6/1988

MOEGAMAT ABDOEL SAMAAI — Appellant

and

THE STATE — Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MOEGAMAT ABDOEL SAMAAI — Appellant

and

THE STATE — Respondent

Coram: VILJOEN, VIVIER, JJ A et BOSHOFF, A J A

Heard: 4 March 1988

Delivered: 10 March 1988

J U D G M E N T

BOSHOFF, A J A:

This is an appeal against sentence. The appellant was convicted of public violence in a district

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division of the Wynberg Magistrate's Court and sentenced to 12 months' imprisonment. He appealed unsuccessfully to the Cape of Good Hope Provincial Division and was granted leave to appeal to this Court only against the sentence.

The circumstances of the offence are the following.

On 4 September 1985 at about 19h50 constables Johnson and Witbooi of the South African Police were on patrol duty in a police vehicle in the Parkwood residential area. There was a situation of unrest in Acasia Road. The police dispersed people at various spots. Two large fires fuelled by motor tyres were raging at different places in the middle of the road. The fires were clearly intended to serve as road-

blocks...../3

blocks. The arrival of the police caused the people at these fires to turn to flight. Further down the road near the intersection of Willow Road there was a crowd of 30 to 40 people alongside and halfway into the road. Near them two motor tyres were in the intersection. When these people noticed the approaching police vehicle they became riotous and started to throw stones at it. The appellant was amongst them and was also seen to throw stones. He then went to the tyres, which had previously been doused with petrol, and set them alight. This was obviously done to obstruct the course of the police vehicle. When the stone-throwing and the burning tyres failed to stop the approach of the police vehicle, the appellant fled. The police vehicle went on to the

pavement...../4

pavement to pass the burning tyres and followed the appellant. It caught up with him and he immediately turned back and fled in the opposite direction. Constable Johnson got out of the vehicle and called upon him to stop. He ignored the call and the constable then fired a shot at him with a shot-gun using birdshot and struck him in the hand and in the buttock. He was then arrested.

On the evidence the tyres that were lit and the stones that were thrown in the vicinity of the area in question were part of a far wider upheaval. Burning tyres piled in the road not only obstructed traffic and made vehicles fall prey to stone-throwers, but also damaged the tarred surface of the road. In the instant case there was no damage to the

road...../5

road solely due to the fact that the fire was extinguished and the tyres were removed from the road by some unknown person.

The magistrate took a serious view of the offence and at one stage thought of referring the case to the regional court for sentence. He was of the view that a sentence of two to three years would be a proper sentence for this kind of offence and that his jurisdiction of one year imprisonment would in the circumstances be inadequate. He eventually decided against such a step.

In discussing the offence, the magistrate made mention

inter...../6

inter alia of the following:

"As far as the crime is concerned, it is common knowledge that the unrest just grew and grew and to such an extent did the different sporadic commissions of unrest take place that in this area, the Peninsula and specifically in this Magisterial District of Wynberg, a situation of emergency was declared. The Court must take that into consideration, although in your favour is that the commission of your crime was not at or about the time that this was declared an emergency area.

The crime that you have been convicted of is of a serious nature because firstly, your action shows no respect whatsoever for the public peace and security. You invaded the rights of other persons, the public and also the police in this respect. Further, what the Court also bears

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in mind is that this crime was committed quite close to the residence of a Member of Parliament and the Court is aware of Members of Parliament, Coloured Members of Parliament whose houses have been burnt, bombs have been thrown at these houses and in fact two members were quite seriously injured through the doings of certain of these unrest people. Public violence as such is a very serious crime and the Court sees it in that light and under normal circumstances this is a case that should be heard in a Regional Court, not in a District Court. This Court is of a strong opinion that none of these cases should be in any District Court."

Mr Potgieter for the appellant contends that the magistrate misdirected himself in three respects. According to him he acted on the basis that a sentence of two to three

years...../8

years was the norm for the offence of public violence irrespective of the considerations relative to the assessment of punishment. He thus fettered his discretion. There does not seem to be any merit in this point. The magistrate did not consider himself bound to refer the case to the regional court so that such a sentence could be passed. He merely mentioned these terms of imprisonment to indicate in what serious light such cases are regarded. The fact remains that he dealt with the case himself despite his limited jurisdiction.

Mr Potgieter also argues that the magistrate erred in taking the following factors into account: (a) That "a situation of unrest" was declared in the "Peninsula" due to the growing instances of "different sporadic commissions of

unrest...../9

unrest", there being no evidence to this effect on the record; and (b) that the incident occurred close to the house of a member of Parliament and that the houses of other members were burnt and bombed and two of them seriously injured; this information being irrelevant in the absence of evidence linking the actions of the appellant to such incidents.

This argument cannot be supported. It overlooks one of the basic reasons why a court of appeal regards the infliction of punishment as pre-eminently a matter for the discretion of the trial court. As was pointed out by Innes C J in R v Mapumulo and Others 1920 AD 56 at 57:

> "It can better appreciate the atmosphere of the case and can better

estimate...../10

> estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal."

De Wet C J in R v Ford 1939 AD 559 at 560 said about this passage:

> "The Chief Justice by mentioning the relevance of the atmosphere of the case and the circumstances of the locality where the offence was committed, seems to me to recognize impliedly that the question whether offences of a similar nature are prevalent or not in this district can be taken into consideration by a magistrate in passing sentence."

Mr Potgieter further contends that the trial court did not properly weigh or have sufficient regard to the

appellant's...../11

appellant's personal circumstances and background.

The appellant was represented at his trial and did not give evidence in mitigation of sentence. The magistrate certainly had regard to circumstances to which his attention was drawn because he mentioned them in his judgment. There are other circumstances which were mentioned in argument about which no evidence was placed before the trial court. It is difficult to imagine how the magistrate could have considered them.

Mr Potgieter in conclusion argues that the magistrate incorrectly failed to consider alternative forms of punishment, more particularly a fully suspended sentence or corporal

punishment...../12

punishment. This is not correct because it appears from his judgment that he was requested by the representative of the appellant not to consider corporal punishment but to consider a postponed sentence.

In all the circumstances I am unpersuaded that the magistrate misdirected himself in any way or that the sentenced imposed by him was disturbingly inappropriate.

In the result the appeal is dismissed.

ACTING JUDGE OF APPEAL

VILJOEN, J A)
concur
VIVIER, J A)