Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Republic of South Africa In the High Court of South Africa (Western Cape High Court, Cape Town)

Case Number: A 520/2012

Reportable

In the matter between:

TOUFEEQ ABRAHAMS Appellant

THE STATE Respondent

JUDGMENT: 19 March 2013

BOQWANA AJ

1. On 17 March 2010 the appellant and Wade Woodman ('Woodman') and Yusuf Paulse ('Paulse'), all pleaded not guilty to a charge of robbery with aggravated circumstances in the Cape Town Regional Court.

2. During the course of the trial, Woodman changed his plea to guilty and his trial was separated from that of the appellant and Paulse. On 27 September 2011, at the conclusion of their trial, both the appellant and Paulse were convicted as charged and on 10 April 2012, they were both sentenced to 8 years imprisonment of which 2 years were suspended on certain conditions.

3. On 12 April 2012 the appellant applied for leave to appeal against his sentence and for leave to adduce further evidence relating to the sentence given to Woodman who on 31 May 2010 was sentenced by another court to four years imprisonment, suspended for five years on certain conditions including submitting himself to rehabilitation for the treatment of his drug dependency. Evidence relating to Woodman's sentence was not before the magistrate at the time of the sentencing of the appellant.

4. In granting the appellant leave to appeal against his sentence, the magistrate remarked that even if she had known of Woodman's sentence at the time, it would not have made a difference to the sentence imposed by her, as she did not agree with the sentence that Woodman received.

5. The facts of this case are largely common cause and they are that on 09 August 2009 at approximately 13h00, the appellant, Woodman and Paulse were travelling in a motor vehicle driven by the appellant, in the V [….] area. The appellant stopped the vehicle, in St James Street alongside a pedestrian, one J.W., ('the complainant'), who was talking on his cell phone. Paulse and Woodman got out of the vehicle and Paulse demanded the cell phone from the complainant. J.W. stood to one side holding a knife which was visible to the complainant. The complainant immediately surrendered his cell phone.

6. For reasons known to Woodman alone, he proceeded to stab the complainant with the knife on his upper right leg after he had handed over his cell phone.

7. Woodman and Paulse ran back to the vehicle, where the appellant had been waiting and he then drove off with Woodman and Paulse on board. This incident

was witnessed by members of the local neighbourhood watch who alerted the police, who came and intercepted the vehicle before it could leave the area. The appellant's vehicle collided with the police vehicle whereupon the appellant, Woodman and Paulse were arrested.

8. The appellant gave evidence and stated that he was not aware that his colleagues intended to rob the complainant and that he only found out about the stabbing when they were caught by the police. The magistrate rejected the appellant’s evidence and found him guilty on the basis that he was the driver of the getaway car in a robbery and sentenced the appellant effectively to six years imprisonment.

Central to the appellant’s grounds of appeal is the startling disparity between the sentence imposed on the appellant and that which was given to Woodman. In argument, the appellant’s counsel submitted that it is anomalous that Woodman who approached the complainant and who participated in the robbery by first exhibiting the knife and then stabbing him after the cell phone had been handed over, was given *a* non-custodial sentence, whilst the appellant, his accomplice who had no interaction whatsoever with the complainant but drove the getaway vehicle, received an effective custodial sentence of six years. Counsel further submitted that the sentences were not only strikingly different but they were inversely proportional to the gravity of the actions sought to be penalised in that he who played the palpably more active and blameworthy role in the robbery received a substantially lesser sentence

9. .Counsel further submitted that the non-custodial sentence given to Woodman was not inappropriate having regard to the mitigating circumstances in his case, and in particular Woodman's addiction to *'tik'* which impelled him to commit the crime in that he needed to obtain money to acquire the drug his clean record and his comparatively youthfulness at 18 years of age. He submitted that the appellant's personal circumstances are materially the same as Woodman's. At the time he was 21 years and four months old and like Woodman he was a first offender with an addiction to *'tik.*

10. It is trite that the discretion in sentencing lies with the trial court. The appeal court will generally only interfere with the sentence if the magistrate committed an irregularity or misdirected him or herself in imposing the sentence or the sentence is disturbingly inappropriate. It is accepted by the appellant that the magistrate did not misdirect herself regarding the disparity of sentences as Woodman's sentence was not before her when sentencing the appellant. However, a court of appeal may find a sentence to be disturbingly inappropriate where it is markedly more severe than a sentence imposed on another person convicted of the same offence.

11. In S *v Glanrtoulis*[1] the court held as follows:

1 **(1975} 4 SA 867 (A)**

"1. In general, sentence is a matter for the discretion of the trial court Disparity in the sentences imposed on participants in an offence (whether tried together or in separate court) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.

2. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellant interference with the sentence may, depending on the circumstances, be warranted The ground of interference would be that the sentence is disturbingly inappropriate.

3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."

