REPORTABLE

IN THE KWA-ZULU NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

High Court Ref No: DR409/12
Magistrates Serial No: 25/2012
Case No: M1950/2012

THE STATE

versus

V C

REVIEW JUDGMENT

Delivered on: 5 February 2013

STEYN, J

[1] The accused was charged in the Magistrates' Court Port Shepstone with two counts of housebreaking with the intent to steal and theft. Upon his plea of guilty a s 112(2) statement was handed in, confirmed by him as true and correct, and accordingly he was found guilty on both the said counts. On 22 March 2012 the accused was sentenced to 3 (three) years' imprisonment on each count and it was ordered that the sentences should not run concurrently.

[2] Despite the fact that the matter was finalised on 22 March 2012, it was only referred to the High Court to be automatically reviewed on 2 October 2012 in terms of s 302 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as 'the Act'). It is disturbing that six (6) months had to pass before the matter was referred to the High Court for a review of the proceedings. I shall return to the inordinate delay of submitting the record later.

At this stage of the judgment it is necessary to say that a delay of 6 (six) months defeats the purpose of the proceedings being reviewed, especially when it is taken into account that a judge must decide and be satisfied that the proceedings were in accordance with justice. The legislature by enacting section 303 of the Act regulated that records should be transmitted as soon as possible for a review by a judge.

This matter was never sufficiently prioritised as can be gleaned from the delay caused by the magistrate in furnishing his reasons in response to the review query. The learned Magistrate's reasons were submitted to the High

Court on 18 January 2013, some 13 weeks after the judge had asked for reasons.

[3] The following was queried on 12 October 2012 by the Review Judge:

> *"The entry on 6 March 2012 reads* inter alia*:*
>
> > *"Proceedings mechanically recorded. See J15 for plea and verdict.*
> >
> > *The said proceedings are not attached. It is not clear if the plea in terms of section 112(2) Act 51 of 1977 was read into the record, interpreted to the accused person and confirmed by him.*
> >
> > *In the light of the fact that the accused who is 17 years old, has not previously served a more robust sentence for his transgressions, why did you not think it prudent to order the sentences to run concurrently."*

[4] The learned Magistrate responded to the query as follows:

> *"1. Attached herewith is a record of the plea proceedings. The delay in submitting same is regretted. The proceedings were finalised in two different courts. The magistrate concedes that it was incumbent upon him to ensure that a full and complete record is submitted for review purposes.*
> *2. The personal circumstances of the accused are such that he has distanced himself from his family since 2007 and he has no adult supervision from the age of eleven years.*

> *The court was mindful of the fact that there are programmes available to the accused at the Westville Youth Centre that would assist the accused in all facets of his life. Sentencing the accused to a short term of imprisonment would inevitable mean that he would be back in society in a year or two depending on his probationer and performance at the centre. Inevitably thrusting him into society without adequate life skills. This would lead to the accused involving himself in what he was exposed to throughout his adolescent years, namely gangsters, substance abuse and crime. It is respectfully submitted that it was more prudent to afford the accused a lengthier time in detention in order to rehabilitate and educate him adequately so that he can withstand the temptation to commit crime and lead a more fruitful life especially given that he has no family ties in the court's jurisdiction and has estranged himself from his own family."*

[5] It is desirable to first deal with the inordinate delay of this matter. In my view the delay created by the late submission of the record to the Registrar and the late answering of the review queries, impacted on the fairness of the accused's trial, albeit not *in casu* to the extent that it constituted an irregularity. The remarks of Jordaan AJ in *S v Hlungwane*[1] are opposite and I align myself with the view:

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[1] 2001 (1) SACR 136 (T) also see *S v Maluleke* 2004 (2) SACR 577 (T).

