

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO.: B1206/2001

REPORTABLE

In the matter between:

THE STATE

and

REGINALD BUYS Accused No. 1

RICARDO BUYS Accused No. 2

REVIEW JUDGMENT DELIVERED ON 19 JUNE 2002

DENZIL POTGIETER, A.J.:

This is a review in the ordinary course in terms of Section 302 of Act 51 of 1977. The accused were jointly charged in the Magistrate's Court, George with one count of malicious injury to property arising from an incident which occurred on 2 September 2001 when the house of Kerneels Stalmeesters situated at Golden Valley, Blanco in the district of George was damaged. Accused no. 1 was charged with a further count of malicious injury to property in respect of a separate incident that occurred subsequently in the same vicinity on 8 September 2001. Accused no. 1 was convicted of both counts and Accused no. 2 in respect of the first count only. It is convenient to commence with the second count.

When the matter came before a judge in chamber on an earlier occasion, the trial Magistrate was requested to deal with the following query in respect of count 2 :

- "1. whether a plea of not guilty should not have been entered for accused no 1 in respect of count 2 in view of his statement (when questioned in terms of section 112(1)(b) that he "broke the window when it was already**

broken");

- 2. whether the finding that the witness Laws testified that accused no 1 broke the window of the house referred to in count 2 (record p36, lines 19-20), was in the circumstances justified. In this regard the magistrate's attention is drawn to the evidence of Laws at page 25, lines 23-24, where he testified: "Reggie het gesê Neil moenie die mense se ruite uitslaan nie"."**

The Magistrate responded as follows:

- "4.1 In respect of (1) supra, a plea of not guilty should indeed have been entered.**
- 4.2 In retrospect, the finding that Mr Laws testified that accused no 1 broke the window of the house referred to in count 2, was in the circumstances unjustified as line 23-24 of the records reads: "Reggie het gesê Neil moenie die mense se ruite uitslaan nie".**
- 6. I request the Honourable Reviewing Judge to confirm count 1 in respect of accused 1 and 2."**

It is clear from the above response that the Magistrate conceded that the conviction of Accused no. 1 in respect of count 2 should be set aside. This is a proper concession. A plea of not guilty should indeed have been entered. No evidence was tendered at all by the State in support of this count. Accused no. 1 is accordingly entitled to be acquitted on count 2.

In respect of count 1, the trial court correctly found that the Accused were part of the group that attacked the complainant's house. Both participated to some extent in the attack and clearly associated themselves with the actions of their companions. It was common cause that complainant's house was damaged in the attack. In the result the conviction of the Accused on count 1 is well-founded.

The trial court took the convictions of Accused no. 1 in respect of the two counts together for the purpose of sentence and imposed a 12 months wholly suspended period of imprisonment

upon the Accused. A wholly suspended fine of R600-00 or 90 days imprisonment was imposed on Accused no. 2.

The following query in respect of sentence was addressed to the trial Magistrate by the judge in chambers referred to above:

"3. whether either of the accused had access to the report of the probation officer before they were asked to admit same and, if not, whether the magistrate was entitled to have regard to the recommendation of the probation officer."

The Magistrate responded as follows:

"As far as no (3) is concerned there is no express mention that the report of the probation officer was made available to the accused on the trial date, but the accused themselves confirm that the social worker consulted with them. In view of the fact that they admitted the contents of the report, the magistrate was entitled to have regard thereto conversely if the report was not admitted, the magistrate was then not entitled to have regard thereto, which is not the situation in casu."

The record at p39(19)- p41(25) reflects the following exchanges in respect of the probation officer's report:

"PROSECUTOR: Your worship in this matter probation officer's report which were requested, both of them are available (sic). Due to the fact that this case was remanded previously, on a frequent basis due to the fact that accused 1's guardian was not present the probation officer could not be here today. She was here previously to dispose of this matter. She could not be here due to some workload and she is not present in the district of George your worship. But the probation officer's reports are available.

