Case Number 116/92

/al

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SHAAN SCHLEBUSCH Appellant

and

THE STATE Respondent

CORAM : SMALBERGER, GOLDSTONE JJA et KRIEGLER AJA

DATE OF HEARING : 14 September 1993

DATE OF JUDGMENT:

J U D G M E N T

KRIEGLER AJA/.....

KRIEGLER AJA:

This is an appeal against a sentence of three years imprisonment imposed in the Regional Court, Johannesburg, for attempted car theft. An appeal against the sentence failed in the Witwatersrand Local Division but was pursued in this court with leave granted on petition.

The appellant had attempted to steal a motorcar belonging to a Ms O'Grady in Yeoville, Johannesburg, on the evening of 12 June 1990. Upon arraignment some three weeks later he pleaded guilty but, in a rambling response to questioning in terms of s 112(1)(b) of Act 51 of 1977, disclosed sufficient exculpation to cause a plea of not guilty to be entered.

The prosecutor thereupon proceeded to put the evidence of three witnesses before the court. The first was the complainant, who lived in a block of flats some 50 metres from where her car had been

parked. At about 20h00 on the evening in question the second prosecution witness alerted her to something untoward about her car; she went outside with her informant, saw the appellant sitting in her car and summoned the help of a Mr Cooke, a co-tenant of hers in the block of flats. (He was the last prosecution witness.) When the two of them emerged from the building the appellant was strolling in their direction with his hands in his pockets. Cooke accosted him and, despite his protestations of innocence, forcibly detained him. Although Cooke opined that the appellant was "by no means drunk" he did form the impression from his manner of speaking that he could be under the influence of liquor and/or drugs. The appellant cut such a sorry figure that the complainant was prepared to drop any charges against him. He was nevertheless arrested and handed over to a policeman who happened to arrive shortly

afterwards. The complainant then inspected her car; the lefthand vent window had been smashed and the ignition wires had been tampered with. She estimated her damage at R100,00 to R150,00.

The appellant, who appeared without legal representation, made no attempt to conduct a defence: he put no questions to the first and second State witnesses (intimating that he did not dispute their evidence) and confined himself to a suggestion to Cooke that he had been "panicky" when confronted on the evening in question. The appellant's "defence" was even more laconic when he entered the witness-box. He merely said that he had been drinking excessively on the day in question, was under the influence of the liquor and not "in a right state of mind". In reply to a question by the magistrate he reiterated that he did not deny the State evidence. There was no cross-examination by the prosecutor. Indeed none

was called for as the appellant's guilt had been established conclusively. He was thereupon duly convicted.

During the subsequent discussion of a remand for sentence the appellant disclosed that he was under the supervision of a probation officer and the regional magistrate called for a pre-sentence report. When the trial resumed the appellant's probation officer, Mrs Meyers of the Department of Health Services and Welfare, expanded upon a presentence report she had prepared. At that stage she had been involved with the appellant's rehabilitation for more than two years and was able to furnish an unusually detailed and informed opinion. Withal she drew a depressing picture. The appellant was born on 26 September 1969, the second of three children of emotionally ill-matched parents, the father being a compulsive martinet and the mother indulgent to a fault. His schooling was

traumatic and increasingly stormy. When the appellant was in grade one it was discovered that he was dyslexic, which seriously hampered his educability and self-esteem; from the age of ten his parents and teachers found it increasingly difficult to control him and in standard six he became an habitual drug abuser. His behaviour degenerated into truancy and frequent changes of school and culminated in his "dropping-out" of a trade school in standard nine.

Predictably he had had several brushes with the law. In February 1987 (at age 17) he incurred his first conviction, viz driving a motor vehicle without a licence, for which he was fined R100,00. In May 1988 he was convicted of attempted murder and the possession of an unlicensed firearm and ammunition arising out of a drug-induced prank that went badly awry. Fortunately for the appellant the court took an indulgent view and postponed sentence

for three years on condition that he submitted to probation for two years and complied with any prescribed regime of treatment. (That is when he first came under the supervision of Mrs Meyers.) Hardly a month later he was sentenced to juvenile cuts and was given a suspended sentence of six months imprisonment for the theft of a bicycle. Once again he was placed under probation and on that occasion he was also ordered to submit to out-patient treatment for drug addiction. He had by then become addicted to drugs (possibly to alcohol as well) and had sold the bicycle to support his addiction.

In the interim he had become an out-patient of the South African National Council for Alcohol and Drug Abuse ("SANCA") on the instructions of Mrs Meyers. The SANCA therapists diagnosed him as having a serious drug-dependency problem and in August of that year he was admitted to a SANCA

institution for in-patient treatment; he absconded but was re-admitted shortly afterwards and successfully completed the course in mid-December 1988. He had responded well to the rehabilitation and Mrs Meyers noted a marked improvement in his behaviour. Regrettably he commenced his national service shortly thereafter, which meant the end of the after-care for his drug dependency and attenuation of Mrs Meyers' supervision. He resumed the use of drugs while in the army and by the time the present crime was committed had relapsed into a destructive pattern of coping with stress by resorting to drugs.

