265/74

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between -

STELIOS GIANNOULIS ..... Appellant.

and

THE STATE ..... Respondent.

Coram: HOLMES, JANSEN et RABIE, JJ.A.

Heard: 19 September 1975.

Delivered: 29 September 1975.

J U D G M E N T.

HOLMES, J.A., :-

The appellant was sentenced by a regional court to imprisonment for 12 months on a conviction of bribery. His appeal against the sentence was dismissed by the Cape Provincial Division. He now appeals

to /.....

to this Court against the sentence, having obtained leave under the provisions of section 363 (6) of Act 56 of 1955. He is on bail.

The substantial issue is whether the sentence of imprisonment for twelve months warrants interference on the ground of disturbing disparity from the fine of R200 (plus a wholly suspended period of imprisonment) imposed on a co-offender.

1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal -

   (a) should be guided by the principle that sentence is "pre-eminently a matter for the discretion of the trial Court"; and

   (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

See /.....

See, as to all of the foregoing, R. v. Mapumulo and Others, 1920 A.D. 56 at page 57; R. v. Freedman, 1921 A.D. 603 at page 604, in fin.; S. v. Narker and Another, 1975 (1) S.A. 583 (A.D.) at page 585 (C); and S. v. Rabie, (A.D. 23 September 1975).

And so, as always, to the facts. They may be distilled as follows -

(i) The appellant is a man in his late thirties. He is an immigrant from Greece and has been in this country for seven years. He has no previous convictions. He has at all material times been gainfully employed. For three years prior to his conviction in the present case he was managing a night club in Cape Town.

(ii) The night club was next-door-but-one to a karate club owned by one Thompson. The two men became friends. The appellant started taking karate lessons. Doubtless this would enable him to combine the arts of host and chucker-out at his night club if the occasion should arise.

(iii) Trouble came. Thompson's karate instructor, young Ditton, was arrested by Constable Barnard for being in

possession of a small quantity of dagga for his personal use, in contravention of section 2 of Act 41 of 1971. This was on Saturday, 9 June 1973. He was to appear in court on Monday. He had four previous convictions for this offence. It looked as though things might not go well with him in court; and this would injure the good name of the karate club. It is plain that Thompson confided his misgivings to the appellant.

(iv) The appellant knew what to do - or thought that he did. He spent the week-end trying to get in touch with Constable Barnard so that he could arrange matters, for the benefit of Thompson and Ditton. He could not find Barnard. On the Monday Ditton appeared in court. The case was adjourned and Ditton was released on bail in the sum of R20. Outside the court the appellant approached Barnard. He offered him R1 000 if he would help to have the charge against Ditton withdrawn. He asked Barnard to think it over and to come to him at his night club in the evening. Thompson took no part in this conversation although he was within earshot.

(v) With commendable integrity, Barnard reported the matter to his superior officer and sought advice. In the evening of Monday, 11 June, Barnard and another policeman called on the appellant at his club. Thompson was also there. Thompson came straight to the point with the remark that,

although the appellant had that morning offered R1 000, their financial position was not good and they would give him R500 if he would hand over the dossier to Ditton for destruction. The appellant assured Barnard that this would be safe. Barnard accepted the offer. Either Thompson or the appellant, or both, suggested that the four of them (Barnard, his fellow-policeman, Thompson and the appellant) should meet on the following day (Tuesday) at a certain café in Sea Point, where the exchange could take place - the dossier for the R500. Barnard's impression was that the appellant was playing the leading role in this discussion.

(vi) Acting on instructions, Barnard did not keep the appointment; and at 3.30 a.m. on Wednesday, 13 June he and his fellow-policeman called at the appellant's club. The appellant showed him a bundle of notes (R500) and a cheque counterfoil indicating the withdrawal of that sum. They made an appointment to meet again at 3 p.m. on Friday afternoon at the café at Sea Point.

(vii) On that Friday morning Barnard went to see Thompson at the latter's karate club. Thompson increased the offer to R600. Barnard said that the meeting place already arranged for that afternoon was dangerous and should be changed. It was altered to the

Lagoon at Milnerton. Thompson stipulated that only two should meet there: one from each side, as it were. Barnard agreed. Thompson went with Barnard to the Lagoon and they agreed upon the exact rendezvous on an open stretch of beach alongside the lagoon. Thus was the trap set. Shortly after this, on the same day, the appellant and Ditton and Thompson foregathered at the aforesaid café, and discussed the latest developments. The appellant (either there or back at his club) handed his cheque for R600 to Thompson, who gave it to Ditton, who cashed it. The appellant agreed that Ditton should be the one to keep the appointment with Barnard and to hand over to him the R600 in cash.

