CASE NO 127/99 **REPORTABLE**

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

In the matter between:

BONILE NINGI **1st APPELLANT**

ZOLILE MABADI **2nd APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **F H GROSSKOPF, SCOTT *et* PLEWMAN JJA**
HEARD: **26 SEPTEMBER 2000**
DELIVERED: **29 SEPTEMBER 2000**

Sentence - 18 months imprisonment for public violence - correctional supervision not a sentencing option by reason of imprisonment imposed on other counts - convictions on other counts set aside on appeal - matter referred back to trial magistrate to consider sentence under s 276(1)(h) of Act 51 of 1977

J U D G M E N T

SCOTT JA/...

SCOTT JA :

[1] As long ago as 1994 the two appellants together with 12 others stood trial in the Regional Court on one count of murder, one of attempted murder and one count of public violence. One of the accused was acquitted. The others, including the appellants, were convicted on all three counts. Each was sentenced to eight years imprisonment for murder on count 1, six years imprisonment for attempted murder on count 2 and 18 months imprisonment for public violence on count 3. In each case four years of the sentence imposed on count 2 and the whole of the sentence imposed on count 3 were ordered to run concurrently with the sentence imposed on count 1 so that each of the 13 accused who were convicted was to serve an effective period of 10 years imprisonment.

[2] On appeal to the Eastern Cape Division the convictions on all three counts were set aside in the case of three of the 13 who had been convicted. The appeal of the remaining 10 (including the two appellants in this Court) against their conviction and sentence on count 3 (public violence) was dismissed. The appeal of the two appellants against their convictions on counts 1 and 2 was upheld. As to the other eight, all were unsuccessful in their appeal against their conviction and sentence on count 2 (attempted murder), but all, save one, were

successful in their appeal against the conviction on count 1 (murder). In the case of the one, the conviction was altered to one of attempted murder and the sentence reduced from eight to six years imprisonment. In his case four of the six years imposed on count 2 and the whole of the sentence on count 3 were to run concurrently with the 6 years imposed on count one resulting in an effective period of imprisonment of 8 years. Of the remaining seven, the 18 months imposed on count 3 was to continue to run concurrently with the sentence of six years imposed on count 2. In the case of the two appellants the sentence imposed on each was similarly left intact save of course that there was no longer any other sentence with which it could run concurrently.

[3] The present appeal is against sentence only. It is with the leave of the Court *a quo*. Both appellants are out on bail.

[4] All the charges arose from an incident which occurred on Saturday 4 September 1993 at the Boskor sawmills, Storms River, in the Eastern Cape, where all the accused were employed and where they resided in a compound on the premises. It appears that the workers fielded a rugby side called the “Boiling Waters”. Dissension among the players caused a group to break away and establish their own rival team which they called the “Wonderful Fifteen”. The latter team was due to play a match against a visiting side from the Ciskei on

Saturday, 4 September 1993. Tension between the two Boskor sides and no doubt their supporters, resulted, however, in the match having to be cancelled. The situation was exacerbated when a member of the one group who resided in dormitory 11 assaulted and injured a member of the opposing group who lived in dormitory 25. Following the assault a group from dormitory 25 proceeded to dormitory 11 which they attacked with stones and bottles. Window panes were broken and at some stage a refuse bin was rolled into the dormitory. The group then went off to lodge a complaint with the team manager of the "Boiling Waters" before returning to dormitory 25. Inevitably the occupants of dormitory 11 retaliated, but with a vengeance. A mob of 30 to 50 persons descended on dormitory 25. They were armed with kieries, iron bars and other weapons; one of them had an axe. The dormitory was stoned and a firebomb thrown in through the window setting a bed alight.

[5] Most of the occupants of dormitory 25 were able to escape through a rear window. But at the stage when the attackers broke down the door and stormed into the room two of the occupants had not yet fled. They were Mphakamisi Xhali, the deceased in count one, and Jacky Sishuba the complainant in count two. The mob set upon Sishuba. He was viciously assaulted, first in the dormitory and then outside. He suffered head injuries and

was hospitalised for several weeks. At the time he had sight only in one eye, having lost an eye in a motor accident many years before. As a result of the assault he is now totally blind. Next, the mob turned on Xhali who had attempted to hide under a bed. He too was taken out of the room and brutally assaulted. Later he was found lying some distance from the dormitory. How he got there is unknown. He died the next day as a result of intra-cranial bleeding.

