IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO.

CA&R CA&R141/2017

Date heard: 16 May 2017
Date delivered: 19 May 2017

REPORTABLE

In the matter between:

THE STATE

and

AKHONA NTOZINI **Accused 1**

SIYABULELO MTWALO **Accused 2**

REVIEW JUDGMENT

BEARD AJ:

[1] The Senior Magistrate, Grahamstown has referred this matter to this court by way of special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[2] The accused appeared in the Magistrate's Court for the district of

Albany sitting in Grahamstown. They were both charged, in the main, with one count of housebreaking with intent to steal and theft and in the alternative, with one count of trespassing. Accused 1 pleaded guilty to housebreaking with intent to steal and theft and accused 2 pleaded guilty to receiving stolen property in contravention of section 37(1) of Act 62 of 1995. On 19 January 2017, both accused were convicted in terms of their pleas.

[3] Accused 1 was sentenced to three years' imprisonment and it was further ordered that *"accused 1 serve his sentence at Cradock prison and that he be assessed of the said prison (sic) and be enrolled for the courses offered by the said institution – e.g. Woodwork / plumbing etc. for the duration of his sentence."* Accused 2 was sentenced to two years' imprisonment and it was further ordered that accused 2 *"serve his sentence term at Cradock prison and that he be enrolled skills/trade courses (sic) offered by Craddock prison for the duration of his sentence."*

[4] The Senior Magistrate brought numerous concerns to the attention of this court. These are :

[4.1] Accused 2's conviction refers to a contravention of the provisions of section 37(1) of Act 62 of 1995, which reference is incorrect and should read Act 62 of 1955; and

[4.2] In respect of the sentences imposed on both accused:

[4.2.1] there has been a contravention of the provisions of section 276B(1)(b) of the CPA;

[4.2.2] non-compliance with the directives set out in *S v Stander*[1] and *S v Madolwana*;[2]

[4.2.3] no provision is made in the CPA for the further orders made by the magistrate in sentencing the accused.

ACCUSED 2'S CONVICTION :

[5] As I have already noted, accused 2 was convicted of a contravention of the provisions of section 37(1) of Act 62 of 1995. Act 62 of 1995 is, however, the Right of Appearance in Courts Act and is only 7 sections long. This error in the conviction was carried through from accused 2's section 112(2) statement, in which he stated:

> *"I am guilty of contravening the provisions of section 37(1)(a), read with the relevant sections of the General Law Amendment Act 62 of 1995 – receiving stolen property…"*

[6] The General Law Amendment Act to which accused 2 refers, and to which his conviction for the contravention of section 37(1) should refer, is Act 62 of 1955. Section 37(1)(a) of that Act reads as follows:

> ***"37. Absence of reasonable cause for believing***

[1]2012 (1) SACR 537 (SCA) at para. [22].
[2]Unreported CA&R 436/2012 (ECG) delivered on 19 June 2013.

goods properly acquired.

(1) (a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory."

[7] Of the circumstances of the offence, accused 2 states:

"…on or about the 1st of January 2017 and at or near 9902 in the District of Albany I did unlawfully and in a manner otherwise than a public sale, acquire and receive into my possession from another person, stolen goods, other than stock or produce as defined in section 1 of the Stock Theft Act to wit 1 Money Case containing an amount of R300.00 in coins, Vaseline container containing an amount of R70.00, Samsung Cellphone in the amount of R900.00, and a wallet with bank cards in the amount of R450.00 without having reasonable cause for believing at the time of such acquisition that such goods were the property of the person from whom they were received or that such person had been duly and properly authorized by the owner thereof to deal with or dispose of such property."

[8] Accused 2 then goes on to state that he acquired the items from accused 1; that accused 1 could not satisfactorily account for how the items had come to be in his possession; and that, despite strongly

suspecting that the items had been stolen, he nonetheless accepted possession thereof, as he and accused 1 had agreed to sell the items.

[9] As a consequence of accused 2's section 112 statement, I am satisfied that the facts he admits support his plea of being guilty of a contravention of the provisions of section 37(1) of Act 62 of 1955. The only issue in this respect is the erroneous reference to Act 62 of 1995.

