CG CASE NUMBER: 674/93

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MYNARDT JOHN MORRIS DAVIDS Appellant

and

THE STATE Respondent

CORAM: NESTADT, VAN DEN HEEVER JJA et NICHOLAS AJA

HEARD ON: 19 SEPTEMBER 1994

DELIVERED ON: 8 NOVEMBER 1994

JUDGMENT

VAN DEN

HEEVER JA

I have read the judgment of Nicholas AJA, and wish to add the following to his summary of facts:

The group approached by appellant were street children. He asked them

> "maar wat soek julle dan hierso, moet julle dan nie by die huis gewees het nie, toe se die spannetjie vir my, die klonges, nee hulle loop maar hier in die rondte, want hulle gaan nie huis toe nie, want hulle kry pak by die huis, want hulle ma en hulle pa bly dronk".

The oldest of the group was M.. Erica's older sister, Ma. aged about 9, was the only other girl. When M. told appellant he could provide no woman for him, appellant said that Ma. would do. The boys objected that she was too young. Appellant then offered to take them home by bakkie. Instead, he drove to the lonely spot where he parked, and first called Ma. to him. She however jumped out of the cab. Appellant then called E.. She went, because

> "M. het vir haar gesê van die geld ... Toe het sy seker bly geraak oor die geld, toe het sy gegaan".

When be dropped off the children after enjoining them to silence, he promised that he would return to that same place the next evening to bring them blankets and food.

I agree that decided cases on sentence provide guidelines, not straight jackets. I however disagree, with respect, that the magistrate misdirected himself in looking to S v E 1979 (3) SA 973 (A) for guidance. There is no indication that he was not fully aware that the facts in that matter differ in many respects from those he was dealing with. The principle enunciated in the passage quoted from that judgment is clear. It has not been invalidated by the legislative introduction of correctional supervision as a sentencing option, nor by the later decision of this court in S v R 1993 (1) SA 476 (A), where the facts differed and the complainant was almost twice as old as E.. Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. Even where an offence is brought to

light, our

adversarial system often results in the courts failing the victims. Had appellant (presumably confident that he could bribe the impoverished children to silence) not taken the whole group with him, and had not, as a result, one of the boys been able to give good evidence of the events of that evening, appellant would indeed have got away with it. M. was found to be as incompetent to testify as E.. It would probably have taken very little, even had they been rated capable of testifying, for appellant's attorney to show them up as unreliable witnesses.

Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the court's strong disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children. His victim was doubly vulnerable. Not only was she very young, but she had neither a safe haven to return to nor any of the armour caring parents try to provide for their children. She was perhaps chosen for that very

reason: sexually attractive she certainly was not. Appellant exhibited no

genuine remorse. He protested (untruthfully) to the end, that though he was after sexual satisfaction he did no more than hug the child and kiss her neck. Genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. There is no suggestion that he suffers from any psychological flaw to deflect the obvious inference that he chose a street urchin because he thought he could get away with it. The worst of it is that he did not care that buying her services from M. as though she were a prostitute in the hands of her pimp, constituted corruption of the whole group of children.

In my view for the very reason that correctional supervision does not contain a denunciatory element, a sentence of only correctional supervision would not be adequate here. The offence was pre-planned. Appellant had sufficient time for

reflection. And one needs no evidence of formal statistics to persuade that abuse of children is rife. Hardly a newspaper appears but carries some report of malpractices with or against the vulnerable young. The magistrate was correct in regarding

the offence as serious and the interests of society as requiring a severe sentence. However, he does not appear to have given sufficient regard to the third leg of the accepted triad relevant to the determination of what is appropriate. In the light of the mitigating factors set out in the other judgment, of which the most important is that appellant had an unblemished record, the sentence imposed was unduly severe despite the fact that appellant displayed no remorse. In my view the court's disapproval of appellant's conduct may be sufficiently voiced by combining effective incarceration in terms of sec 276(l)(i) of the Criminal Procedure Act with suspended imprisonment. At the same time such an order would put the appellant's future in his own hands in greater measure than the magistrate did.

The appeal is allowed. The sentence imposed by the magistrate is set aside and replaced with the following:

> "1. Beskuldigde word gevonnis tot 3 jaar gevangenisstraf ingevolge a 276(l)(i) van Wet 51 van 1977. 2. Daarbenewens word beskuldigde gevonnis tot 2 jaar

gevangenisstraf opgeskort vir 5 jaar op voorwaarde dat hy nie skulig bevind word aan verkragting of poging tot verkragting of onsedelike aanranding gepleeg gedurende die tydperk van opskorting nie."

