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CASE NO 160/87
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IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

TEMBA MHLABUHLANGENI ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : HOEXTER, MILNE et KUMLEBEN JJA

HEARD : 24 NOVEMBER 1988

DELIVERED : 24 NOVEMBER 1988

J U D G M E N T

KUMLEBEN, JA/.....

KUMLEBEN, JA

This is an appeal against sentence. The appellant was charged in the regional court with the contravention of sec 28(1) read with sec 28(2) of the Explosives Act, 26 of 1956. The charge sheet, as quoted in the judgment of the court a quo, alleged that the appellant possessed a petrol bomb in the Beaufort West township in circumstances giving rise to a reasonable suspicion that he intended using it to cause injury to persons or damage to property. The appellant was initially tried in the regional court. He pleaded not guilty but was convicted as charged.

The case against him was satisfactorily proved in that court. The evidence of two policemen was accepted. In brief, they said that on the 27th of October 1985 they went from house to house in the township as part of a cleaning-up

operation. The township had been the scene of large scale rioting and damage to property. Whilst they were carrying out this operation a person came towards them, holding a home-made petrol bomb. They shot at him and he fell wounded. They went up to him where he lay and were able to identify him reliably as the appellant. Whilst they were doing that a crowd gathered and they were obliged to leave the spot because they considered that their lives were endangered. Later that day they went to the hospital where they again identified the appellant. The evidence of the appellant denying that he was involved was rejected by the magistrate and on appeal to the Cape Provincial Division the correctness of the conviction was conceded. The sentence imposed by the magistrate was one of eight years imprisonment. The appeal to the court a quo, as I have indicated, was restricted to the sentence. The appeal was dismissed and leave to appeal to this court was refused. This court, however, granted such leave.

The magistrate, in deciding upon the sentence he imposed, considered the three factors which bear upon sentence, namely, the personal circumstances of the appellant, the seriousness of the offence and the interest of the community.

As regards the personal circumstances of the appellant, the magistrate took into account that he was at the time of his trial twenty years of age. (The trial took place in February of 1986, a matter of a few months after the offence was committed.) But the youthfulness of the appellant was in the view of the magistrate, and in my view quite correctly, offset by his impressive list of previous convictions. In August 1979 when he was about fourteen years old, he was convicted of assault with intent to cause grievious bodily harm and received four strokes with a light cane. The following year he was convicted of robbery and the punishment was one of seven strokes. The next year, in

October 1981, at the time when he was about sixteen years old, he was convicted of robbery and received a prison sentence of nine months, of which five months were suspended. Finally, in April of 1983 he was convicted of housebreaking with intent to steal and theft and a period of nine months imprisonment was the sentence imposed.

As regards the seriousness of the offence and the interest of the community, the magistrate regarded the offence in a very serious light against the backcloth of the events taking place in this particular township at that time. After the conviction of the appellant, the State called a witness, Major Marx. He testified to the extent of the rioting, civil commotion, damage to property and actual or potential injury to people at that particular time. It is unnecessary to refer to his evidence in detail. State property was damaged and a building belonging to a welfare agency was gutted. Stones were thrown at innocent passers-

by. The overall picture revealed by his evidence was one of large scale disruption of civil authority and extensive damage to property in the township.

That this is a consideration to be taken into account, is conceded by the appellant in the Heads of Argument in which it is acknowledged that "appellant's offence is undoubtedly a serious one particularly in view of the prevailing conditions in the township in which the offence was committed."

Mr Desai, who appeared for the appellant before us, did not rely on any misdirection on the part of the magistrate. That being the case, this court is empowered to alter the sentence only if it can be said that the magistrate failed to exercise a proper judicial discretion in imposing the sentence of eight years' imprisonment. This is an inference that may be drawn if we conclude that the sentence

is disturbingly inappropriate.

Whilst the seriousness of this offence is acknowledged, there is a consideration which, in my view, is a significant one and ought to be weighed on the scale in deciding whether or not this punishment is unduly harsh. I refer to the fact that, as I have indicated, the appellant was shot and wounded at the time of, or shortly before, his arrest. The undisputed evidence is briefly that this injury to his stomach caused him to be conveyed from Beaufort West to the Grootte Schuur hospital in Cape Town where he underwent an operation. At the time he gave evidence at the trial he stated, and this was not disputed, that he was still suffering from a measure of pain and disability. It is perhaps unfortunate that more precise details of this injury were not furnished at the trial. However, what is on record justifies the inference that it must have been a reasonably severe wound and one which, as I have said, caused him pain

and discomfort. The magistrate did not expressly refer to this consideration in his judgment, but one has no reason to think that this was not a factor that he took into account. One may, however, infer from the fact that he did not expressly mention this consideration that he did not give it the significance or attached the weight to it which I consider it deserved. Be that as it may, it is to my mind an important consideration to take into account. It amounted to retribution and punishment, as it were, on the spot and at the time the offence was being committed.

Mr Rorich, who appeared for the State acknowledged the signficance of this consideration and very fairly agreed, having regard to this factor and the others that favour the appellant (although bearing in mind the counterveiling considerations), that were a portion of this sentence to be suspended, the objectives of punishment in this particular case would be as satisfactorily achieved. He

also, equally correctly in my view, conceded that if three years of the eight years were to be suspended and if such be regarded as an appropriate sentence, there is a significant disparity between such a sentence and the one imposed by the magistrate.

In the circumstances I would therefore allow the appeal, set aside the sentence and substitute a sentence of eight years' imprisonment of which three years are suspended for five years on condition that the appellant is not found guilty of a contravention of sec 28(1) read with sec 28(2) of the Explosive Act, 26 of 1956, committed during the period.

M E KUMLEBEN
JUDGE OF APPEAL

HOEXTER J.A. - I agree.
MILNE J.A. - I agree.
HOEXTER J.A. _ It is so ordered