Nevertheless the probation officer was firmly of the opinion at the trial that the appellant had previously gone far in overcoming his drug dependency and, given constant and consistent discipline and structure, could be rehabilitated. She felt that his domestic support system would

play a positive role in that regard - he lived in his parental home with his girl-friend and their young baby. The degree of progress he had made as an in-patient of the SANCA institution in the last quarter of 1988 led her to believe that he needed and would benefit from a long term of treatment in a drug rehabilitation centre. She therefore recommended an order in terms of s 296(1) of Act 51 of 1977 committing the appellant to such a centre under the sanction of a wholly suspended sentence of imprisonment.

The regional magistrate viewed the probation officer's opinion and recommendation with considerable scepticism, as he made plain in questioning her. (Thus he suggested that the appellant had "had all the chances that he needed", that "he had just all the opportunities in the world to get the treatment for his dependency" and that "he thinks he can get away every time with a

suspended sentence, if he pleads that he is suffering from drug dependency...".) In addition he disclosed that he had scant respect for the rehabilitation centre at Magaliesoord, where, so he said, there was no discipline and from which people absconded "on a daily basis". Mrs Meyers adhered to her recommendation however, maintaining that the root cause of the appellant's aberrant behaviour was not criminality but drug-dependency and that the prospects of treatment - as opposed to punishment - were fairly good.

The trial court accepted that the appellant was a person as described in s 29 of Act 41 of 1971, and that it was his drug dependency that gave rise to his criminal conduct but declined to follow the probation officer's recommendation. It is apparent from the reasons for sentence that it did so for a two-fold reason, the one related to the crime and the other to the criminal. with regard

to the crime the regional magistrate stressed the gravity of car theft and the length of the prison sentences ordinarily meted out in such cases. With regard to the appellant the regional magistrate's attitude was that he had "received all possible treatments", that he had done nothing to rehabilitate himself and that his real problem was that he had not been properly disciplined. Although there is much to be said for such a robust approach, I believe that the trial court misdirected itself with regard to both the crime and the criminal and, in the result, failed to serve the interests of society by sending the appellant to prison.

First, as regards the crime, there are a number of unusual features to be noted. It was indeed a rather bizarre attempted car-theft, far removed from the usual case dealt with in the courts. Even if one discounts the appellant's

inarticulate allegation that he was drunk and confused, the evidence of the prosecution witnesses does indicate that there was something amiss with him. Cooke formed the impression that he was not normal, while he struck such a sorry figure that the complainant, who had every reason to be incensed at him, was minded to let him go. That evidence, read in conjunction with the appellant's plea explanation, lends support to the inference that the appellant, while walking home from a day frittered away in smoking Mandrax and drinking liquor, chanced upon the motor-car and impulsively tried to steal it. It was an inept attempt - he cut both his hands, presumably trying to gain access, and did not manage to activate the starter motor by fiddling with the ignition wires.

Whether he is truthful when he says he then gave up and continued on his way, only to be apprehended by Cooke, or whether he realised he had

been seen and tried to brazen his way out must remain a matter of conjecture. Although the appellant's version was disclosed in his plea explanation it was hardly touched on during the trial. The appellant put nothing along those lines to the State witnesses and made no mention thereof during his perfunctory evidence-in-chief. Unfortunately neither the prosecutor nor the presiding officer saw fit to canvass any of the details the appellant had mentioned at the plea stage. Inasmuch as the evidence of the State witnesses largely related to events after the appellant had already gained access to the car little that they could relate bore on his condition and state of mind at that earlier stage. Moreover the court was at that stage concerned with the question of guilt and it is understandable enough that it was not considered necessary to traverse his rambling and confused plea explanation with the

State witnesses.

when the appellant himself testified, however, it was a different matter. It is clear from the record that he had no conception of his rights, despite a detailed exposition by the regional magistrate. Although he was told that his plea explanation carried no evidential weight in his favour he clearly did not grasp the distinction between evidence under oath and statements from the bar in explanation of plea. It is a distinction which many trained lawyers have had difficulty in grasping. In the circumstances, more especially as the appellant had not volunteered any of the potentially exculpatory - or at least mitigatory -aspects of his earlier statement once he had entered the witness-box, it would have been advisable for the prosecutor or the judicial officer to raise them with the appellant, who was patently unable to conduct a proper defence. That

was not done and in the result the reasonable possibility that the appellant had desisted for reasons of his own remained neither refuted nor confirmed. As a further result the trial court could make no finding either way. Counsel for the appellant was therefore able to submit that, although his discontinuation of the attempt because of incompetence did not constitute a defence, it nevertheless was a less culpable case than if completion of the crime had been frustrated by the intervention of the State witnesses. There is merit in the submission. The appellant's blameworthiness should indeed be judged on the basis that he may well have given up an ineffectual attempt to steal the car because of his incompetence.