COURT: Given the length of this case, Mr Pedro and the fact that we have got problems with the guardians attending court, what do you request or what is your opinion as far as this is concerned? Because we cannot just, you cannot just hand in the report, the witness must testify and must hand it in and he must be cross examined

by the accused.

PROSECUTOR: Yes the state is fully aware of the state of affairs your worship. Your worship in this matter the only evidence which is contained in this report is the personal circumstances of the accused. The state will... And the recommendation of this specific probation officer. If, the state has no objection if we can finalize this matter without it. The state will just then read out the recommendation when the state is addressing the court your worship.

COURT: Alright what you are saying is that the report is to the effect that the accused must be given suspended sentences?

PROSECUTOR: A suspended sentence, your worship.

COURT: And their personal circumstances.

PROSECUTOR: That is correct your worship.

COURT: Gentleman the social worker is not available today. He has made recommendations. He has consulted with you, according to the state. Do you confirm the social worker has consulted with you?

INTERPRETER: Yes your worship the social worker was with us.

COURT: Will you have some questions or will you dispute the contents of the report as was made by her or him?

INTERPRETER: No your worship we shall not dispute the... (interpreter).

COURT: Accused 2?

BESKULDIGDE 2: Nee.

COURT: Guardian, accused 1?

INTERPRETER: No, your worship.

COURT: Guardian, accused 2?

INTERPRETER: No, your worship.

COURT: Mr Pedrow will you just read the recommendations of the social worker and hand it in by mutual consent.

PROSECUTOR: As it pleases the court. Your worship the first accused is Reginald Buys. Your worship must just make it clear that due to the fact that the accused was previously, has been assessed and a probation officer's report was previously compiled for this accused, for, his personal circumstances did not change. A recommendation has been made that he be given a sentence in terms of section 276(1)(b) of the criminal procedure act, which is a totally suspended sentence your worship. For accused 2 the recommendation by Mrs Campher is also a sentence in terms of section 276(1)(b), of subsection b of the criminal procedure's (sic) act. Your worship this is also a suspended sentence, wholly suspended sentence.

COURT: The probation officer's report in respect of accused 1 will be handed in as EXHIBIT B, accused 2, EXHIBIT C. Gentleman you know (sic) have got an opportunity to address the court in mitigation of sentence. You can do that by addressing the court from where you stand. You also have got a right to call witnesses in mitigation of sentence. You may go to the witness box to mitigate. Do you

understand that.

INTERPRETER: Your worship we are going to address the court from where we stand. We are going to call our guardian to plead for mitigation for us your worship."

It is abundantly clear that the Magistrate was persuaded to continue in the absence of the probation officer (despite his earlier reservations) by the suggestion of the prosecutor that only the recommendation of the probation officer be used for the purpose of sentence. The prosecutor intimated that the recommendation was for a wholly suspended sentence. The necessary implication was that the course suggested cannot prejudice the Accused, since the recommendation was favourable to them. This was, of course, not an accurate reflection of the recommendation actually made, namely that Accused no. 1 be dealt with in terms of Section 276(1)(b) i.e. direct imprisonment (exhibit "B" dated 29 January 2002) as well as Accused no. 2 (exhibit "C" dated 29 January 2002 pg 6).

While there could very well be justification for a trial court to allow a probation officer's report to be handed in by agreement between the prosecution and defence without leading the evidence of the probation officer, the trial court erred, in my view, in adopting that course in this matter. Both Accused are youthful and unrepresented and there is no indication that they were ever furnished with the probation officer's report or recommendations before and/or fully appreciated the import of the course adopted by the trial court in regard to the report. The fact that the probation officer interviewed the Accused for the purpose of preparing the report, was obviously no indication that they were aware of the contents of the report, let alone the recommendations of the probation officer, that they be sentenced to direct imprisonment. This conclusion is reinforced by the fact that the Accused and their guardians asked for a non-custodial sentence or for mitigation of their sentences.