(viii) And so it came about that Barnard drove his vehicle to the appointed time and place that afternoon and met Ditton there. Ditton handed over the R600 in exchange for what he believed was the police dossier against him. Actually, it was a duplicate copy. Ditton made a hole in the sand; poured in some petrol from a plastic container which he had obtained from Thompson who had got it from the appellant for this purpose; and lit it. He was in the act of burning the dossier when a senior police officer and others emerged from Barnard's vehicle and pounced. Thus was the trap sprung. Ditton was arrested. Later, Thompson and the appellant were also arrested.

(ix) The three men appeared in a regional court, jointly charged with bribery. Thompson pleaded guilty and he was tried separately. He was convicted of attempted bribery and fined R200. He also received a suspended sentence of imprisonment for 2 years.

(x) The trial of Ditton and the appellant proceeded before a different regional court on their pleas of not guilty. Although Ditton had been caught *in flagrante delicto*, and his possession of dagga was the *causa sine qua non* of the plot, the prosecutor accepted his plea, and called him as a witness for the State. At the end of the case he was formally acquitted.

(xi) The appellant was convicted, and was sentenced to imprisonment for 12 months.

(xii) The magistrate, in his judgment, said that Constable Barnard gave very reliable evidence. He further said that Ditton, who was warned as an accomplice, was not shaken in his evidence whatsoever, and his evidence was reliable and satisfactory. He was held entitled to a certificate of immunity. It is not clear why this was necessary, seeing that he was formally acquitted.

(xiii) Ditton eventually received a suspended sentence for his possession of dagga.

I turn/....

I turn now to the question whether there is a disturbing disparity between the sentences of the appellant (imprisonment for 12 months) and Thompson (a fine of R200 and wholly suspended imprisonment). No doubt justice is best seen to be done in the matter of sentence if participants in an offence (even if tried separately) who have equal degrees of complicity are punished equally, if there ~~was~~ ARE no personal factors warranting disparity; see Gardiner and Lansdown, S.A. Criminal Law and Procedure, Vol. 1, 6th ed., page 674; Burchell and Hunt, S.A. Criminal Law and Procedure, Vol. 1, page 79.

What can be done on appeal to put matters right, at the instance of an accused who feels aggrieved because he was punished more severely than the others? In the first place, punishment is pre-eminently a matter for the discretion of the trial Court; and interference on appeal is warranted only if that

discretion / ....

discretion was not properly and judicially exercised. Accordingly, the mere fact that accused A may have been fortunate in getting off lightly, will not necessarily mean that appellant B was unduly punished. This was indicated by this Court in Rex v. Mdhlongwe and Others, 1916 A.D. 265, at page 267, in fin.; and in Rex v. Mapumulo and Others, 1920 A.D. 56 at page 58.

The same principle applies in England -

> "The fact that one of two prisoners jointly indicted has received too short a sentence is not a ground on which this court necessarily interferes with a longer sentence passed on the other; what has to be shown is that the prisoner appealing has received too long a sentence."

This / ....

This was said in 1955 by Lord Goddard, C.J., in R. v. Richards, 39 Cr. App. R. 191 at 192; and it was applied by Lord Parker, C.J., in R. v. Coe, (1969) 1 All E.R., 65 at page 68, in fin.

That, then, is the basic general rule. However, there have often been cases, in this country and Rhodesia and in England, where a sentence has been reduced on appeal on the grounds of its disturbing disparity from that imposed on a person who had equally participated in the same offence, there being no personal factors warranting the disparity. In England, Lord Parker, C.J., observed in R. v. Coe, supra, at

page / .....

page 68 H

> "The Court on many occasions ..... has reduced a sentence to bring it more into line with the sentence imposed on a co-accused; it is something that this court tries to do in the general run of cases on the basis that only thereby can a sense of grievance be averted. But there is no principle of law that the sentences must strictly compare ..... "

Thus in R. v. Richards, supra, two gipsies, mother and daughter, had been convicted of obtaining money by false pretences by representing to a credulous old lady that certain very ordinary carpets were Persian rugs of great value. The mother was convicted on more counts than was her daughter. The trial Court sentenced them both to imprisonment - the mother for 2 years and her daughter for 4 years. (One wonders whether mother-gipsy was per incuriam given her daughter's intended sentence, and vice versa). On appeal by the daughter, Lord Goddard, C.J., thought that the mother's sentence of imprisonment for 2 years

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was too low; and that the daughter's sentence of imprisonment for 4 years was not per se too severe. Nevertheless, because of the "very considerable disparity", the Court ameliorated the position by reducing the daughter's sentence to imprisonment for 3 years.

