REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: A856/13

13/2/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... 10/2/14

In the matter between

THE STATE

AND

1. TERENCE TSHEPO MOERANE
2. REUBEN SEBETA MOLATONE

JUDGMENT

THULARE AJ

[1] The two accused were convicted in the Regional Court in Daveyton on a charge of robbery with aggravating circumstances and each was sentenced to 15

years imprisonment. Both were 18 years of age at the time of the commission of the offence.

[2] Both accused applied for leave to appeal on both conviction and sentence, which leave was refused by the Regional Magistrate. Only accused number 1 moved a petition against his sentence only. Justices Ledwaba and Baqwa granted leave to appeal on sentence only.

[3] Bosielo J, as he then was, set out the approach to be adopted in the sentencing of a youth in *S v Phulwane and Others* 2003(1) SACR 631 (T) at paragraphs 8 to 9 as follows:

"[8] As the Director of Public Prosecutions correctly pointed out, the learned magistrate failed to acknowledge the important fact that the accused herein are relatively young, with clean criminal records, who deserved a sentence based more on rehabilitation than deterrence. As the learned Cachalia J correctly remarked in S v Nkosi 2002(1) SACR 135 (W) at 143b:

"The fine balance that needs to be struck between society's needs to punish crime while not overlooking the interests of a juvenile offender was emphasized by Botha J in S v Jansen and Another 1975(1) SA 425 (A) at 427 in fine -428A in the following terms:

"The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted personality being eventually returned to society."'

In *S v Z en Vier Andere Sake* 1999(1) SACR 427 (E) at 430f the learned Erasmus J correctly observed as follows:

"Besondere omstandighede geld by die bestrewing van jeugdige oortreders, juis vanwee die feit van hul jonkheid. Die jeug is kenlik van kosbare waarde vir die gemeenskap soos weerspiel word in Art 28 van die Grondwet. Hulle is ons toekoms. Verbandhoudend hiermee is die feit dat jeugdiges se persoonlikhede in die algemeen nog nie ten volle ontwikkel is nie. Hulle is meer buigsaam as volwassenes en dus uiteraard meer vatbaar vir beinvloeding, ten geode sowel as ten kwade .... Dit is derhalwe die dure plig van elke person en instansie gemoeid met jeugdes, ook dan die howe, om te poog om jeugdige oortreders vir die geledere van wetgehoorsames te win ...."

Although accused 1 and 3 are, strictly speaking, not juveniles, I am of the view that the salutary approach set out above should apply to them as well.

[9] It is clear from the record that the magistrate adopted an incorrect approach in sentencing the accused. Undoubtedly the youth is our hope for the future. When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officers invested with the task of sentencing such a youth

to ensure that she or he receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best suit the needs and interests of the particular youth. It is, after all, a salutary principle of sentencing that sentence must be individualized. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote the rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community."

[4] In *S v OZ* 2013 (2) SACR 138 (GNP) at paragraph 6 I said the following:
"[6] Currently, in my view, the best way to obtain relevant information pertaining to a youth, to enable a magistrate to structure a sentence that will best suit the needs and interests of a youth, is to obtain a report of a probation officer appointed in terms of the Probation Services Act 116 of 1991. We do not know whether the childhood of the appellant was characterized by neglect, ill-discipline or ineffective parenting. It is unknown whether the youth has challenges inherent in his faculties, challenges from his family set-up or challenges from the community from which he emerges. By not obtaining a probation officer's report, and any further relevant evidence to assist the magistrate to structure a sentence best suited to appellant, it was a misdirection. The misdirection resulted in the magistrate denying himself an opportunity to impose a sentence that would promote the rehabilitation of the appellant. The sentence imposed, in my view, is disproportionately harsh. It is not individualized to the appellant. In my view, the youthfulness of the appellant, on its own, in the absence of any countervailing evidence, leaves an impression that the appellant is capable of being rehabilitated, moulded and placed on the right path in life."

[5] The investigation of the circumstances of an accused with a view to reporting to the court on his treatment and committal to an institution, as well as the rendering of assistance to his family; and the investigation of circumstances of a convicted person, the compiling of a pre-sentencing report, the recommendation of an appropriate sentence and if needs be the giving of evidence before a court are the powers and duties constitutionally conferred on probation officers in terms of their enabling legislation, Act 116 of 1991.

[6] Furthermore, amongst others, the purpose of our correctional system is set out in the Correctional Services Act, 1998 (Act No. 111 of 1998) as follows in section 2(c):
"2. The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by-
(c) promoting the social responsibility and human development of all prisoners and persons subject to community corrections."

[7] It is inconceivable that the promotion of social responsibility would not feature in the mind of a sentencing officer who is faced with a youthful offender. It is natural to expect such a sentencing officer to be concerned about the human development of such a youth. In my view, a judicial officer who is seized with the sentencing of an accused and who ignores the relevant consideration of a probation officers' report in respect of a young offender, ignores a relevant consideration. He fails to apply his mind to the relevant issue with the behest of the applicable statutes and the tenets of natural justice. I am unable to conclude that the decision on sentence in this case was not arrived at arbitrarily, which in my view warrants an inference that the sentencing officer failed to apply his mind to the matter in a manner expected of him.
In my view, the sentence must be an application of the law to and in the community from which the accused emerges so that decisions of the court have a direct impact on individuals in the ordinary circumstances of their daily life. The sentence must strive to reflect the feeling and requirement of the community to enhance maintenance of peace and tranquility.
The new constitutional and democratic dispensation require of judicial officers to move from an intuitive and subjective approach to sentencing to a rational and objective process of sentencing. A sacrosanctious attitude is a monument of our history, but unfortunately, it informed the harsh and disproportionate sentence herein imposed.

[8] The appellant was a first offender. The complainant suffered no physical injuries or any pecuniary loss, the stolen goods were recovered and a co-accused arrested amongst others because of the co-operation of the appellant with the investigators and the role played by the appellant was also secondary.

[9] Armed robbery with aggravating circumstances warrant a severe sentence, but the personal circumstances of the appellant, his role in the crime committed and his conduct overall should be accorded an appropriate consideration.

[10] This appeal comes before us into the 9th year after the appellant was convicted and sentenced.

I would make the following order:

1. The appeal against sentence is upheld.
2. The order of the court a quo on sentence is set aside and replaced with the following:

"Accused number 1 is sentenced to 8 years imprisonment antedated to 28 August 2004."

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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J R MURPHY
JUDGE OF THE HIGH COURT