[10] The conviction must, therefore, be set aside and corrected. However, no purpose would be served in remitting the matter to the magistrate's court for the plea to be considered afresh and accused 2 to be appropriately convicted. Accused 2 is plainly, by his own admission, guilty of contravening the provisions of section 37(1) of Act 62 of 1955. There can thus be no prejudice to accused 2 if his conviction as it stands presently is set aside and simply substituted for a conviction of the contravention of the provisions of section 37(1) of Act 62 of 1955.

THE SENTENCES IMPOSED :

[11] Section 276B(1) of the CPA provides:

> *"(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.*
>
> *(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."*

[12] Prior to the enactment of section 276B of the CPA, a decision about parole fell within the exclusive jurisdiction of the Department of Correctional Services. It was recognized by our courts as being an executive function. Two principles underpinned this conclusion: the first finding its expression in the separation of powers doctrine; and the second from the fact that courts derive their sentencing jurisdiction from statute and there existed no statutory provision empowering courts to consider the period for which a convicted individual should remain incarcerated prior to the issue of his release on parole being considered.[3]

[13] The enactment of section 276B changed this position. When making an order in terms of section 276B(1), the sentencing court, in effect, makes a *"present determination"* that the convicted person will not merit being released on parole in the future, notwithstanding that the decision as to the suitability of a prisoner to be released on parole involves a consideration of facts relevant to his conduct after the imposition of sentence.[4] It is thus a *"predictive judgment"* as to the likely behavior of the convicted person in the future, reached on the basis of the facts available to the sentencing court at the time of sentence.[5]

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[3] *S v Stander supra* at para. [8].
[4] *S v Stander supra* at para. [15] and *S v Madolwana supra* at para. [7].
[5] *S v Stander supra* at para. [15].

[14] Section 276B is thus an *"unusual provision"*[6] and for this reason our courts have explicitly recognized that:

> *"[d]espite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power."*[7]

And why it is

> *"…the Department, and not a sentencing court, [that] is far better suited to make decisions about the release of a prisoner on parole and why it remains desirable to respect the principle of the separation of powers in this regard."*[8]

[15] As a result, an order in terms of section 276B(1) should only be made in exceptional circumstances and when the sentencing court is possessed of facts that would, after the imposition of sentence, continue to result in a negative outcome for any decision to be made concerning parole.[9] The classic and oft-cited example of such facts are those that lead the sentencing court to conclude that the accused has very little chance of being rehabilitated.[10]

[16] In addition to the requirement that there be a factual basis before a sentencing court makes an order in terms of section 276B(1), a court is obligated to provide both the State and the convicted individual with an opportunity of addressing it as to whether or not a non-parole

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[6] *S v Stander supra* at para. [16].
[7] *S v Stander supra* at para. [12].
[8] *S v Stander supra* at para. [13].
[9] *S v Stander supra* at para. [16].
[10] *S v Mshumpa and Another* 2008 (1) SACR 126 (E); *S v Stander supra* at para. [16]; and *S v Madolwana supra* at para. [7].

period ought to be imposed. After all, a proper judicial consideration of whether the facts support a finding that exceptional circumstances exist can only be undertaken once both parties have made submissions on the issue.[11] To fail to permit the parties this opportunity constitutes, at the very least, a misdirection and, at worst, an infringement of the accused's right to a fair trial, as enshrined in section 35 of the Constitution.

[17] The sentences imposed did not expressly mention section 276B(1) of the CPA or contain the term 'non-parole period'. However, in stating that the accused are to be enrolled in the skills/trade courses offered by the prison for the duration of their sentence, the magistrate has effectively imposed a non-parole period. That this was her intention is left in no doubt as, during the course of her judgment on sentence, she stated the following of the sentence she imposed in respect of accused 1:

> *"…so that means you might not be legible (sic) for parole before you receive the skills as I have said for the duration of your sentence you will have to attend to the trade skills, do you understand, he is not legible (sic) for parole, not yet because of the Court order, up until he is done with the skills or trades that he has to be assessed for."*

[18] The magistrate gave no indication that this was her intention prior to imposing the non-parole period and she at no stage invited the parties

[11] *S v Pauls* 2011 (2) SACR (E) at para. [15]; *S v Madolwana supra* at para. [11], *S v Strydom* (20215/14) [2014] ZASCA 29 (23 March 2015) at para. [12].

to make submissions on the issue. The State did not request such an order and the eligibility or otherwise of the accused for parole was mentioned for the first time by the magistrate in her judgment on sentence.