In Natal, Broome, J.P. put it thus in R. v. Mazibuko, 1952 (2) P.H., H. 127 -

> "This Court has never hesitated to interfere so as to bring about a certain measure of equality in the sentences imposed by different courts upon persons who have participated in the same offence. The most common instance is in convictions under Act 5 of 1927 where the man and the woman concerned are often tried before different magistrates. Where the sentences imposed upon the man and the woman for such an offence are grossly divergent, this Court has often reduced the more severe sentence, not because it is unreasonably severe in relation to the circumstances of the offence, but because it is unfair that one should suffer so much more severely than the other. Indeed, in such a case it might be said that the higher sentence is unreasonably severe and induces a sense of shock when it is compared with the lower."

~~In the Cape a similar attitude was adopted~~ by De Villiers, J.P., in R. v. O. and Another, ~~1958~~ (4) S.A. 179 (C). In that case two accused, a European and a Coloured, both males, were tried by separate magistrates for the same offence, a venereal affair against the order of nature. The European pleaded guilty and was fined £10. The Coloured pleaded not guilty. He was tried by another magistrate and was sentenced to imprisonment for 4 months. On review, the learned Judge President said at page 180 A -

> "I would have said that the sentence of four months' imprisonment with compulsory labour is by no means unduly severe, but that the sentence of a fine of £10 or 20 day's imprisonment with compulsory labour was unduly lenient. I think it essential that in both cases the same sentence should have been imposed - on the facts here. Obviously, it is not possible to increase the sentence imposed on R from £10 or 20 days to four months imprisonment. In my view, the justice of the case requires that, in order to put matters on a fair basis, the sentence imposed on O should be

altered from four months' imprisonment to a fine of £10 or 20 day's imprisonment, so that each accused will suffer the same penalty."

In Rhodesia, in the case of R. v. Mpofu, 1968 (3) S.A. 142, the Court reduced a sentence on the grounds of disparity. Beadle, C.J., expressed himself thus at page 143 -

> "The sentence of six months' imprisonment with hard labour imposed on the appellant if taken in vacuo might not perhaps be so excessive as to justify this Court interfering ..... The real question for determination, however, is whether the sentence imposed on his master should be taken into account in the matter and whether because of that sentence the Court is justified in interfering in the instant case. There are a number of authorities which deal with this problem. Gardiner and Lansdown, 6th ed., vol. 1, p. 674, points out that as far as possible sentences for the same sort of offences should be uniform. A similar problem to this arose in the case of R. v. O. and Another, 1958 (4) S.A. 179 (C), and the case of R. v. Seventy, 1963 R & N, 8 (N.R.). In both these cases the Court decided that in order to ensure that justice was not only done but seen to be done the sentences should be reduced, so that the

> sentences imposed on two accused who committed substantially the same offence should be equated, the one with the other ..... The Court must, of course, act on some principle, and, as is pointed out in the case of R. v. Zvakaramba, R.A.D. 169/66, not reported, the Court would not interfere unless the disparity between the two sentences was so great as to warrant its interference with the magistrate's exercise of his discretion."

This Court made similar observations on the question in S. v. Moloi, 1969 (4) S.A. 421 (A.D.). Van Winsen, A.J.A., had this to say, at page 424 E -

> "Where two accused are associated to a more or less equal degree in the commission of an offence and no factors personal to each accused, such as, e.g., his previous convictions, suggest any reason for the imposition of disparate sentences, this Court may well interfere on the ground that due cognisance has not been taken of these facts by the court imposing the sentences."

The learned Judge went on to differ from the decision in S. v. B, 1965 (3) S.A. 17 (E). The latter was a review judgment which departed from what was

said in R. v. O. and Another, 1958 (4) S.A. 179, referred to above.

Finally, there is the case of S. v. Chetty, 1975 (3) S.A. 757 (A.D.). The appellant was convicted by a regional magistrate on 98 counts of theft. The total amount of money involved was R4 000, over a period of 15 months. He occupied a position of trust. He was a first offender. He was sentenced to imprisonment for two years, one of which was suspended on relevant conditions. A certain John Joseph, who collaborated with the appellant in this illegal scheme, was convicted on 141 counts of theft and sentenced, by another magistrate, to a fine of R150 and to a period of imprisonment for one year, wholly suspended.