12. There is a clear disparity between Woodman and appellant's sentences. The appellant played a lesser role in the crime than Woodman did. This is not to say that his role was not serious. It was serious because with the appellant's participation Woodman and Paulse could flee from the scene of the crime. This issue is important and correctly featured in the magistrates reasoning on sentence.

13. In her reasoning the magistrate correctly found injury to the complainant to be an aggravating factor. However, the enquiry is more nuanced. The question is whether the State proved that the appellant was aware of the knife before it was

so gratuitously used after the event by Woodman. The appellant stated that he only became aware of the stabbing after the fact. The evidence for the State does not show that the appellant was so aware and his knowledge of the knife and of its possible use during the robbery was not raised in cross-examination. Furthermore the stabbing took place after the complainant had already handed over the cell phone. Whilst the wound administered on the complainant was serious and could have been fatal, that should not be taken against the appellant without the State establishing that the appellant knew of the knife and that the knife could be involved and used in carrying out the offence. The magistrate therefore misdirected herself by not properly assessing this issue in her reasoning.

14. Turning to the addiction to tik as a factor. The magistrate agreed that addiction to tik was an illness but found that it was not a mitigating factor in the sense that it could excuse the appellant from blameworthiness.

15. The appellant testified that he had been drinking and using tik and dagga before he drove to town with his friends and was not in his proper state of mind.

16. Furthermore, the probation officer's pre-sentence report confirmed that the appellant had been using tik for a period of two years. It also states that when he is intoxicated with the drug, the appellant's self-esteem is low and he can easily be influenced by friends; that after he was arrested the appellant quit the use of drugs and that he was attending counselling sessions at N.A. Kingston Rehabilitation Centre. The appellant testified that he had not used tik since the incident.

17. While it is correct that drug addiction cannot be an excuse for the offence,[2] the magistrate, however, simply dismissed drug addiction as a factor without considering whether it should play any role in the sentence to be imposed on the appellant. In my view that constituted a misdirection on her part. In the case of *Net v The State*[3] Mlambo JA (as he then was) held as follows:

> "Whilst a gambling addiction may be found to cause the commission of an offence, even if it is pathological (as in this case), it cannot on its own immunise an offender from direct imprisonment Nor indeed can it on its own 'be a mitigating factor, let alone a substantial and compelling circumstance justifying a departure from the prescribed sentence', in the words of Stephan Terblanche in South African Journal of Criminal Justice (2004) 17 at 443 who, correctly in my view, criticises the approach in Wasserman."

18. The Court in *Nel* had to consider the issue of finding compelling and substantial circumstances which would justify a deviation from a prescribed sentence and held that to find compelling and substantial circumstances the Court ought to look more broadly than the issue of addiction. The addiction factor must be viewed with other factors. In that case the facts had shown that the appellant's financial pressures and his gambling addiction were inextricably linked to other relevant factors which were that he was a first offender and showed remorse by his guilty plea. The Court found that those factors viewed together should not have been found to be irrelevant but deserved appropriate consideration and effect in sentencing. The Court held further that the financial pressures caused by the gambling addiction were

2 ***Nel* v *The Stale [2007] SC A 51 (RSA) at para 16***
3 **Nel v the State supra at para 16**

clearly pivotal in the appellant's decision to commit the robbery and that his objective, in that skewed state of mind, was to rob to have access to money to ease his financial burdens, which in turn would enable him to continue gambling. These considerations taken together, were found to be substantial and compelling and justified the imposition of a lesser sentence.

19. In this case the magistrate did find substantial and compelling circumstances and she consequently imposed a lesser sentence than the prescribed sentence. However, in considering what sentence to impose, the appellant's addiction to tik remains relevant, but should also not be viewed in isolation. The degree of the appellant's participation in the offence must also be taken into account. His conduct was manifestly less blameworthy than Woodman and there are no significant differences between his and Woodman's circumstances warranting any significant differentiation in sentence. The appellant at 21 years and four months old was relatively young, unemployed, a first offender and a father of a young child. After he was arrested he stopped using drugs. He attended counselling sessions at NA Kingston Rehabilitation Centre. All these factors are relevant and should be looked at cumulatively and be weighed against the undoubtedly serious nature of the crime.

20. The appellant is a clear candidate for rehabilitation outside of the prison. It is therefore my view that there are indeed circumstances which justify the substitution of the effective custodial sentence of 6 years imprisonment with a totally suspended custodial sentence coupled with correctional supervision.

21. 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*)[4] the Constitutional Court held as follows:

"[61] It 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.[5] Thus, it creates a greater chance for rehabilitation than does prison given the conditions in our overcrowded prisons. The SALC cautioned in 2000 that 'South African prisons are suffering from overcrowding that has reached levels where the conditions of detention may not meet the minimum standards set in the Constitution'.

