

A280/08

¹
IN THE HIGH COURT OF SOUTH AFRICA /AH
(TRANSVAAL PROVINCIAL DIVISION)
7/4/2008

REPORTABLE

High Court Ref no. 2392
Case no. J12/00773/07

In the matter between:

.
THE STATE
and
SANDILE NYAMBOSI
Accused
REVIEW JUDGMENT
LEGODI J

When this matter was initially laid before me on automatic review, I raised my concern with the trial court about the sentence imposed on the accused.

The accused initially appeared in the Magistrates' court for the district of Pretoria on a charge of theft. The allegations were that on or about the 1 September 2007 at or near Hatfield Plaza, the accused wrongfully and intentionally stole a Sony Erickson cell phone valued at R2000 the property of Mr Andries Jacobus Janse Van Rensburg.

²
The accused's plea of guilty was changed to that of not guilty. Evidence having been led against the accused, he was convicted as charged. A three year imprisonment was imposed on him one year of which was suspended on certain conditions.

The accused's limited personal circumstances were placed on record as follows: he was a first time offender, he was at the time of the commission of the offence 24 years old, he is unmarried and there are no dependents, although later in the proceedings, the accused indicated that he wanted to be in a position to bring up his baby. He

used to cut hair at a salon. The cell phone in question was retrieved.

When I raised the issue with the trial court, I enquired as to what militated against the imposition of any other form of sentence than direct imprisonment, particularly regard been had to the fact that the accused was still relatively young, had no previously conviction and the stolen cell phone was recovered.

In response, the trial court still held the view that the sentence imposed was the only effective sentence available and that it was not shocking in the circumstances. In coming to this conclusion, the trial court indicated that the frequency at which cell phones are stolen has reached an alarming proposition and that most of his colleagues are dealing with cell phone theft cases on a daily basis. He held the view that the accused in the instant case planned, prepared and blatantly stole the cell phone in question. In his view, he had shown mercy by suspending one year.

The matter was also referred to the Director of Public Prosecutions for his comment. State Advocate P Voster, having referred to a number of decided cases, suggested that the sentence as imposed by the court *a quo* be set aside and substituted with a sentence of two years imprisonment one year of which to be

3
suspended on certain conditions. However, his Deputy Director of Public Prosecutions, E C J Wait, is of the view that the sentence is inappropriate in the circumstances especially that the accused is a first time offender. In his view, the possibility of rehabilitation must still be considered. However, in his view in the light of the fact that the sentence was imposed four months ago, the sentence ought to be altered to four months imprisonment, which would have the effect of the accused's immediate release. I cannot agree more. I have already instructed my secretary to send out a telegram ordering the immediate release of the accused.

I find it necessary to deal with this matter in detail. The purpose of sentence or punishment can be placed in four categories, namely, deterrence, prevention, rehabilitation and retribution. The idea of deterrence is described as a man being a rational creature, would refrain from the commission of crimes, if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment or the imposition of punishment on others, which should cause a person to think twice before he or she would commit a crime. (See **Rabie et al Punishment 39, S V Matoma 1981 (3) SA 838 (A) at 842 H, and S V Di Blasi 1996 (1) SACR 1 (A) 10C**).

It is said that two forms of deterrence are recognized. That is, *general deterrence* which operates against society as a whole. The second form is referred to as *individual deterrence*. It operates against

the offender.

In terms of the general deterrence, the sentence is used as an example to other potential offenders. The belief is that the threat of similar punishment will cause such potential offender to refrain from committing crime. (See **Terblanche , Guide to sentencing in SA at 179**).

4

The trial court in the present case appears to have adopted the general deterrence approach. In doing so, the trial court appears to have been influenced by the fact that the crime was serious and that the crime was prevalent. The trial court seems to have held the view that sentences other than imprisonment have been tried and have failed to yield good results, that is, failed to reduce the crime rate.

One can understand the trial court's frustrations in this regard. However, in sentencing, relevant factors have to be considered on an equal basis. In doing so bear in mind that, imprisonment has a drastic effect on the life of an offender and his family. It is a severe punishment to be removed from the community in which people normally live, into a total different community inside a prison, where privacy and self determination are almost non-existence. Imprisonment can therefore only be appropriate if the offender's blameworthiness requires the imposition of such a severe sentence. (See **Terblanche at 248**). Therefore, imprisonment should not be imposed lightly.

Remember, there are other options of sentencing before direct imprisonment is contemplated. For example, the introduction of correctional supervision as a sentencing option has ushered a new phase in the South African Criminal justice system. As a whole, punishment, whether it be rehabilitation or if need be, highly punitive in nature, is not necessary or even primarily attainable by means of imprisonment. The legislature having expressed itself clearly, regarding correctional supervision in terms of Section 276 A of the Criminal Procedure Act, it is the duty of judicial officers to use these ample means of sentencing at their disposal.