This Court held that the appellant's sentence could in no way be regarded as excessive. However, counsel for the appellant contended that, when regard

was had to the sentence imposed on John Joseph, whose degree of participation in the scheme exceeded that of the appellant, the latter's sentence was disturbingly inappropriate and warranted interference. This Court rejected that argument on the ground that there was no evidence before it regarding the general circumstances in relation to John Joseph. This Court could therefore express no views in regard to the sentence which was imposed upon him, though it prima facie appeared, in the light of the circumstances mentioned above, to be on the lenient side, particularly when compared with the sentence imposed upon the appellant. In these circumstances this Court held that the appropriateness of the sentence imposed upon the appellant could be judged only in the light of the relevant circumstances of his case.

Botha, J.A., who wrote the judgment of the Court, also said this -

> "It would not ..... be improper for a judicial officer to have regard, in

addition to all the other relevant circumstances in the case, to the sentence imposed upon another accused in respect of the same offence, or to sentences generally imposed in respect of offences similar to the offences dealt with by him, or in respect of offences of a kindred nature, but to follow such sentences for the sake of uniformity without proper regard to the relevant circumstances in the case, may not only constitute an irregularity but may result in ineffective or inappropriate sentences."

Finally, Botha, J.A., went on to say -

"It may be that where there is no uniformity in the sentences imposed on persons jointly charged with the same offence and notwithstanding the fact that the relevant circumstances in relation to the several accused are reasonably identical, such lack of uniformity may be evidence of arbitrariness or caprice on the part of the judicial officer concerned, justifying interference by the court on appeal."

The learned Judge observed that that was not the position in the case before the Court. The appeal was dismissed.

Reviewing all of the foregoing judicial

pronouncements over the past 60 years, there seems to me to be discernible a fairly consistent thread running in the same general direction. It may be expressed thus -

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 courts) 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 no personal factors warranting such disparity, appellate 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 / ....

~~equate the sentences: it does what~~
it considers appropriate in the
~~circumstances.~~

Where two or more accused are jointly tried and are sentenced by the same court, on appeal on the ground of disparity of sentence the judgment will disclose the degrees of complicity and any factors personal to each accused, affecting his sentence. Where co-participants are tried in separate courts (for example, because one of them pleads guilty) on appeal by one of them against his sentence on the ground of disparity, there ought to be no difficulty about the other court's judgment (indicating reasons for sentence) going in by consent at the trial. In the matter of sentence the trial court may receive such evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed; see section 186 (2) of Act 56 of 1955. And the word "evidence" is used therein in a wide sense: the judical officer "is

entitled / .....

entitled to avail himself of many sources of information ..... some of which it would not be proper for him to regard in coming to a conclusion as to whether the accused were guilty or not guilty" - per Selke, J., in Mbuyase and Others v. Rex, 1939 N.P.D. 228 at 231, approved by this Court in R. v. Zonele and Others, 1959 (3) S.A. 319 (A.D.) at page 330 G.

In the present case, when the issue of disturbing disparity was raised in the appeal before the Cape Provincial Division, that Court called for a copy of the record in Thompson's case. (Actually, only the judgment was necessary, for it contains the reasons for sentence). Presumably the Court a quo did this because the magistrate said that the legal representative of the appellant had undertaken to hand in to him a copy of the record, but had not done so. And such record is before this Court too. Counsel for the State contended that it was inadmissible, citing R. v. Sachs, 1922 TPD 81, in which Wessels, J.P.,

said at page 82 - "The Court of Appeal is bound by the record, and it cannot go outside the record in order to determine whether a person is or is not guilty".

In my view the Court a quo was entitled to refer comparatively to the judgment in the Thompson-case; and this Court is free to do so. After all, courts often refer, comparatively, to the judgments in other cases, whether reported or otherwise, in considering the matter of sentence.

The magistrate's judgment in the Thompson case makes it clear why he imposed on Thompson the lenient sentence which he did. I quote from it -

> "In giving evidence in mitigation you tried to water down your part in this matter as far as you could. And in that regard I would like to say without any hesitation whatsoever that I fully and completely accept the evidence given by Constable Barnard in this regard to this incident ..... He himself said that in initiating these proposals the accused did not take an active part.

And / .....

> And it is also clear to the Court that the accused did not try, as was said on his behalf, to gain any personal benefit from the non-prosecution of Ditton. It would have reflected badly on him, it would have reflected badly on his club to a certain extent. And the Court can quite understand that a man will be apprehensive as to the result of anything like this, because Ditton was a junior instructor at the club. And what is more the accused had himself on a previous occasion been convicted of possession of dagga for his own use. That being so a further conviction of another person who has now been disclosed was convicted together with him on that previous occasion can reflect badly on him, and the Court can quite see that after the matter had been broached by somebody else the accused would be interested in trying to further it. If it wasn't for this fact that there was an altruistic motive to a certain extent in trying to arrange this non-prosecution of Ditton the Court would have had no hesitation whatsoever in imposing imprisonment without the option of a fine. These matters are serious and when a person is convicted of doing anything like this the Court has to impose a sentence which will be exemplary and will deter the party concerned as well as other from indulging in this kind of activity".