L VAN DEN HEEVER JA

CONCUR: NESTADT JA)

J U D G M E N T

NICHOLAS AJA:

This is an appeal against sentence. The appellant, Maynard Davids, was charged in the regional court sitting at the Strand with the attempted rape of E.W., an 8-year old girl, on 23 October 1991. He pleaded not guilty. The magistrate convicted him of indecent assault, and sentenced him to imprisonment for 6 years, of which 2 years were suspended for a period of 5 years on condition that he was

not convicted of rape, attempted rape, or indecent assault committed during the period of suspension. His appeal against the conviction and sentence was dismissed by the Cape Provincial Division, as was his

application for leave to appeal further to this court. On a petition to the Chief Justice however leave was granted to appeal against the sentence "oil the basis of the facts found by the trial court".

In summary those facts were the following. On the evening of 23 October 1991 a group of young people, which included E.W., were walking in a street in the Strand. Davids, who was driving a bakkie, stopped and offered one of the group R 10 to get a woman for him. The group got onto the bakkie and he drove to a lonely spot near Sir Lowrey's Pass where he parked his vehicle.

Everybody got off the bakkie. The accused took E. with him into the cabin of the bakkie, which he locked. After a while the other children came closer to see what was going on. Davids was seen to be

lying on top of E., whose dress was up and whose panties were around her

knees. She was struggling and kicking. The accused's pants and underpants were down to his knees. He was moving up and down on the child. The spectators knocked on the cabin. Davids waved with his hand, indicating that they should wait. They carried on knocking until he climbed off the child. She was crying. Davids pulled up his pants, and also pulled up E.'s panties. He told them that they must not report to the police. He then drove back to the Strand where he dropped the children.

In his judgment, the magistrate said after analysing the evidence:

> "Die Hof kan nie as enigste redelike moontlikheid dit as bewese bevind dat die beskuldigde vaginaal met die klaagster won verkeer nie. Die moontlikheid bestaan selfs

dat die beskuldigde sy penis tussen die klaagster se bene op en af beweeg het. Dit bring gevolglik mee dat die Staat nie die misdaad van poging tot verkragting bewys het nie."

The magistrate found that all the ingredients of indecent assault had been proved and he convicted Davids accordingly.

In the course of his judgment on sentence the magistrate made the following remarks - the numbers have been added by me for convenience of reference:

" (1) Daar is geen mediese getuienis dat die kind enige beserings opgedoen het nie. (2) Dit moes vir haar 'n ondervinding gewees het wat sy seker nooit sal vergeet nie, alleenlik die tyd sal leer. (3) Sy het die Hof ingekom en in die getuiebank het sy 'n patetiese houding ingeslaan. (4) Alhoewel daar nie fisiese skade is wat u haar aangedoen het nie, sal die Hof die omstandighede van hierdie voorval in verrekening moet bring by die oplegging van 'n gepaste

straf. (5)In S v E 1979(3)SA973(A)op978(A-B) worddeui Corbett AR soos volg opgemerk:

> Die fisiese skade wat hy haar aangedoen het was, relatief gesproke, taamlik gering, maar dit was eerder aan geluk as aan appellant se goeie oordeel te danke ... Kinders moet teen hierdie soort optrede beskerm word. Die Hof het 'n plig om sy afkeuring daarvan ten sterkste uit te spreek en ook om in so 'n geval 'n vonnis op te lê wat die nodige afskhkwaarde sal he. Die aard van die misdaad en die belange van die gemeenskap verg, na my mening, 'n redelik strawwe vonnis.'

I make the following comments.

(1) Dr AJ Stals, who was called as a witness by the trial court, said that he had examined E. at 2.30 p.m. on 24 October 1991, the day after the occurrence. She was neglected, dirty and very frightened.

There were no signs of assault or violence. On vaginal examination the doctor found no sign of penetration: the hymen and the perineum were both intact.

3) I do not think that the magistrate was here suggesting that E.'s pathetic showing in the witness box was a consequence of her treatment by the accused. All that it revealed was that she was a very timid little girl who was overawed by the unaccustomed atmosphere in the court room.

4) It cannot be gainsaid that the circumstances of the incident were of considerable importance in the determination of a proper sentence.

(5) I do not think however that the dicta quoted from the judgment of Corbett JA could properly be used to support the conclusion which the

magistrate ultimately reached, namely that a sentence of direct imprisonment was imperatively demanded in this case. The dicta were uttered with reference to the facts of that case, and it is unsafe and likely to lead to error to apply dicta uttered with reference to particular circumstances as if they embodied a rule of general application. Counsel for the State submitted that there were points of correspondence between the present case and S v E. I do not think that that was a useful exercise. In R v Wells 1949(3) SA 83(A) Centlivres JA said at 87-88 that:

> "Decided cases are ... of value not for the facts but for the principles of law which they lay down. In this connection I cannot do better than quote the remarks of LORD FINLAY in Thomson v Inland Revenue (1919, SC (HL) 10):

> 'No enquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together: the use of cases is for the propositions of law they contain, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case.'"

