

REPORTABLE**CA**

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**IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)**

In the matter between:-**DAVID RAMANTSI MOTLHOKI****APPLICANT****and****THE STATE
RESPONDENT**

JUDGMENT**LEEuw J:**

1. This is an application in terms of section 276 A (3) of the Criminal Procedure Act No 51 of 1971 ("The Act"). In terms of this section, section 276 A(3)(a) thereof:

"Where a person has been sentenced by a Court to imprisonment for a period of ---

- (i) not exceeding five years; or
- (ii) exceeding five years, but his date of release, in terms of the provisions of the Correctional Services Act 8 of 1959, and the regulations made thereunder is not more than five years in

the Commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the Court, as the case may be, to have that person appear before the court *quo* in order to reconsider the said sentence.”

2. In terms of section 276 A(3)(d) “whenever a court reconsiders a sentence in terms of this subsection, it shall **have the same powers as if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis*** during such reconsideration : Provided that if the person concerned concurs thereto in writing, the proceedings contemplated in this subsection may be concluded in his absence : Provided further that he may nevertheless be represented at such proceedings or cause to submit written representations to the court.” (My emphasis)
3. In considering the sentence, the court will take into account the circumstances that prevailed at the time the accused was sentenced and the post sentence circumstances which may have a bearing on the sentence to be reconsidered. See **Ex parte Department of Correctional Services:** In **Re S v Katsi** 2002 (I) SACR 497 – 503 a-e TPD at 502 g-j and the cases referred to therein; **S v Van Rooyen** 2000 (I) SACR 372 NCD at 374 g-j to 375 a-c.

4. From the wording of subsection (3)(d), one can infer that not only should the court consider the sentenced accused person's circumstances before and after sentence, but that all other factors that can assist the court to mete out an appropriate sentence, must be taken into account including the interests of the victims, who may have an interest in the sentence imposed. See the remark of Kgomo J, as he then was, in ***S v Van Rooyen*** *supra* on 383 b-d.
5. The prisoner, David Ramantsi Motlhoki, (applicant) was convicted of Culpable Homicide and sentenced by Hendler J, on 6 May 2003, to ten (10) years imprisonment of which five (5) years was suspended for a period of five (5) years with the appropriate conditions. Because of the fact that Hendler J is not available, I was assigned this application and was also provided with the transcribed record of proceedings, in accordance with section 276 A(3)(c)(i) of the Act. According to the evidence placed before me by the Area Commissioner of the Department of Correctional Services, who was duly delegated to launch this application, the prisoner will have served half of his sentence by the 5 November 2005.
6. The facts placed before me to substantiate this application are:

- (i) The report of good behaviour of the prisoner, compiled by Mss Matlhaela and Molete, from the Odi Correctional Centre. They both state in their reports that the prisoner has been assigned to the hospital section of the prison as a cleaner; that he is a member of the recreational committee of prisoners and has donated a television set and a DVD to the inmates. The Sports Organizer confirmed that he is a Team Manager of the Prison Football Club and the Deputy Chairperson of the Sports Recreation Arts and Culture. They all state that he is a very cooperative and diligent inmate;
- (ii) That he is a religious person and has attended and completed a course, in prison, on "Basics of HIV/AIDS peer education programme" and has obtained a certificate in Social Work Programmes;
- (iii) The Social Worker, Mrs Tlhoaele, having evaluated the prisoner, came to the conclusion that he has acknowledged full responsibility for the crime committed, and that in view of his good behaviour in prison, and the fact that the prisoner is ready to plough back to the community the skills obtained in prison, she therefore recommends the conversion of his sentence to correctional supervision;
- (iv) A detailed programme was also filed outlining the activities to be undertaken by the prisoner if he were to serve a correctional supervision sentence;
- (v) The abovementioned reports were presented to the Parole Board, whose Chairperson recommended the conversion of the sentence to Correctional Supervision because of the fact that the prisoner has "realized the element of punishment" and that he is remorseful and has committed himself to leading a crime free life.

7. The State opposed the application, for the following reasons: that the prisoner committed a serious offence, and that the Social Worker and the Correctional Officer did not consider the interests of the family of the deceased in their recommendations for the conversion of

the sentence and further that if the Court were to consider correctional supervision, then strict conditions of such supervision be imposed.