[19] Accordingly, in imposing the sentences she did, the magistrate has not only exceeded the maximum non-parole period set out in section 276B(1)(b), namely two-thirds of the term of imprisonment, but has also committed a misdirection in failing to provide the parties with an opportunity to make submissions thereon. On these two bases the non-parole period of the sentences imposed fall to be set aside.

[20] However, the criticisms of the sentences imposed by the magistrate do not end there. As has been repeatedly emphasis by our courts, sentencing jurisdiction remains statutory. As Harms JA stated:

> *"…sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the Executive branch of government as to how … convicted persons should be detained courts should also refrain from attempts, overtly or covertly, to usurp the functions of the Executive by imposing sentences that would otherwise have been inappropriate."*[12]

[21] There is no provision in the CPA or other legislation that permits a district magistrate's court to direct where the accused person will serve out his sentence. Nor is there any statutory provision permitting

[12] *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 521*h – i.*

such a court to order that an accused person be enrolled in skills transfer courses whilst serving the term of his imprisonment. These functions fall exclusively within the purview of the Executive. In exceeding her jurisdiction by making these orders the magistrate has fallen foul of the separation of powers doctrine.

[22] That this is the consequence of the further order the magistrate made to the sentences is illustrated by the following. The further order to the sentence imposed upon accused 1 and set out in the opening paragraphs of this judgment was not the original further order to the sentence imposed by the magistrate at the conclusion of her judgment on sentence. She originally ordered that accused 1 serve his term of imprisonment at Kirkwood prison. However, in the order contained in Annexure "B" to the charge sheet, the reference to Kirkwood prison in accused 1's sentence has been replaced with a reference to Cradock prison and at the foot of the page the following appears in parentheses:

> *"(Kirkwood does not offer programmes – Siyabulela[13] - well (sic) also go to Cradock prison.)"*

The record does not contain an explanation of when or how the magistrate came to learn that Kirkwood prison does not offer skills transfer rehabilitation programmes. Information regarding rehabilitation

[13]The reference to Siyabulela is a reference to accused 2 and highlights an unsettling aspect of the magistrate's conduct in the matter; namely that she frequently referred to the accused by their first names. This is inappropriate and out of place in the formal setting of a criminal court.

programmes offered by the various prisons is held by officials of the Department of Correctional Services. It is for precisely this reason that they, as those tasked with carrying out the functions of the Executive in this respect, are far better placed to make such decisions.

[23] Accordingly, the further orders to the sentences imposed similarly need to be set aside. Once the aforementioned orders are set aside, one is left with the following:

[23.1] in respect of accused 1, convicted on the charge of housebreaking with intent to steal and theft, a sentence of three years' imprisonment; and

[23.2] in respect of accused 2, convicted of a contravention of the provisions of section 37(1) of Act 62 of 1955, a sentence of two years imprisonment.

[24] The next issue to be determined is whether or not the matter should be remitted to the magistrate to consider sentence afresh. Section 304(2)(c)(ii) of the CPA provides that, where it is evident that the proceedings were not in accordance with justice, the court, whether or not it has heard evidence, may *"confirm, reduce, alter or set aside the sentence or any order of the magistrate's court"* whilst section 304(2)(c)(iv) permits the review court to *"generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given imposed or made on any matter which was before*

it at the trial of the case in question". Whilst sentencing is pre-eminently a matter that falls within the discretion of the trial court, an appeal court may interfere with that discretion if the sentence is vitiated by irregularity or misdirection or is one which no reasonable court would have imposed in that there is a striking disparity between the sentence imposed and that which the appeal court considers appropriate. This principle applies equally to the court tasked with reviewing the sentence imposed.

[25] In my view the sentences imposed by the magistrate, even trimmed of the further non-parole period orders and those relating to the prison and manner in which the accused are to serve their sentences, are shockingly heavy. There is thus a significant disparity between the sentences I would have imposed in this matter and those imposed by the magistrate. It also appears from a reading of the record and the magistrate's reasons for imposing the sentences she did (which are contained in her judgment) that she misdirected herself. I say this for the reasons that follow.