Decided cases dealing with sentence may be of value as providing guidelines for the trial court's exercise of discretion (see S v S 1977(3) SA 830(A)) and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See R v Kars 1961(1) SA 231 (A) at 236 G.) But it is an idle exercise to try to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. "Each case

should be dealt with on its own facts, connected with the crime and the criminal...." (Karg's case ubi cit.) See S v Fraser 1987(2) SA 859(A) at 863 CD.

In my opinion the magistrate misdirected himself in relying on S v E and this misdirection led him to impose a sentence which in my view was entirely disproportionate. This court is accordingly at large in regard to sentence.

The magistrate did not consider correctional supervision as a possible sentencing option. This was probably because the probation officer had stated in the welfare report on Davids -

"Die oplegging van korrektiewe toesig kan oorweeg word, maar in die lig daarvan dat die betrokkene buite die

bedieningsgebied van

die korrektiewe kantoor woon, word die vonnisopsie nie oorweeg nie."

This objection was however no longer operative when the appeal was heard. Counsel for the State then informed this court that the Strand was now within the service area of a correctional office. Consequently the way is open for such a sentence to be considered in this case.

In Punishment, Prison and the Public (1971), Sir Rupert Cross said the following at pp 108-9:

"Writing in 1922, Sydney and Beatrice Webb said in their English Prisons under local Government

We suspect that it passes the wit of man to contrive a prison which shall not be gravely injurious to the

> minds of the vast majority of prisoners, if not also to their bodies. So far as can be seen at present, the most practical and hopeful of 'prison reforms' is to keep people out of prison altogether.'

I am sure there are those who would be disposed to question the first sentence, especially in the case of comparatively short term prisoners; but I doubt whether there are many who would wish to quarrel with the second. Even if imprisonment has no permanent detrimental effect on a prisoner, it means loss of employment, temporary, if not permanent, loss of wife and family, the risk of contamination and impaired ability to get further employment. Small wonder then that prison has come to be regarded as the sentencer's last resort."

The learned author referred to various reforms made in England, mostly as the outcome of twentieth century legislation, but concluded (at

the foot of 109) that -

> "the fact remain that the provision of further alternatives to imprisonment is still the penal reformer's most insistent demand."

In South Africa the year 1991 saw a radical shift in penal policy. To the list of sentences which might be passed upon a person convicted of an offence, there was added by s 41(a) of Act 122 of 1991 a new type of sentence called correctional supervision. In the same year the Prisons Act No 8 of 1959 became the Correctional Services Act No 8 of 1959. And by s 28 of the Correctional Services and Supervision Matters Amendment Act, 122 of 1991 ("the amending Act") there was inserted in Act

8 of 1959 a new chapter headed "CORRECTIONAL

SUPERVISION" comprising sections 84, 84A, 84B, 84C, 84D, and 84E. In the leading case of S v R 1949(1) SA 476(A), Kriegler AJA made the following points inter alia:

1) While it is true that correctional supervision is still an untested sentencing option, it appears already from the empowering legislation that it has great potential (at 487 E).

2) like most important feature of the amending Act is the shift of emphasis from imprisonment to reform (ct 487 F).

3) The law-giver has made a clear distinction between two kinds of offenders, namely those who must be removed from the community by imprisonment, and those who, while deserving of punishment, do not require to be removed from the community

(488 G).

(4) The legislature has unequivocally indicated by the shift of emphasis which is apparent from the amending Act as a whole, that punishment, reformative but if necessary highly punitive, is not necessarily or even primarily to be achieved by incarceration (at 488 G-H).

(5) Where the legislature has expressed its wishes so clearly and the executive is prepared to provide the necessary administrative support, it is the duty of judicial officers to actually adopt the measures which have been placed at their disposal. In particular it should be realized that appreciable punishment can now be

inflicted without imprisonment, with all its well-known

disadvantages for both the prisoner and the broad community. The injunction in point (5) was necessary because the new sentencing option has been received by sentencers, not with universal approval, but frequently with doubts and misgivings, - one judge indicated that he would have no truck with "trendy" sentences. The lack | of enthusiasm was perhaps not surprising: many of those concerned in the administration of criminal justice had acquired a particular mind-set as a result of years of habituation to the idea that imprisonment is the punishment of choice for serious crime, and it required a basic mental shift to regard imprisonment "as the sentencer's last resort".