"The system of automatic review is indeed a salutary practice. Not only are injustices that occur corrected but junior magistrates receive guidance and training in the process. The interests of the undefended accused are protected. See S v Mboyani *1978 (2) SA 927 (T) at 928G. In the 1962 South African Law Journal at 267 a quote is contained from a report by two Judges dealing with these reviews:*

> *'One of the important contributions made by South African law to the administration of justice is the system of review as of course, or, as it is more commonly known, automatic review.. The system requires that every conviction and sentence of an inferior court falling within certain categories be confirmed by a Judge of the Supreme Court and each case is reviewed without any application by the accused. Automatic review is unknown both to the laws of England and of the Netherlands. When it is borne in mind that at least 90% of the accused persons are either wholly or partially illiterate and that the great majority of them are undefended, the vital importance of the system in the administration of justice in this country becomes apparent.' "*

(My emphasis)

The obligations as set out in s 303 of the Act were completely disregarded and ignored despite it being peremptory. The failure to comply with the provisions

constitutes a failure of justice.[2] In *S v Manyanyo* the Court succinctly stated the rationale for the expeditious transmission of review records as follows:

> *"The reason for the statutory insistence on the expeditious despatch of records on review is generally to provide the speedy and efficient administration of justice, but in particular to ensure that an accused is not detained unnecessarily in cases where the court of review set aside thee conviction or reduces the sentence."*[3]

(My emphasis)

If a system of automatic review is valued as a form of protection of the fundamental rights[4] of an accused, then it should not be compromised by administrative incompetency.[5] The facts of this case show that the delay deprived the accused of the right to have the proceedings be re-appraised by a judge speedily. This young offender went to prison and a real likelihood existed that he would have served a greater part of his sentence before the matter was

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2 See *S v Raphatle* 1995 (2) SACR 452 (T). *S v Maja and Others* 1998 (2) SACR 637 (T); *S v Manyanyo* 1997 (1) SACR 298 (E) and *S v Lewies* 1998 (1) SACR 101 (C) and *S v Joors* 2004 (1) SACR 494 (C).

3 *Ibid* at 1466C-D.

4 See s 35(3)(o) of the Constitution of the Republic of South Africa, 1996.

5 For similar delays and administrative bungling *cf. S v Ntantiso; S v Papazayo* [2003] ZAWCHC 89 (12 December 2003) and *S v Senatsi and Another* 2006 (2) SACR 291 (SCA).

reviewed by a judge. At the time when this was considered the accused had already served 10 months of the imprisonment imposed. The necessary safeguards provided for in terms of s 303 of the Act can only be relied upon if the provisions relating to the time frames are strictly adhered to. As a result of the ineptitude to submit the record timeously a young offender was deprived of a fair review process. It is likely, depending on the circumstances and the context in which it occurs, that such delays may result in an unfair trial in future.

[6] It is important to remember that when a review record is not dispatched to a judge expeditiously that a perception is created that presiding officers are indifferent to the freedom of an individual.[6]

[7] I am satisfied however that the proceedings relating to the accused's conviction *in casu* were in accordance with justice.[7] The reasons given for imposing an effective prison term of 6 (six) years are however not persuasive. In my view

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6 *Cf S v Ramulifho* (413/2012) [2012] ZASCA 202 (30 November 2012).

7 The general test is whether there had been a failure of justice. See *S v Moodie* 1961 (4) SA 752 (A) the *locus classicus* on procedural failure.

the learned Magistrate was misdirected when he sentenced the accused and clearly overemphasised the seriousness of the crimes committed. In fact he glossed over the accused's peculiar circumstances. It is my considered view in the circumstances of this case that the sentence imposed is not in the interests of justice, it appears to be excessively retributive, moreover it merely pays lip service to the obligations imposed by the Child Justice Act, 75 of 2008. The preamble to the Act emphasises the break with the past and the Act itself provides for a paradigm shift from the practices of the past to the current procedures when children are in conflict with the law. In the light of the court's misdirection in passing sentence this court is at large to determine the sentence afresh.