The trial court during its judgment, should deal with correctional supervision as a sentencing option, so that it appears clearly that it has truly considered such an option. It is particularly

5
important to realize that there is now the possibility of imposing finely tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community. (**S v R 1993 (1) SA 476 (A), S V E 1992 (2) SACR 625**). In my view, the trial court had failed to consider at all or sufficiently other options. Wholly suspended sentence or correctional supervision was overlooked.

Remember, where the nature of the offence and the interest of the society are considered, the accused to a certain extent is still in the background. But, when he, as a culpable human is being considered, the spot light must be focused fully on his person in its entirety, with all its facets. He is not to be regarded with a primitive desire of revenge, but with human compassion which demands that mitigating circumstances be investigated in each case, however serious the offence might be. (See **S v Du Toit 1979 (3) SA 846 (A)**).

In addition to the fact that the accused was a first offender, stolen goods recovered and the accused was relatively still young, he made a passionate plea in mitigation of sentence. I find it necessary to quote what the accused said in mitigation of sentence. He immediately opened his address in mitigation by stating as follows:

"I was asking if the court, it can be able to give me any job to do for the community or even if it is a community service, anything that is possible for I to show this thing that I got myself in, I will never be in such situation again. I am still a young growing man, who on its life to honest to work out for his life.

If ever I can go to jail, the time I am going to come out, I will be nothing, then, the other people will be having their own families and I will be having nothing. I will just be a person who is useless who is not even his full to the country. That is why I am asking the court if it can give me a chance to prove myself that where am I? Why did God have

6

to bring me in to this world? I believe I have a living out there which is still wanting for me to live.

Anything, anything that the court like me to do for me that I can be able to be outside or anything or even if you can sent me, I must be where at a certain time, I promise the court that I can be at that place at the time which the court have given me"

The interpretation or transcription may not be completely correct however, having said this, the trial court enquired from the accused if there was anything the accused wanted to say, he said the following:

"I have learned everything since the, this past one month two weeks I have learned many things that, being in prison, you achieve nothing. You lose everything. Exactly you are losing your future. But, being outside is something like you can have chance to achieve your future, to work for yourself, even if God can give you chance to give you kids, you can work for your kids so that even if you pass away, you will leave your photo behind which are your kids"

In conclusion, the accused having been asked if there was anything further he wanted to say, he stated:

"No, I am only begging the court must all this past one month and two weeks, I have heard enough. I am begging the court if it is possible for the court, to help me not to go back into jail. Every person learns from his own mistakes and not do the same mistake again. I will never do the same mistake again. I swear with my believe in God and my life".

The accused made all the remarks unrepresented. He called on the trial court to be given a chance. He wanted community service.

He promised the trial court that he will comply with any condition for community work. For example, he will be where the court can order

7

him to be at any given moment. He promised the court that he had turned into a new leaf since his incarceration for a month and two

weeks. I do not gain a sense that the accused was not serious about all what he said to the trial court. This should be seen in the light of his attitude right at the start of the trial. He pleaded guilty although the plea was subsequently changed to that of not guilty. He asked for mercy. Mercy means to a criminal court that justice must be done, but it must be done with compassion and humanity, not by rule of thumb and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation. (See **Van Der Westhuizen 1974 (4) SA 61 (C) at 66 E-F**).

In my view, the trial court did not properly consider an element of mercy, particularly having regard to the remorse displayed by the accused. I honestly do not believe that the accused is the kind of a person who should have been sent to jail. He could have been given a suspended sentence, had the trial court felt that seeking for a probation officer's report would unnecessarily delay the matter. Individual deterrence would have been appropriate. Its purpose is that an offender will be deterred from re-offending because he has learnt from the unpleasant experience of his punishment or because he is fearful of what may happen if he re-offends.

Personally, I do not believe that random sentencing of people to jail serve any purpose. All what happens is to destroy the good that is left in a particular accused person, like in the instant case. Quite very often the fear of going to jail becomes a thing of the past by sending every first offender to jail.

While the public is entitled to protection against anyone individual, one cannot sacrifice the individual entirely in offering that protection to it. The most the court can do which is consistent with

I agree, it is so ordered

W L SERITI
JUDGE OF THE HIGH COURT

IN THE ORDINARY COURSE OF EVENTS

justice is to protect the public, having regard to other forms of punishment. I do not think that the accused having wronged the society once has become a threat to the society. Setting an example out of him was in my view, unwarranted.

Having said all of these, I do not think it is necessary to deal with other purpose of punishment for example, prevention, rehabilitation and retribution. The accused in this case has already spent some months in jail. Before his sentence he had apparently spent about six weeks in jail. It is for this reason that the immediate release of the accused had been ordered. Had it not have been for the fact that the accused had already served part of his sentence, I do not think that direct jail term would have been justified. Consequently, I make the following order:

1. 2.

Conviction of the accused is confirmed.

Sentence of three years imprisonment imposed on the accused is hereby set aside and substituted by the following

"The accused is hereby sentenced to four months imprisonment antedated to the 16 October 2007"

M F LEGODI

JUDGE OF THE HIGH COURT