The fundamental right of an accused to a fair trial in terms of Section 35(3) of the Constitution, Act 108 of 1996 extends to all aspects of the trial, including the sentencing stage. Fundamental to this right is the need for justice to be done and seen to be done (**cf S v Dzukuda & Others; S v Tshilo 2000(4)SA 1078(CC) para 11**). The failure to furnish the Accused with the recommendations of the probation officer, particularly where they are adverse to the Accused as in the present matter where direct imprisonment was recommended for youthful offenders or where the recommendations are to be implemented by the trial court, is unfair and amounts to a violation of the Accused's rights in terms of Section 35(3).

The value of a probation officer's report with regard to sentencing in the case of youthful

offenders cannot be over-emphasised (cf. **S v C 1973(1)SA 739(C) at 742D-E; S v Adams 1971(4)SA 125(C) at 126G-H, 127F-G; S v H & Another 1978(4)SA 385(E) at 386D-E**). That value, however, does not lie in an uncritical acceptance of the contents of the report, particularly its recommendations. It is apposite in this regard to refer to the following instructive exposition of the purpose of a probation officer's report given by Smalberger, J (as he then was) in **S v H (supra at 386C-E)** :

"The purpose of a probation officer's report is to provide a 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. (S v Adams 1971(4)SA 125 (C).) The probation officer's recommendation is merely an expression of opinion for the guidance of the court. Where necessary, it must be tested and subjected to critical analysis. The ultimate responsibility for the determination of a proper sentence rests with the presiding judicial officer. In order to exercise his discretion in this regard he must apply his mind judicially to all relevant considerations affecting sentence. He must not slavishly follow the recommendation of the probation officer, and merely substitute the latter's view for his own."

In this matter the Accused fortuitously benefited from a misreading of the actual recommendations of the probation officer. The uncritical and slavish acceptance of the recommendations would have resulted in the direct imprisonment of the Accused, both youthful offenders, for a not too serious offence but for the misdirection about the actual recommendation. The following approach ordered in **S v H (supra at 387A-E)** should at the very least, also have been followed in this matter:

- "(a) Ensure the presence of the accused's parent or, at least, the mother of each accused;**
- (b)**
- (c) allow the parent or parents of each accused present the opportunity of questioning the probation officer in relation to her investigations and recommendations;**
- (d) afford the parent or parents of each accused present the opportunity of giving or leading evidence relative to the recommendations of the probation officer;**
- (e) call for such further evidence or investigation as [the magistrate] considers necessary to arrive at a proper sentence;"**

In spite of the above mentioned misdirection in regard to the probation officer's report, the sentence imposed upon Accused no. 2 is not inappropriate, in my view. The trial court justified the differentiation in the sentences of the two Accused basically on the ground that Accused no. 1 was not a first offender and had been convicted of two counts of malicious injury to property (count 2 wrongly assumed to have been committed on the same day as count 1). In view of the conviction in respect of count 2 now having fallen away, it is necessary to reconsider the sentence to be imposed on Accused no. 1. In my view no useful purpose would be served by remitting the matter to the trial court to reconsider sentence in respect of Accused no. 1. It is in the interests of justice to dispose of the matter at this stage.

The relevant facts indicate that both Accused played a similar but limited role during the incident. Accused no. 1, in fact, tried to stop one of the co-perpetrators from breaking the windows of the house. The Accused were the same age. Although Accused no. 1 did not have a clean record, he had no previous conviction for malicious injury to property. In the circumstances it is not justified to differentiate between the Accused for the purpose of sentence in the present matter.

In the result the convictions of both Accused are confirmed in respect of count

1 and the conviction of Accused no. 1 on count 2 is set aside. The sentence imposed on Accused no. 1 is set aside and substituted with the following sentence:

"A fine of R60000 (six hundred rand) or 90 (ninety) days imprisonment which is wholly suspended for a period of 3 (three) years on condition that he is not convicted of malicious injury to property committed during the period of suspension."

DENZIL POTGIETER, A.J.

I agree.