THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

Case no: 313/06

In the matter between:

FRANS OOSTHUIZEN
Appellant

and

THE STATE
Respondent

Coram: *Navsa JA, Malan et Cachalia AJJA*

Date of hearing: **20 November 2006**

Date of delivery: **30 November 2006**

Summary: Magistrate wrongly concluding that appellant 'has a preponderance of violence' – circumstances of the case warranting custodial sentence – earlier error and failure to consider a sentence in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 requiring this court to intervene.

Neutral citation: This judgment may be referred to as *Oosthuizen v The State* [2006] SCA 159 (RSA).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] This is an appeal with the appropriate leave, against a sentence imposed by the Magistrates' Court held at Fochville and confirmed by the Pretoria High Court (Patel J, Kemp AJ concurring).

[2] On 10 September 2001 the appellant, Mr Frans Oosthuizen, was convicted in the Magistrates' Court Fochville of assault with intent to do grievous bodily harm and sentenced to 36 months' imprisonment, 12 months of which were suspended for a period of three years on condition that he is not convicted of a crime involving violence committed during the period of suspension.

[3] It is common cause that the magistrate did not call for a probation officer's report in order to enable him to consider a sentence of correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the Act). It was submitted on behalf of the appellant that against the circumstances of this case it was a material misdirection entitling this court to interfere with the sentence imposed.

[4] It is necessary at this stage to consider the background facts in some detail.

[5] The appellant who at the time of the trial was 39 years old was represented during his trial and pleaded not guilty, asserting that he had acted in self-defence. He did not testify. The following picture emerged from the evidence adduced in support of the state's case. On 13 December 2000 the appellant assaulted the complainant, 17 year-old Koos Fortuin, because he suspected him of stealing a penknife. The assault was preceded by the appellant threatening to

assault Fortuin until he revealed where the knife was. The appellant had kicked the complainant, slapped him with an open hand, struck him on the head with the handle of a knife, fisted him and sat on his chest. During the assault the appellant ordered Fortuin to wipe-up his own blood. The assault was perpetrated intermittently over a period of approximately one hour. Fortuin's cousin, Mr Simon Banks, was present, at least during part of the time that the assault took place. The appellant twice ordered Banks to fetch a rope without specifying the purpose. The rope could not be found. At the time of the assault the complainant was employed by the appellant as a farmhand. After the assault the appellant locked Fortuin in a room from where he was released hours later when his mother and the police arrived on the scene.

[6] Fortuin testified that he had marks on his head, sustained injuries to his ribs, suffered a bleeding nose, a swollen face, bruises and painful shoulders as a result of the assault. It is common cause that Fortuin sustained two half a centimetre puncture wounds on his head. He was not admitted to hospital but was treated by a general practitioner who administered and provided medication. It is common cause that Fortuin did not sustain any permanent injuries.

[7] The appellant has two previous convictions, namely housebreaking with the intention to assault and assault (taken together for the purpose of sentencing) and for which he received a fine with imprisonment as an alternative, wholly suspended on condition that he is not convicted of an offence of which violence is an element committed during the period of suspension. The appellant was convicted and sentenced as aforesaid on 12 March 1992.

[8] It appears from the record that the appellant's attorney requested the magistrate to consider a fine coupled with a suspended sentence or alternatively, if the magistrate was of the view that the appellant was to be sentenced to imprisonment, to consider him a 'possible candidate for correctional supervision'

– seen in context this could only mean a sentence in terms of s 276(1)*(i)*[1] of the Act. The following personal particulars of the appellant were placed on record by his legal representative. He is a farmer and conducts a business in which he employs 21 people. The appellant is married and has three children. He earns approximately R4 500.00 per month and his wife earns a salary of approximately R2 000.00 per month.

[9] The magistrate described the assault as vicious and was troubled by the fact that it had endured for so long. Furthermore, he described the threat to assault Fortuin until he revealed where the knife was as 'torture'. The magistrate rejected both a fine and correctional supervision in terms of s 276(1)*(h)* of the Act as appropriate punishment. He was of the view that direct imprisonment was an appropriate sentence. He was concerned that the sentence imposed should have a deterrent effect.

[10] The magistrate, in considering the appellant's previous convictions wrongly, in my view, stated the following:

'The accused has a preponderance of violence.'[2]
This was a material misdirection. The offences of which the appellant was previously convicted took place a long time ago and they appear to be interrelated. His conclusion that the appellant 'has a preponderance of violence' is unfounded.

[11] In the circumstances of this case, the magistrate rightly discounted a non-custodial sentence. The appellant assaulted a youth whom he employed and who was virtually in his care. The assault was a serious one. However, the magistrate, probably because of his view that the appellant had a propensity for violence, erred in not considering the kind of custodial sentence provided for in terms of s 276(1)*(i)* of the Act. The court below in confirming the sentence imposed by the magistrate itself erred by not considering the provisions and

[1] Section 276(1)*(i)* states that upon conviction a person may be sentenced to imprisonment from which he may be placed under correctional supervision at the discretion of the Commissioner of Correctional Services. This is a custodial sentence.
[2] The magistrate must have meant that the appellant was prone to violence.

advantages of s 276(1)*(i)* of the Act. In *S v Scheepers* 2006 (1) SACR 72 (SCA)

at 76e-g (para 10) the following appears:

'The particular advantage of s 276(1)*(i)* should always be in the foreground when the sentencer considers that a custodial sentence is essential, but the nature of the offence suggests that an extended period of incarceration is inappropriate. In such cases, s 276(1)*(i)* achieves the object of a sentence unavoidably entailing imprisonment, but mitigates it substantially by creating the prospect of early release on appropriate conditions under a correctional supervision programme. This sentencing option seems tailor-made for the appellant's offences. Neither the magistrate nor the High Court considered its precise advantages. Their failure to do so requires us to intervene.'

[12] In the present case a sentence of imprisonment in terms of s 276(1)*(i)* is appropriate. It will serve as a deterrent and will bring home to the appellant and others that behaviour of the kind in question will not be tolerated. It will promote rehabilitation and will achieve a balance between the appellant's interests and those of society. The extended period of incarceration imposed by the magistrate, seen in the light of the totality of the circumstances of the present case, is unwarranted and has the potential to break the appellant. The misdirection referred to in para [10] and the magistrate's failure to consider s 276(1)*(i)* as a sentencing option requires us to intervene.

[13] The appeal succeeds to the extent reflected in the order that follows. The sentence imposed by the magistrate is set aside. In its stead the following sentence is imposed:

'18 months' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.'

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

MALAN AJA
CACHALIA AJA