193/92

CASE NUMBER: 104/91
H v N

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MARTINUS JOHANNES ESTERHUIZEN — Appellant

and

THE STATE — Respondent

CORAM: NESTADT, F H GROSSKOPF, JJA, et HOWIE, AJA

HEARD: 25 SEPTEMBER 1992

DELIVERED: 6 NOVEMBER 1992

J U D G M E N T

HOWIE, AJA:

Appellant was convicted in a regional court on ten counts of contravening s 14 (1) (b) of the Sexual Offences Act, 23 of 1957, and one count of contravening s 2 (1) of the Indecent or Obscene Photographic Matter

Act, 37 of 1967. The ten counts were taken as one for sentence and four years' imprisonment was imposed, three and a half years being conditionally suspended. On the remaining count, six months' imprisonment was imposed which was ordered to run concurrently with the unsuspended portion of the first sentence.

Appellant appealed to the Witwatersrand Local Division against the effective gaol terms and the State applied for an increase in sentence. The appeal and the application were dismissed but leave was granted to both appellant and the State to appeal to this court.

The ten counts involved appellant's conducting various forms of masturbation with eight teenage boys over sundry periods from September 1983 to October 1988. The eleventh count concerned appellant's possession on 11 October 1988 of nineteen pornographic video films. Appellant pleaded guilty to all the charges. Subsequent to conviction his counsel led evidence in

mitigation from Dr J J van Onslen, a clinical psychologist, Pastor L Fulford of the Rhema Bible Church and Mr L J Liebenberg, a former colleague of appellant's in the employ of the South African Broadcasting Corporation ("SABC"). The State, in turn, called evidence from Captain P Badenhorst of the Prison Services, Lieutenant W J Botha, of the police Child Protection Unit, Mrs M J van Ryn, a psychologist, and five of the complainants on the indecency charges. During the course of argument in relation to the matter of sentence appellant's counsel submitted that community service would be an appropriate element of a fitting sentence. The court enquired in that regard whether appellant's legal advisers had considered obtaining the recommendations of the National Institute for Crime Prevention and Rehabilitation of Offenders ("NICRO"). In response, appellant's counsel asked that the hearing be adjourned so that a report by a NICRO official could

be obtained. In due course the trial resumed and appellant's counsel called Mrs J E Raath, community service co-ordinator in the employ of NICRO.

From the evidence given by the five complainants who testified, and from admissions made on appellant's behalf by his counsel, it appears that the offences covered by the first ten counts were committed in the following circumstances. Appellant, who was 35 years of age at the commencement of the five-year period in question, was at all relevant times a compiler and organiser of musical programs at the SABC. When he first met the complainants their respective ages varied from 14 to 17. His modus operandi in the case of each complainant was broadly the same. Having met the complainant he would invite him to his house. There, appellant would offer refreshment, including alcoholic liquor. They would listen to music. After establishing a friendly relationship, appellant would show some of

the video films in order sexually to arouse the complainant. The films shown involved explicit scenes of sexual contact between men and women, women and women and men and boys. Appellant would then initiate the conduct of which the State complained. Thereafter repeated visits would occur. It is not apparent whether these further visits were prompted by appellant or whether the complainants returned of their own accord. Be that as it may, sexual contact between appellant and six of the complainants, which involved the acts in question variously being performed by the one on the other or mutually, frequently recurred. The acts with one complainant persisted for more than three years and with four others for periods between one and three years. The unavoidable inference from all the evidence is that those five complainants allowed themselves to be repeatedly abused by appellant because they were impressionable and lacked the judgment and control

necessary to enable them to cease their relationship with him. The same reason probably applied to a major extent in the case of a complainant who was involved with appellant for only some two months. However, in his case there was a further relevant factor. He was keen to make his way in the music world and testified that his return visits were occasioned by appellant's having made a number of promises to help him further his musical ambitions. He finally desisted from seeing appellant because those promises were continually broken.