Moreover, on the evidence there was no rational reason for the appellant to steal the vehicle. He lived nearby and required no transport

home; he lived with his parents, was earning a pittance as a national serviceman and could hardly have anticipated explaining to them - and indeed to his girl-friend - how he had come by the car. Clearly none of them would have countenanced such conduct. And there is nothing to suggest that the appellant had any means of secreting the car for future use. At worst he may have wanted to go for a joy-ride.

The prevailing impression is that the appellant impulsively made a bumbling and brief attempt to steal the car when he happened to come across it on his somewhat inebriated way home. Clearly that puts the case in a less blameworthy category than the usual case of attempted car theft where the thief is caught red-handed. Yet there is no indication in either of the two judgments of the trial court that the appellant's conduct was seen in this mitigatory light. Lastly, with regard to

the crime, it should be noted that the loss suffered by the complainant was relatively trivial.

Turning then to an evaluation of the criminal, one is immediately struck by the difference of approach between the probation officer and the trial court. Whereas Mrs Meyers took the view that the appellant's rehabilitation from his drug addiction should take precedence, the regional magistrate emphasized the demands of personal deterrence and retribution. In doing so, the appellant's youth, his inadequate personality and particularly his very real problems related to drug and alcohol dependency do not seem to have been afforded sufficient weight. Mrs Meyers' report and evidence established (i) that the root cause of the appellant's socially deviant behaviour was his drug dependency; (ii) that he had indeed made serious attempts to overcome his addiction; (iii) that

their failure had not been due solely, or even primarily, to a lack of motivation on his part but to the hiatus created by his call-up for national service; (iv) that the prognosis for rehabilitation was good if a prolonged regime of in-patient therapy in a disciplined environment were to be instituted; and (v) that committal to a specialised rehabilitation centre was distinctly preferable to imprisonment. That opinion was based on the probation officer's knowledge of the case built up over more than two years and cannot be ignored. Indeed the trial court accepted that the appellant was a person as described in s 29 of Act 41 of 1971 and that it was his dependency that led to his criminal conduct.

That being the case, there would have had to be very cogent reasons for not following the expert's recommendation. And those the trial court found in the inherent seriousness of attempted car-

theft and the appellant's perceived wilful failure to pull himself together. From what has been said above it should be clear that, in doing so, the unusual circumstances of the crime were overlooked, as was the bondage of a drug addict.

As the trial court misdirected itself in the exercise of its discretion as to sentence this court is at large to impose whatever sentence it considers would have been fitting. That task is complicated by the circumstance that more than three years have elapsed since the trial, a long time in the life of an immature and unstable young man with a drug problem. However, having regard to the essential nature of his condition at the time, the possibility that he has spontaneously managed to rid himself permanently of his addiction can be disregarded. The appellant is therefore probably still a prime candidate for the type of sentence for which s 296(1) of Act 51 of 1977 makes

provision, especially having regard to the proviso added by s 2 of Act 64 of 1982. By that I mean that the appellant's committal to a rehabilitation centre can be fortified by the sanction of a sentence of imprisonment which is wholly suspended on appropriate conditions. Having regard to the nature of the offence and the appellant's previous convictions a sentence of three years imprisonment would be appropriate if his breach of the conditions of suspension were to result in implementation of sentence. And in the circumstances it would be appropriate to keep that sanction over his head for a period of three years. with regard to the conditions of suspension, the appellant's drug addiction and his consequent resort to theft should be the primary targets.

It goes without saying that the objectives of such a sentence would be frustrated if the suspended sentence of six months imprisonment

imposed in June 1988 were to be put into operation as a result of the instant conviction. In the unlikely event of an application for implementation (none has been made yet) the court will no doubte have regard thereto that the goal sought to be achieved by this judgment would be rendered nugatory by the appellant's committal to prison.

The appeal against sentence is upheld. The sentence of three years imprisonment is set aside and in its stead the following sentence is imposed:

1. In terms of s 296(1) of Act 51 of 1977 the accused is committed to a rehabilitation centre established in terms of Act 41 of 1971.

2. In addition the accused is sentenced to three years imprisonment which is wholly suspended for three years on condition that he -

(a) co-operates fully with the rehabilitation

programme prescribed by the director of any centre to which he is admitted;

3. both during his detention in such centre and upon his discharge, release on licence or with leave of absence therefrom, submits to and complies with any regime of after-care rehabilitation prescribed by such director;

4. is not convicted of theft or an attempt thereto committed during the period of suspension.

J.C. KEIEGLER ACTING JUDGE OF APPEAL SMALBERGER JA]

GOLDSTONE JA] AGREED