[6] Much of the evidence related to the role that each of the accused had played in the two assaults. The appellants in this Court were identified as being part of the mob. They were armed with kieries but the evidence did not establish that they actually participated in the assaults. In upholding their appeal on counts one and two the Court *a quo* found that it had not been shown beyond reasonable doubt that they had made common cause with those who had assaulted Xhali and Sishuba and that, on the contrary, there was at least a reasonable possibility that they had joined the mob in its activities only after the assaults had been committed. This finding was not contested by counsel for the respondent. It follows that for the purpose of sentence the appellants must be assumed to have joined the mob at a stage when the rampage had virtually come to an end.

[7] Counsel for the appellants pointed out that in view of the

appellants' convictions and the sentences imposed on counts one and two, correctional supervision in terms of s 276(1)(h) of Act 51 of 1977 was not an option available to the Regional Magistrate when imposing sentence on count 3. (The same is true of imprisonment in terms of s 276(1) (i).) Once, however, the appeal against the convictions on counts 1 and 2 were upheld in the Court *a quo* so that the sentence of 18 months on count 3 stood alone, this obstacle no longer existed when considering the appropriateness of the sentence. In such circumstances there can be no doubt that a court of appeal is entitled to reconsider the sentence imposed against the option of correctional supervision (or imprisonment in terms of s 276(1) (i)). If the position were otherwise, it would mean that the appellants would be prejudiced by the incorrect finding of guilt on counts 1 and 2. It is apparent from the judgment of the Court *a quo* granting the appellants leave to appeal that the imposition of correctional supervision, or imprisonment subject to the provisions of s 276(1)(i), was not considered as the issue was not raised before it. Leach J, who delivered the judgment, expressly stated, however, that had the issue been raised "we may well have set aside the sentences imposed on [the appellants] in respect of count 3 and referred the matter back to the trial magistrate to consider imposing a sentence under s 276(1)(h) or (i)."

[8] The question is, therefore, whether in all the circumstances a sentence of correctional supervision would be appropriate. It is unnecessary to repeat what has been said before of the advantages of correctional supervision. They are well known. What I think must be acknowledged, however, is that in so far as a first offender in particular is concerned and leaving aside for the moment the practicalities of administering a non-custodial sentence, whether correctional supervision as opposed to direct imprisonment is to be imposed must depend ultimately on the seriousness of the offence and the particular circumstances in which it was committed. This is so because, whatever its advantages, correctional supervision remains a lighter sentence than direct imprisonment. Any contention to the contrary I think would be unrealistic.

[9] Both the appellants were, or were regarded for the purposes of sentence as, first offenders. Both were in their early thirty's and both were in fixed employment at Boskor where they had worked for some years. The real issue therefore is the extent of their crime. It is true, as emphasized by counsel for the State, that public violence is a serious offence. But as previously indicated, the basis on which their conviction on count 3 was confirmed (and their appeal against their convictions on counts 1 and 2 upheld) was the reasonable possibility that they had joined the mob after the assaults had been

perpetrated. It follows that for the purpose of sentence it must be accepted that the appellants participated in the activities of the mob only at a very late stage and indeed after the real damage had been done. This limited degree of participation must, furthermore, be seen in the context of the events which preceded the attack on dormitory 25. The attack was in retaliation for the earlier attack on dormitory 11. To this extent there was clearly a measure of provocation. In all the circumstances it seems to me that this is an appropriate case to refer back to the Regional Magistrate to consider imposing a sentence under s 276(1) (h) of Act 51 of 1977.

(10) In the result the following order is made:

(1) The appeal succeeds and the sentence of 18 months imprisonment imposed on the appellants in respect of count 3 is set aside.

(2) The matter is referred back to the trial Magistrate to impose sentence afresh, after due compliance with the provisions of s 276 A (1) (a) of Act 51 of 1977 and after receiving such further evidence as may be proffered, to correctional supervision in terms of s 276 (1) (h) of that Act or, if the appellants (or either of them) are found not to be fit for such a sentence, to otherwise sentence them (or the one found not to be so fit) in the light of the views expressed in this judgment.

D G SCOTT

Concur:
F H GROSSKOPF JA
PLEWMAN JA