The complainant just referred to was the only one of those who testified to claim to have suffered adverse psychological after-effects as a result of his involvement with appellant. However, it is clear that apart from his frustrated musical career there were other reasons for the unhappiness to which he had become subject and the trial court was unable to find more than

that appellant's conduct had contributed "to a certain degree" to these psychological problems. As to the remaining complainants, the magistrate did not find any of them to have been negatively affected by their contact with appellant. Moreover, all the complainants who gave evidence said that they had since established heterosexual associations.

It remains, as far as appellant's dealings with the complainants are concerned, to mention that subsequent to his arrest appellant encountered one of them in the street and told him not to give any information to the police regarding what had happened between them.

Appellant consulted Dr van Onslen shortly after his arrest in October 1988 and on six further occasions prior to the trial. Each consultation lasted for at least two hours. Dr van Onslen testified that appellant at the outset begged to be extricated from his

tendencies towards illicit activities of the present sort. He said he diagnosed appellant, (who had never married) as innately homosexual and a paedophile, having sexual urges

"wat hom met die samelewing en die gereg laat bots en wat hy nie kan beheer nie."

For this reason, said the witness, appellant was in very urgent need of psychotherapy. This form of treatment would aim to sublimate appellant's sexual needs and to divert them towards sexual behaviour that would not be unlawful. Asked about the success rate of such treatment, Dr van Onslen said that one could not be dogmatic but that on a rough estimation he would assess it at approximately 65 per cent in his experience. He said he found appellant to be an exceptionally intelligent and sensitive person in respect of whom the recommended treatment should be implemented within the community where he could retain his employment, maintain

the daily routines of life and associate with members of both sexes. For these reasons, said the witness, he was in no doubt that it would be unhelpful and indeed counterproductive to gaol appellant at all.

Dr van Onslen went on to mention that appellant had told him that after having to undergo surgery late in 1987 and in the first half of 1988 for thyroid cancer he had turned to religion for help. Accordingly he had, since then, regularly consulted a member of the clergy. (Later evidence revealed this to be Pastor Fulford.) Appellant also stressed to Dr van Onslen that the case and its possible consequences had placed his employment at the SABC in jeopardy and that this was the only work for which he was qualified and which he had over the years rendered with success and distinction.

As regards appellant's particular sexual proclivities, Dr van Onslen said at one point in his

evidence that it was not the case that appellant was literally unable to keep himself from physical contact with boys. In argument before us counsel for the State sought to rely on this passage as indicating that appellant's conduct with the complainants was not compulsive. In my view, however, it is clear from Dr van Onslen's evidence read as a whole, not that appellant was unable to resist his sexual desires, but that he was unable to resist boys - as opposed to other people - being the target of his need to satisfy those desires. It must follow that in initiating and persisting in sexual contact with the complainants appellant's behaviour was compulsive. The evidence by Dr van Onslen on this particular score was neither disputed in cross-examination nor contradicted by other testimony.

Mrs Raath supported the thesis that appellant was not a suitable subject for incarceration. In her

opinion his reformation and punishment were best achieved by imprisonment suspended on condition that he underwent psychotherapy and rendered community service.

Pastor Fulford said she met appellant soon after he started attending the Rhema Church late in 1988. He told her that he was facing prosecution for offences with boys and that he wanted help to enable him to refrain from homosexual conduct. In counselling him, said the witness, she gained the impression that appellant was genuinely remorseful for what he had done and was committed to improving his lot.

Mr Liebenberg said he met appellant in 1972. They were then co-employees of the SABC. Thereafter he got to know appellant as highly capable and very enthusiastic and efficient as regards his work. He was also a loyal employee. The witness considered appellant to be a "thorough gentleman" and a well-liked and popular member of the radio and entertainment world. He

added that appellant had been nominated for an Artes award (which is recognition by the industry of excellent achievement but that the pending prosecution had resulted in the nomination being withdrawn.

Turning to the evidence presented by the State, Captain Badenhorst testified as to the availability, scope and effectiveness of psychotherapeutic services in prison. It is unnecessary to consider her evidence further because the magistrate accepted the evidence of Dr van Onslen and Mrs Raath that appellant required psychotherapy and that it would best be administered to him outside gaol.