[9] The personal circumstances of the accused, as referred to in the probation officer's report are that he is 17 years' old and the third born child out of four children. At a tender age he was abandoned by his mother and due to his circumstances had to live an independent life since the age of 11 years'. The accused despite being young, immature and uneducated had to fend for himself. It is evident that he

lacked the required parental guidance and supervision of children of his age. His delinquent behaviour can only be reviewed against the background that he had to provide for himself to survive, and inevitably it leads to crime. Society had failed this young offender and considering the facts of this case, the system failed him too. Against all of this the learned Magistrate came to the conclusion that a long term of imprisonment would be beneficial to the accused since he would not be exposed to 'gangsters, substance abuse and crime'.[8] The learned Magistrate has certainly, in my view, ignored the fact that gangterism and substance abuse are rife in prison.[9]

[10] In my view the devastating effect of a long period of direct imprisonment on a young offender in particular was overlooked and his personal circumstances were under emphasised.[10] The sentencing judgment shows no genuine attempt to focus on the individual and the reasons for him to have been in conflict with the law.

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8 See reasons listed by the learned Magistrate as per para 3 *supra*.

9 See *Jali Commission Report* (2006), at chapters 4 and 8.

10 See *Kibido* 1998 (2) SACR 213 (SCA) at 216h-i.

[9] The accused was never in the past given the opportunity to rehabilitate himself or guided not to return to his old habits of committing crime. In my considered view, correctional supervision would have been an appropriate and far more just sentence given the accused's said circumstances. The only reason that motivated the probation officer not to recommend it, was that there is no adult supervision in his life. That in my view is a social problem and it should not deprive him of an opportunity to receive such a sentence.

Correctional Supervision as a sentencing option has been dealt with by our courts and in *S v M* (Centre for Child Law as *Amicus Curiae*)[11] our Constitutional Court held:

> *"[61] In is an innovative form of sentence which if used in appropriate cases and if applied to those who are likely to respond positively to its regimen, can serve to protect society without the destructive impact incarceration can have on a convicted criminal's innocent family members.* S v Schuytte *1995 (1) SACR 344 (C) AT 350 c-d. 63* <u>*Thus, it creates a greater chance for rehabilitation than does prison given the conditions in our over crowded prisons.*</u> *The SALC cautioned in 2000 that 'South African prisons are suffering from overcrowding that has reached levels where the*

[11] 2007 (2) SACR 539 (CC).

conditions of detention may not meet the minimum standards set in the Constitution'. SALC Report above n3 at page 1.37. In S v Lebuku *2007 JOL 17622 (T) at 13-15 Webster J refers to the 2003/2004 Annual Report of the Judicial Inspectorate of Prisons in which Justice Fagan recommends at para 16.2 the use of non-custodial sentences to help reduce the overcrowding in our prisons. He also provides a helpful discussion encouraging judges to actively explore all available sentencing options and to choose the sentence best suited to the crime. See also* S v Siebert *1998 (1) SACR 554 (A) at 539c-d."*[12]

(My emphasis)

[10] Accordingly the convictions are confirmed. The sentence imposed on 22 March 2012 is hereby set aside and replaced with the following:

10.1 In terms of s 276(1)(h) of the Criminal Procedure Act, 51 of 1977 the accused is sentenced to 18 (eighteen) months' correctional supervision.

1. This sentence shall comprise of the following programmes:

   The accused is placed under:

   (a) House arrest at the place and during the times

[12] *Ibid* at para 61.

determined by the Commissioner of Correctional Services for the full duration of correctional supervision;

(b) That the accused attend programmes for the improvement of the following problem areas:

(i) Orientation programme;

(ii) Life-skill programme;

(c) That the accused abstains from the use of alcohol and drugs.

2. The accused may not leave the magisterial district in which he resides without the permission of the correctional supervision official.

3. The accused shall:

(i) Report to the Correctional Supervision Officer at the Magistrates' Court, Port Shepstone on 22 February 2013 at 09h00.

(ii) Comply with any reasonable instruction or instructions given by the Commissioner of Correctional Services regarding the administration of his sentence.

(iii) Notify the Commissioner of Correctional Services forthwith in writing of any change of his residential address.

10.2 The Registrar is directed to forward a copy of this judgment to the Director-General of the Department of Justice and Constitutional Development.

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Steyn J

Jappie J: I agree

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Jappie J