It has sometimes been suggested that correctional supervision is a "soft" sentencing option. Although different in kind from imprisonment,

and lacking its detrimental and degrading effects, correctional supervision is, in the words of Kriegler AJA, " 'n gevoelige straf". The treatment of "probationers" (who are by definition persons who are subject to correctional supervision) is prescribed in s.84 of Act No 8 of 1959:

> " 84. Treatment of probationers.-(l) Every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court or the Commissioner or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision."

If the probationer does not comply with the conditions he may inter alia

be referred back to the court for trial. Kriegler AJA pointed out (at 487 E-F) that it was clear that the name 'correctional supervision' did not merely describe a sentence, but was a collective name for a wide variety of measures of which the single common feature was that they were applied outside a prison. At 988J, he referred to the fact that in terms of s 276A(l)(b) of the Criminal Procedure Act a court may impose for a period corrective supervision of as much as to 3 years. House arrest for so long a period would be in itself a heavy punishment. He had pointed out however at 488 D:

> "Dit staan egter 'n straftoemeter vry om monitering en inskakeling by 'n program van sielkundige behandeling vir

19 drie jaar voor te skryf en huisarres van 'n korter duur."

Although point (3) refers to "the kinds of offenders" this does not of course mean that the sentencer must look only at the the offender's make-up to the exclusion of the other elements of the well-known triad, namely, the crime and the interests of society. All three elements must be considered.

In some cases the courts have stated that "emphatic denunciation" is an important function of punishment. (See Burchell and Hunt. South African Criminal Law and Procedure 2nd ed Vol I. at 69-70). Such a case was S v E from which the magistrate quoted, and the magistrate himself said in his

judgment on sentence -

"Tweedens moet die Hof ook kyk na die gemeenskapsbelang. Die Hof moet deur die vonnis wat hy ople aan die gemeenskap toon met welke mate van afsku 'n misdaad soos hierdie bejeen word."

In its nature a sentence of correctional supervision is not denunciatory. It does not follow however that such a sentence is necessary inappropriate because the case is one which excites the moral indignation of the community. The question to be answered is a wider one: whether the particular offender should, having regard to his personal circumstances, the nature of his crime and the interests of society, be removed from the community.

The magistrate referred in his judgment on sentence to the following mitigating factors. Davids had no previous convictions. He

was 37 years old, married, with two children aged 10 and 6, one of whom suffered from asthma. Davids had passed standard 4 at school.

He had been employed as manager of vehicles by and earned R 900 per month. He had lost his employment as a result of this case, and was now working as a taxi driver and earning R 720 per month. His wife was working and earning R 970 a month.

In the welfare report the probation officer stated:

> "Uit die ondersoek blyk dit dat die betrokkene 'n gesonde gesinslewe handhaaf, hoewel daar voorheen probleme was rakende die betrokkene se sosiale leefwyse.
>
> Daar kan geen verklaarbare rede vir die betrokkene se misdaad gevind word nie, behalwe dat sy drankgebruik 'n rol daarin kon gespeel net."

This is not the picture of a man who belongs to the class of offenders who must be removed from the community. This the magistrate appears to have recognized. He stated:

> "Die Hof staan nie onsimpatiek teenoor die aanbeveling van die proefbeampte en van u regsverteenwoordiger vir 'n opgeskorte vonnis nie. Die Hof is gedagtig daaraan dat ook genade in gewenste gevalle betoon moet word. Die Hof is egter die oordeel toegedaan dat u eie belange totaal oorbeklemtoon sal word indien u nie na die gevangenis gestuur gaan word nie. Die Hof gaan egter deels voldoen aan die versoek dat daar 'n gedeelte van die gevangenisstraf vandag opgeskort word. Die Hof ag 'n termyn van direkte gevangenisstraf as die mees gepaste vorm van vonnis onder die omstandighede."

The reason for that conclusion lay in the magistrate's view that the offence called for a sentence which would demonstrate to the community

the degree of repugnance with which the offence was regarded by the court. In my view however the offence, serious and reprehensible though it was, was not in the circumstances such as to call for the accused's removal from the community.

In terms of s 276 A(l) of the Criminal Procedure Act punishment shall only be imposed under s 276(l)(h) after a report of a probation officer or a correctional official has been placed before the court. The report which is contemplated is one which deals inter alia specifically with the question whether the imposition of correctional supervision is appropriate. No such report is so far available. Moreover the magistrate's sentence was imposed on 29 June 1992 and in the more than two years which have passed since then the whole picture may have

changed. In my view therefore the following order should be made:
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1. The appeal is upheld.

2. The sentence imposed by the magistrate is set aside.

3. The matter is referred back to the magistrate to impose sentence afresh after considering a report submitted in terms of s 276 A(l)(a) of the Criminal Procedure Act and any further evidence relevant to sentence which may be received by the trial court.

HC NICHOLAS
JUDGE OF APPEAL