Lieutenant Botha presented statistics regarding the marked prevalence of sexual offences involving minors within the jurisdictional area relevant to this case.

Mrs van Ryn gave detailed evidence concerning consultations which she had with certain of the

complainants and her conclusions as to the effect upon them of appellant's behaviour. It is not necessary to discuss her testimony for it was, after due assessment by the magistrate, found seriously wanting and ignored where it conflicted with any other evidence.

It remains to say that no previous convictions were proved against appellant.

Turning to a more detailed consideration of the magistrate's judgment, certain of his findings have already been mentioned briefly. Perhaps the most important of those was his acceptance of the opinions of Dr van Onslen and Mrs Raath to the effect that appellant's offences stemmed from his having a psychological sexual problem, that it required urgent psychotherapeutic treatment and that such treatment was undoubtedly best given in an extra-custodial environment. The magistrate's conclusion in this regard was entirely justified by the evidence of the two

witnesses referred to. That of Dr van Onslen was fully reasoned and persuasive. Mrs Raath's evidence was held by the magistrate to be comprehensive, thorough and founded upon a proper investigation of appellant as a person.

Despite their evidence, and despite the magistrate's evaluation of appellant as a useful and productive member of society, the trial court concluded that some effective gaol term, although adverse to appellant's interests, was necessry in respect of the indecency charges because nothing less would serve adequately to deter others from the commission of similar offences.

In reasoning his way to that conclusion the magistrate bore in mind that appellant was a first offender but he said that the offences with the complainants were ones which society regarded as very serious and which were prevalent enough to call for

unmistakably stern reaction from the courts. Moreover they were crimes which were easily committed and very difficult to detect. The magistrate also found the available evidence insufficient - especially in view of appellant's failure to testify - to show that he was genuinely remorseful. Notwithstanding resort to religion after the cancer surgery, appellant had persisted with these offences until October 1988. Indeed, the magistrate considered it an aggravating circumstance that appellant had offended for as long and as often as he had when, in the magistrate's view, the evidence was that his conduct was not compulsive and he could therefore have chosen to desist. The magistrate referred to the possible loss of appellant's employment at the SABC but said that there was no evidence to show that he would in fact be dismissed.

In short, therefore, the trial court's overall approach to punishment for the indecency offences seems

to have been this. Appellant needed urgent extra-custodial treatment but because some term of direct imprisonment was unavoidable it would be a short term so as not unduly to delay the commencement of treatment.

As to the charge relating to possession of the films, the magistrate found that this was a serious contravention considering the number and nature of the films and the use to which appellant had put them. For that reason, and also because of the sentence which he felt bound to impose on the other counts, the magistrate imposed imprisonment without the option of a fine.

In the intermediate appeal the court a quo found that the magistrate had not misdirected himself and that there was, on the indecency counts, no disturbing disparity between the sentence imposed and an appropriate sentence such as to warrant interference at the instance of either appellant or the State.

Reverting to the trial court's reasons, it is

a matter for comment and commendation that in performing the sentencing function in this awkward and worrisome case the magistrate delivered a judgment significant for its balance, its careful assessment of the issues and its sympathetic concern for the rival interests of the offender and the community. I am nonetheless satisfied that the magistrate misdirected himself in relation to the question of compulsion. He said this:

> "It is further common cause, and I say this because Dr van Onslen's evidence was not placed in dispute during cross-examination or by evidence, that your acts towards the complainants were uncompulsive acts, in other words that you had no control over these acts and that it could be likened to an illness. The court therefore accepts that you did not act out of compulsion, you were thus

> able to choose to desist from these acts, you did not, you persisted in them with a variety of boys over a prolonged period. This persistence appears to be an aggravating factor. The fact that these are not compulsive acts further indicate that treatment or the prognosis for treatment is good."

In parenthesis, the last clause of the first sentence appears to contain a contradiction of what precedes it. There can be no doubt, however, that the magistrate intended to say that appellant did have control and that his problem could not be likened to an illness.