[26] Both accused are first offenders. Accused 1 is 21 years of age and accused 2 is 19 years of age. Accordingly, both are relatively young. Neither accused have much in the way of formal schooling, with both accused having left school upon completing grade 8. They are also both unemployed but do earn a meagre income from hiring out their services on a casual basis. They use this income to contribute towards

the financial maintenance of their respective households. To this must be added that both accused pleaded guilty.

[27] As against this one must weigh the seriousness and prevalence of the offence. In this respect the offence of which accused 1 was convicted is the more serious of the two. Accused 1 did not dispute that his conviction was for the theft of items valued at R2 500.00 and comprising of a wallet, a money box and a tray of meat. Accused 2 admitted to receiving the following items from accused 1: a money case containing an amount of R300.00, a container containing an amount of R70.00, a Samsung cellphone valued at R900.00, and a wallet containing an amount of R450.00. The value of these items totals R1 720.00. The record gives no indication that the complainant recovered the stolen items or of the origin of the cellphone which accused 1 gave to accused 2.

[28] It appears from the magistrate's judgment that the fact that the accused are unskilled weighed heavily against them. She stated:

> *"…you are unemployed right now and you have no skills, if I release you without trying to help you, you are going back to that community, you are going to continue with what you have started…"*

[29] From this it is evident that the magistrate assumed that, as the accused are unemployed and unskilled, they would continue to commit further crimes. It was for this reason that she considered a

suspended sentence or one of correctional supervision to be inappropriate. The magistrate was clearly of the view that only a term of direct imprisonment would suffice, as this was the only means by which the accused could acquire the skills they would require in order to ensure that they did not commit further crimes. It is, in my view, a misdirection for the magistrate to have assumed that the accused would, in the event that they failed to acquire any skills, continue to commit further crimes. Both of these accused are first offenders. Whilst they clearly come from impoverished backgrounds and are unskilled and unemployed, this is no reason at all to assume that they would, in the future, continue down a criminal path. A sentencing court simply cannot impose a sentence of direct imprisonment as a means of ensuring that accused persons acquire skills through the rehabilitation programmes run by the Department of Correctional Services.

[30] As regards accused 1, I am of the view that it would be appropriate that he be sentenced to one years' imprisonment, seven months of which are to be suspended for a period of three years on condition that he is not convicted of a crime involving an element of dishonesty committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine. As regards accused 2, it would have been appropriate for the magistrate to have called for a report from a probation officer or correctional official in

terms of section 276A(1) of the CPA, in order that she might properly consider the option of imposing correctional supervision. Regrettably, this she did not do. Accused 2 has, since he was sentenced on 25 January 2017 (the date of his arrest is not evident from the record) remained in custody and has thus spent just under four months in prison. Consequently, little purpose would be served in obtaining such a report now, as this would serve merely to delay his release from prison. Accordingly, in my view, accused 2 should be sentenced to eight months' imprisonment, four months and six days of which are to be suspended for a period of three years on the condition that accused 2 is not convicted of a contravention of section 37(1) of Act 62 of 1955 committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.'

[31] Accordingly, I propose that the following order be made:

1. Accused 2's conviction is set aside and substituted with the following:

   'Accused 2 is convicted of contravening the provisions of section 37(1) of Act 62 of 1955.'

2. The sentences imposed on 25 January 2017 in respect of both accused and the further orders made are set aside and replaced with the following:

   'Accused 1 is sentenced to one years' imprisonment, seven

months of which are to be suspended for a period of three years on condition that he is not convicted of a crime involving an element of dishonesty committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.

Accused 2 is sentenced to eight months' imprisonment, four months and six days of which are to be suspended for a period of three years on the condition that accused 2 is not convicted of a contravention of section 37(1) of Act 62 of 1955 committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.'

3. Accused 2 is to be released from custody immediately.
4. The sentences set out above are antedated to 25 January 2017.

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M L BEARD
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

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J ROBERSON
JUDGE OF THE HIGH COURT