The prosecutor in the appellant's case very fairly informed the court that Thompson had been sen-

tenced to a fine of R200; plus a two-year period of imprisonment, the latter being wholly suspended.

I pause here to explain that the prosecutor also informed the court that Thompson had been found guilty of attempted bribery; and that that should also be the conviction in the appellant's case. The magistrate, however, convicted the appellant of bribery. In giving reasons for sentence later, the magistrate in the present case said that some of his colleagues had expressed the opinion that the conviction should have been one of attempted bribery. The magistrate added that this difference was a matter of very minor importance, a mere technicality, which should not influence the sentence in any way. In this Court, neither side sought to make anything of this. As already explained, the lightness of Thompson's sentence was not based on the fact that he was convicted of attempted bribery.

To sum up with regard to Thompson's sentence

of R150, it was imposed because he did not take an active part in initiating the proposals of bribery; but after the matter had been broached by somebody else (the appellant in the present case) Thompson was interested in trying to further it. And to a certain extent Thompson had an altruistic motive quoad Ditton.

In my view the appellant in the present case does not gain any assistance from the foregoing, because the magistrate in the present case based his approach to the sentence on the following factual situation -

> "In my opinion the accused played the dominant part in this affair and should be treated as the offender in the first degree."

This was strenuously challenged in a conscientious argument by counsel for the appellant. We have carefully weighed his submissions. In the end the following facts preponderate. At the outset it was the appellant, a man of 38 years, who suggested the bribing

of the police. This emerges from the facts that, after Ditton was arrested on the Saturday, the appellant spent the week-end, unavailingly looking for Constable Barnard with a view to arranging something for the relief of Ditton. Furthermore, after Ditton's appearance in court on Monday, it was the appellant who accosted Barnard and offered him R1 000 if he would arrange matters. It was the appellant who there and then invited Barnard to think it over and to come to his club that night. At the latter discussion, according to Barnard's accepted evidence, it was the appellant who played the leading role in the negotiations. On the Wednesday morning it was the appellant who temptingly flaunted R500 in cash before Barnard's eyes. On the Friday, after Barnard's call on Thompson, the appellant joined in the conspiratorial conference at a café; and he agreed that Ditton should keep the rendezvous with Barnard. Lastly, it was the appellant who put up the money - all R600 of it.

To /.....

To sum up, from first to last, the appellant was the initiator, the financier, and the kingpin of this murky plan of corruption.

On that account the magistrate was entitled to sentence him much more severely than Thompson was sentenced. The disparity between their sentences is warranted by the far greater role which the appellant played in the offence.

It was also urged that the disparity in the sentences was not warranted because the appellant had no motive to secure a personal advantage: he was doing it for the benefit of Thompson and, indirectly, Ditton. As to that, firstly, he did have some slight personal motive, inasmuch as he was taking lessons at Thompson's karate club, the good name of which would be affected by Ditton's conviction on a dagga charge. Secondly, this is not a case where the accused was moved by what he regarded as the obligations of a debt of gratitude arising out of close ties of family kinship, as in

S. v. Narker and Another, 1975 (1) S.A. 583 (A.D.) at page 589 D - E. Thirdly, in the course of doing what he did the appellant was corrupting the very people whom it was submitted that he was seeking to benefit, namely Thompson and young Ditton (as well as trying to destroy the integrity of a member of the police).

Lastly, there was some discussion whether the magistrate misdirected himself in saying that all forms of bribery and corruption should be stamped out by merciless and exemplary sentences. The magistrate certainly expressed himself strongly in that particular passage; but it must not be viewed in isolation, and it did not deter him from fully discussing the other relevant considerations in arriving at an appropriate sentence. See the remarks of this Court in S. v. Narker and Another, supra, at page 586 B. Hence, this is not a case such as R. v. Mzwakala, 1957 (4) S.A. 273 (A.D.), in which the enormity of the offence blinded the trial Court to all other considerations in passing

sentence/ ...

sentence.

In the result the appeal is dismissed.

G.N. HOLMES,

JUDGE OF APPEAL.

JANSEN, J.A.)
RABIE, J.A.) Both concur.