had personally travelled to Upington from Kakamas, but had been unable to obtain the appellant's full criminal record there. Enquiries at the National Office also drew a blank, due to problems with the computer system there. The appellant's

attorney opposed a further postponement. The magistrate thereafter refused a further postponement on the basis that the appellant was constitutionally entitled to a speedy trial (the appellant had been arrested some 6 months earlier already).

13.3 The State was consequently not able to prove any previous convictions against the appellant.

14. Prior to the hearing of the appeal I had requested the legal representatives for the State and the appellant to prepare argument on whether it was competent for this Court to remit the matter to the trial court to afford the State a reasonable opportunity to attempt (again) to prove the appellant's previous convictions (if any).

Upon reconsideration and after having heard argument from Counsel, I am satisfied that to remit the matter for the aforementioned purpose, would offend the fair trial provisions contained in sec 35(3) of the Constitution, Act 108 of 1996.

It is highly probable that in the event that the matter is remitted and if previous convictions were to be proved against the appellant, that a more severe sentence would be imposed.

15. It has been decided in a long line of cases that it is the State's discretion to prove previous convictions and, in the absence of such proof, an accused has to be treated as a first offender.

See: **S v Khambule** 1991(2) SACR 277 (W) at 283 b – c;

S v Maputle 2002 (1) SACR 550 (W)

S v Njikaza 2002(2) SACR 481 (C)

S v Smith 2002(2) SACR 488 (C)

S v Kqawane 2004(2) SACR 80 (T)

16. In **S v Joaza** 2006(2) SACR 296 (T) Patel J said the following regarding the failure by the State to prove previous convictions:

"Previous convictions of an accused person certainly play an important role in the assessment of a fair and just sentence. Apart from the seriousness of the offence, it is a crucial determining factor to reflect an informed punishment which the offender deserves. If persons are simply regarded as first offenders and receive lenient

sentences then the administration of our criminal justice system will invite societal disdain."

These remarks are particularly apposite to the present matter. See further: **S v Sethokgoe** 1990(2) SACR 544 (T) at 545 i – j.

17. Of course, the prosecutor had in the present matter made a concerted attempt on two occasions to prove the appellant's previous convictions. Upon careful consideration of the facts and circumstances, I have taken the view that it cannot be said that the trial magistrate had exercised his discretion unreasonably in refusing the State a further (third) postponement in this regard, hence the decision not to remit the matter.

18. **The appellant's appeal against sentence is dismissed. His conviction and sentence is confirmed.**

SA MAJIEDT

JUDGE

I concur

C C WILLIAMS

JUDGE