23. In light of my findings above, I propose an order in the following terms:

1. The appeal is upheld and the sentence imposed upon the appellant on 10 April 2012 is set aside and replaced with the following:

1.1 Four years imprisonment which is suspended for five years on the following conditions:

1.1.1 The accused is not convicted of robbery or of crime which is a competent verdict on a charge of robbery, or any offence under the Drugs and Drug Trafficking Act, 140 of 1992, committed during the period of suspension and in respect of which he is sentenced to a term of imprisonment without the option of a

4 **2007 (2) SACR 539 (CC)**

5 *Ibid* **at para 539 61. See also S v** *Schuytte* **1995 {1) SACR 344 (C) AT 350 c-d. 63. See also 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.**

fine.

1.1.2 The accused refrains from drinking alcoholic liquor and from the use of any drug defined in the Drug and Drugs Trafficking Act, 140 of 1992, save where taken upon prescription of a medical practitioner.

1.1.3 The accused submit to correctional supervision and the control of the probation officer for Mitchells Plain or such other correctional supervision official who has jurisdiction over the appellant ('the correctional supervision official'), which supervision and control is to commence within 30 calendar days from the date of this order and shall include that:

1.1.3.1 The accused perform a total of 80 hours community service at the rate of 16 hours per month, as is directed by the correctional supervision official;

1.1.3.2 The accused attend weekly meetings of the AA or NA for a period of two years from the commencement of the period of correctional supervision referred to in paragraph 1.3 above.

1.1.3.3 The accused attend such rehabilitation treatment programmes as is determined by the correctional supervision official, to deal with his tik and/or dagga dependency.

1.1.3.4 The accused submit himself to drug testing whenever required to do so by the correctional supervision official.

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

1.1.5 The accused comply with any reasonable instruction or instructions given by the correctional supervision official regarding the administration of his sentence.

1.1.6 The accused notify the correctional supervision official forthwith in writing of any change of his residential address.

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BOQWANA, AJ

Acting Judge of the High Court of South Africa —| —

LOUW, J

Judge of the High Court of South Afric

aRepublic of South Africa In the High Court of South Africa (Western Cape High Court, Cape Town)

In the matter between:	RAHAMS And THE STATE
	Case Number: A520/2012
TOUFEEQ ABT	Appellant
	Respondent

Order dated 9 April 2013 Addendum to the judgment which was delivered on 19 March 2013

LOUW J

[1] In this appeal Boqwana AJ delivered a judgment on 19 March 2013. I agreed with this judgment and the orders made. It has now been brought to our attention that the formulation of the sentence substituted and imposed by us contains a lacuna in that no period of correctional supervision is specified in paragraph 1,1.3 of the substituted sentence.

[2] This was a clear omission since we intended the period of correctional supervision to be for a period of two years In the result the order made on 19 March 2013 is corrected to read as follows:

[3] The appeal is upheld and the sentence imposed upon the appellant on 10 April 2012 is set aside and is from that date replaced with the following:

1.1 Four years imprisonment which is suspended for five years on

the following conditions:

1.1.1 The accused is not convicted of robbery or of a crime which is a competent verdict on a

charge of robbery, or any offence under the Drugs and Drug Trafficking Act, 140 of 1992, committed during the period of suspension and in respect of which he is sentenced to a term of imprisonment without the option of a fine.

1.1.2 During the period of suspension, the accused refrains from drinking alcoholic liquor and from the use of any drug defined in the Drug and Drugs Trafficking Act, 140 of 1992, save where taken upon prescription of a medical practitioner.

1.1.3 The accused submit to a two year period of

correctional supervision and the control of the probation officer for Mitchells Plain or such other correctional supervision official who has jurisdiction over the appellant ('the correctional supervision official'), which supervision and control is to commence 30 calendar days from the date of this order (19 March 2013) and shall include that:

1.1.3.1 During the period of correctional supervision, the accused perform a total of 80 hours community service at the rate of 16 hours per month, as is directed by the correctional supervision official;

1.1.3.2 The accused attend weekly meetings of the AA or NA for a period of two years from the commencement of the period of correctional supervision referred to in paragraph 1.1.3 above.

1.1.3.3 During the period of correctional supervision, the accused attend such rehabilitation treatment programmes as is determined by the correctional supervision official, to deal with his tik and/or dagga dependency.

During the period of correctional supervision the accused submit himself to drug testing whenever required to do so by the correctional supervision official

1.1.4 .During the period of correctional supervision, the accused may not leave the magisterial district in which he resides without the

permission of the correctional supervision official.

1.1.5 During the period of correctional supervision, the accused comply with any reasonable instruction or instructions given by the correctional supervision official regarding the administration of his sentence.

1.1.6 During the period of correctional supervision, the accused notify the correctional supervision official forthwith in writing of any change of his residential address.

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Judge of the Western Cape High Court

I agree.

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Judgment:
Boqwana AJ

Counsel for the State: **Adv.**
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Counsel for Accused: **Adv.**
T R Tyler

Dates of hearing: **1**
March 2013

Date of judgment: **19**
March 2013