8. Counsel for the applicant submitted that the State had no right to appear in this matter, but merely had to facilitate the process of having the matter enrolled before Court. I find no substance in such submission. The State clearly has an interest in the sentencing of an accused person in Court. Compare **De Lange v Provincial Commissioner Services, EC** 2002 (2) SACR 185 SECLD at 187 h-i.
9. I have already alluded to the fact that in considering whether to convert imprisonment sentence in accordance with section 276 A(3), the Court has the same powers as the Court that convicted the accused and considered sentence after conviction. See section 276 A(3)(d), **S v Van Rooyen**, and **S v Leeb** *supra*. The State could not gainsay the fact that the prisoner acquitted himself well in prison and that he has been rehabilitated with good prospects of conducting himself as a law abiding citizen in the community. There is nothing on record to prove otherwise.
10. With regard to the nature of the offence and the circumstances that prevailed at the time when he was sentenced, I shall rely mainly on what appears in the record of proceedings. The accused was charged with

the Murder of the deceased. The Court found that he was attacked by a group of people because of the fact that he had accidentally run over the foot of the deceased with his vehicle whilst he was reversing his car. He ran away and later came back to collect his vehicle. On coming back he was accosted by people making noises and he fired shots at them. The Court found that he had overstepped the bounds of self-defence to a great degree and hence convicted him of Culpable Homicide.

11. Hendler J, in considering sentence, stated that because of the seriousness of the offence, he could not keep the accused out of prison. He took the interests of the deceased's family and the community into account. He went further to make the following remarks: "Much as I think that you are the kind of person who will never commit a crime again, I cannot for your personal reasons keep you out of prison. But you can consider yourself fortunate that **if you behave yourself** you are not going to be in prison that long because I had tempered my sentence with a great deal of mercy **I find you a good useful citizen and somebody who could still achieve something for the community.**" (My emphasis).
12. I can infer from the remarks of Hendler J, that despite the seriousness of the offence for which the accused was convicted, the circumstances under which it was

committed did, to a great extent, influence him to impose a lenient sentence. At that stage, correctional supervision was not considered.

13. I agree with the views expressed by Hendler J. I consider that the interests of society called for a sentence of imprisonment, and that the sentence imposed was considerably less than what would have been imposed for Culpable Homicide.
14. In terms of section 276 A(3)(e), the Court may after reconsidering the sentence.

- “(i) Confirm the sentence or order of the Court *a quo*;
- (ii) Convert the sentence into Correctional supervision on the conditions it may deem fit;
or
- (iii) Impose any other proper sentence;

Provided that the last-mentioned sentence, if imprisonment, shall not exceed the period of the unexpired portion of imprisonment still to be served at that point.”

15. I wish to observe here that in terms of section 276 A(3)(a), the Commissioner may apply for the reconsideration of the sentence if, he is of the opinion that such **person is fit to be subjected to correctional** supervision. But section 276 A(3)(e) *supra*, empowers the court to “impose any other proper sentence.” Sentences have been

reconsidered where the court applied this subsection by not subjecting the prisoner to correctional supervision but rather suspended part of the sentence originally imposed. See **S v Van Rooyen** *supra* and **Ex parte Department of Correctional Services in re S v Katsi** *supra*.

16. I am of the view that Correctional supervision would be appropriate in this instance in that the applicant has served a period of almost two (2) years of his sentence in prison and evidence has been placed before me which indicated that he has been rehabilitated. He is expected to plough back to the community the skills gained in prison and I am satisfied that the period served in prison has made a better person out of him.
17. The application succeeds and I will alter the sentence imposed by Hendler J. I accordingly make the following order:

- “1. The conviction is confirmed.
2. The sentence imposed on the 6 May 2003 is set aside and the following substituted therefor: Five (5) years imprisonment in terms of section 276 (l) (i) of the Criminal Procedure Act No 51 of 1977. The operation of the sentence is antedated to the 6 May 2003.”

M M LEEUW
JUDGE OF THE HIGH COURT

APPEARANCES:

Date of Hearing : 13 December 2004
Date of Judgment : 07 April 2005

Appellant's Attorneys : Mogwerane & Letsoalo Attorneys
C/O Kgomo, Mokhele & Tlou Attorneys
Respondent's Attorneys : State Attorneys

Appellant's Counsel : Adv V J M Malema
Respondent's Counsel : Adv P N Mogale