IN THE HIGH COURT

(BISHO)

CASE NO.: CA&R65/2001

DATE: 22 FEBRUARY 2002

In the matter between:

THANDOXOLISI

versus

THE STATE

EX TEMPORE JUDGMENT:

EBRAHIM J:

This is an appeal by the appellant against the sentence that was imposed in the Court a quo in pursuance of his conviction on the offence of culpable homicide.

At the outset of the trial the appellant pleaded not guilty to the charge of culpable homicide and, as he was entitled to do, elected not to disclose the basis of his defence. There was also a co-accused and he similarly pleaded not guilty to the charge and also elected not to disclose the basis of his defence.

The State then led the evidence of a witness from which it appears that he did not actually witness the assault which was perpetrated on the deceased. He had witnessed various events surrounding that and during the course thereof placed both the appellant and his co-accused on the scene. Further evidence that was tendered was that of Dr DT John who conducted the post-mortem on the deceased.

The State then closed its case and thereupon both the appellant and his co-accused, who were duly represented by a legal representative,

informed the Court that they wished to change their pleas of not guilty and tendered the following pleas: In respect of the appellant a plea of guilty to culpable homicide was tendered. In respect of his co-accused, namely accused no. 2, a plea of guilty to assault with intent to do grievous bodily harm was tendered. These pleas were thereupon accepted by the State.

The magistrate, in rather brief questioning of both the appellant and his co-accused, thereafter convicted them respectively of culpable homicide and assault with intent to do grievous bodily harm. In respect of the appellant the magistrate obtained confirmation from the appellant that he had stabbed the deceased several times and in respect of his co-accused he obtained an admission that he had assaulted the deceased with a plank.

It is evident from the post-mortem report that the deceased was severely assaulted. The deceased sustained a number of stab wounds, one of which penetrated his lung and then the heart and there were certain other stab wounds inflicted on other parts of his body. The post-mortem report also reflects that he was assaulted with a blunt object and in this regard it would be line with the admission made by accused no. 2 that he had assaulted the deceased with a plank.

On the basis of the admissions made by the appellant and his co-accused the magistrate was satisfied that they had correctly pleaded guilty respectively to culpable homicide and assault with intent to do grievous bodily harm, and as I have indicated, thereupon convicted them.

Thereafter the defence requested a postponement in order to obtain a probation officer's report in respect of both the appellant and his co-accused. At a subsequent hearing these reports were tendered in

evidence and it appears that the legal representative for the appellant and his co-accused sought to persuade the Court that a sentence of correctional supervision was an appropriate sentence in the circumstances of this case. I should mention that the State throughout indicated, by default more than anything else, that it was not opposing the imposition of a sentence of correctional supervision.

The magistrate, in imposing sentence, addressed the question of a sentence of correctional supervision and indicated that he did not consider that the nature of the offence and the circumstances surrounding the offence warranted that a sentence of correctional supervision would be appropriate. Accordingly he rejected the suggestion that such a sentence should be imposed and then, after making certain observations with regard to the crimes and the needs of the community etc, sentenced the appellant to a period of imprisonment of 14 years and his co-accused to a period of imprisonment of 7 years.

Mr Swartbooi who appears for the appellant has made various submissions. I should note that the co-accused, accused no. 2, has not appealed against his conviction nor against the sentence imposed and consequently the appeal before us relates only to an appeal against the sentence imposed in respect of the appellant, namely accused no. 1. In broad Mr Swartbooi submits that a sentence of correctional supervision is appropriate and should have been imposed by the trial magistrate. He has correctly pointed out that the sentence of 14 years is startlingly inappropriate and evokes the sense of shock. These submissions are made in relation to the conviction of culpable homicide.

I have no difficulty with those submissions. I agree, that I consider the sentence to be startlingly inappropriate and that it does evoke a

sense of shock. Moreover, it is also a sentence which is strikingly different from that which this Court might have imposed. I am of the view that the magistrate, regrettably, has misdirected himself in regard to determining what an appropriate sentence is.

It is clear that the magistrate, quite correctly, took due cognisance of the seriousness of the offences. Moreover, quite correctly again, he observed that the appellant and his co-accused were indeed fortunate that they had not been charged with the crime of murder as they may very well have been convicted of that. My only observation in this regard is that, prior to the appellant and the co-accused pleading guilty, the evidence of the State did not, in my view, amount to such as to enable a Court to find beyond reasonable doubt that it was the appellant and his co-accused who committed the offence. Be that as it may, in view of the fact that the pleas on behalf of the appellant and his co-accused were altered and pleas of guilty were tendered I make no further comment on that. It is an aspect that may impact on sentence.

The sentence on accused no. 2 of a period of 7 years' imprisonment appears to, my mind, to bear some relation to what the Court considered might be an appropriate sentence if he had been convicted of culpable homicide. I speculate in this regard. I say so quite clearly, since the magistrate's comments that they might have been convicted of murder provide some insight into his reasoning in respect of sentence. Be that as it may, I am more than persuaded that the magistrate, as I have indicated, clearly misdirected himself and this Court is at large to interfere in regard to sentence.

The question that has to be addressed, however, is whether a sentence of correctional supervision would be appropriate in respect of

the appellant. In this regard I need to observe that the report that was tabled, whilst enumerating various issues, simply contents itself with the observation that the appellant is a suitable candidate for a sentence of correctional supervision and that such a sentence would be suitable. In my view the report, both in respect of the appellant and his co-accused, fell far short of what is required to enable one to properly assess whether the appellant was a suitable candidate.

But, even if the appellant was a suitable candidate I am still of the view that the seriousness of the offence and the manner in which the deceased was assaulted is such that a sentence of correctional supervision is by no means appropriate. I am further of the view that a period of direct imprisonment is appropriate.

I need to observe that offences involving assaults, either with knives or other sharp objects, and very often over trivial disagreements, have often come before this Court, either in the way of trials or on the basis of reviews. It is disturbing to note that disagreements or arguments are settled by accused resorting to knives in order to settle a score with another person. This Court in various judgment has indicated that this trend is disturbing and that individuals who are convicted of assault or of murder should expect that sentences will be imposed which have, not only a deterrent effect, but are going to be lengthy terms of imprisonment. In that respect I cannot find any basis upon which to conclude that the appellant is either a suitable candidate for correctional supervision or that such a sentence should be imposed.

In determining an appropriate sentence, taking all the circumstances into account, I am mindful of the following:

1. The fact that the appellant at the conclusion of the State case

changed his plea to guilty to culpable homicide indicates that he accepted at least moral culpability for his conduct.

2. He is a very young person, he is 20 years of age.

3. He is a first offender.

4. It is clear that alcohol played a significant role during the course of the commission of this offence.

On the other hand, I have to weigh up the aggravating factors. If he had acted in self-defence, as he claims, he clearly exceeded the bounds of self-defence way beyond what one could possibly expect. The post-mortem report reveals a number of stab wounds and in addition that the person was assaulted with a blunt object. If he had intended defending himself there was no reason to assault the deceased to that extent.

In view of what I have said, and since this Court is at large to interfere with the sentence, I am of the view that the appeal in respect of the sentence should be upheld. However, in its place I consider that the following sentence is appropriate:

> "The appellant is sentenced to a period of imprisonment of 8 years of which 3 years is suspended for a period of 5 years on condition that the appellant is not convicted of an offence involving assault, committed during the period of suspension and for which he is sentenced to a period of imprisonment without the option of a fine."

Having said that, it is apparent to us that whilst accused no. 2 may not have launched an appeal in respect of the sentence imposed on him that an injustice would exist if this Court does not in some way ameliorate his sentence. I am of the view that this Court's inherent

powers of review entitle it to look at the situation insofar as accused no. 2 is concerned and on that basis to address the question as to whether this Court should interfere in respect of the sentence which was imposed on him.

The comments I have made in regard to the appellant are equally applicable insofar as accused no. 2 is concerned and I see no reason to repeat those. Suffice to say that in his case too he is not a suitable candidate for correctional supervision, nor do I consider that it would be an appropriate sentence. He jointly with the appellant engaged in the assault on the deceased. He used the blunt object instead of a knife, but in some ways that does not lessen his involvement in the offence. However, since he has been convicted of the offence of assault with intent to do grievous bodily harm it would be an injustice if he had to serve a period of 7 years' imprisonment whereas the effective period of imprisonment that the appellant would serve would be 5 years. Similarly I am of the view that this Court is at large to interfere with his sentence and I do so.

Accordingly the sentence which the Court a quo imposed on him of 7 years is set aside and the following imposed:

> "In respect of accused no. 2 he is sentenced to a period of imprisonment of 5 years of which 2½ years is suspended for a period of 5 years on condition that he is not convicted of an offence involving assault committed during the period of suspension and for which he is sentenced to a period of imprisonment without the option of a fine."

Y EBRAHIM

JUDGE : BISHO HIGH COURT

PICKARD JP:

I agree. In respect of the appeal the conviction is confirmed and the sentence altered as my learned Brother has set up, and in respect of accused no. 2 on review the sentence is altered as set up by my Brother.

B de V PICKARD

JUDGE PRESIDENT : BISHO HIGH COURT