In my view the finding contained in the quoted extract is in conflict with Dr van Onslen's evidence, the effect of which, as I have already indicated, was that appellant was unable to resist seeking sexual contact with boys. The existence of that inability is

strongly consistent with the frequency and persistence with which appellant's sexual contact with the complainants recurred. The fact that there was no evidence to show that appellant had indulged in similar conduct subsequent to his arrest was referred to on behalf of the State both at the trial and in this court but all that conveys is that appellant appeared to have abstained from sexual contact. His problem, as the evidence showed, was that when he sought sexual contact his tendencies compelled him to obtain satisfaction with boys. As the magistrate himself elicited when Dr van Onslen was cross-examined about this apparent six month abstinence:

> "So u sê nou vir die hof dis soos 'n alkoholis wat ophou drink, maar die sielkundige probleem is nog nie opgelos nie? - - Is nog daar en is nog nie mee gekonfronteer nie".

Finally, the magistrate's statement that the prognosis was good, had no basis in Dr van Onslen's evidence. It was presumably founded on what Mrs Raath said she was told by another psychologist. the important thing however, is that her hearsay evidence in that connection could not contradict the evidence of Dr van Onslen. It therefore does not support the magistrate's conclusion that appellant's attraction to boys was not compulsive.

The magistrate's misdirection in the present respect was fundamental. It led him to find the presence of aggravation where he should have found mitigation and it must inevitably have influenced his assessment of the offender and the nature of his crimes.

In addition, there seems to me to be much to be said for the conclusion that the magistrate also erred in giving insufficient weight to two other matters: the very realistic prospect that direct

imprisonment would result in appellant's losing the only employment which he had ever held, which was in effect the cornerstone of his existence and in which he functioned securely and successfully; and Dr van Onslen's evidence that direct imprisonment was contra-indicated having regard to the attributes and personality of this particular offender.

However that may be, the misdirection referred to is enough to vitiate the sentence imposed in respect of the first ten counts. That sentence must therefore be set aside, leaving this court at large to consider sentence afresh. In addition there is nothing in the judgment of the trial court to show that had a non-custodial sentence been imposed on the first ten counts direct imprisonment would in any case have been imposed on count 11. If anything, the indications are the other way. As already mentioned, the sentence on the last count was partially influenced by the fact that

unsuspended imprisonment was being imposed on the other counts. In any event, if an unsuspended gaol term were not appropriate in respect of the indecency offences, the relevant reasons would also make a custodial sentence inappropriate, on the present facts, in the case of count 11.

Assessing anew the matter of sentence on counts 1 to 10, it is convenient first to list the aggravating features of the case. In the first place appellant was a mature adult who must have been fully aware that his sexual predilections were constantly involving him in anti-social and unlawful behaviour. Making allowance for the mitigation inherent in the compulsive nature of his inclinations, he allowed this state of affairs to continue for years without taking any steps to obtain professional help. Secondly, and allied to that factor, there is the consideration that these offences were not committed in situations of

sudden temptation; the climate for their commission was deliberately engineered. Thirdly, appellant told one of the complainants not to assist the police. Fourthly, he abused the reliance placed in him by the complainant whose music career he promised to advance. Fifthly, he employed pornographic films with which sexually to arouse the complainants.

Before dealing with the mitigating circumstances it is appropriate to discuss those factors which were said, both at the trial and on appeal, to operate extenuatingly but the evidence in respect of which is really no more than neutral in effect. Firstly, there is the matter of appellant's alleged remorse. This was only conveyed to other witnesses. Appellant was not prepared to take the trial court into his confidence and give evidence in this regard. The effect of the available inferences is no more than equivocal. Secondly, whatever his commitment to

rehabilitative treatment may be, and I accept that he is thus now committed, it is as consistent with anxiety at his own predicament as it is with anxiety as regards what the complainants have suffered. In the third place there is the evidence of appellant's turning to religion. This factor is equivocal. He did so in the beginning because of fear engendered by his suffering from cancer. Thereafter he continued to commit indecent acts with boys. The fourth factor is that the complainants have not been shown to have suffered adversely. That is coincidence. It is not the result of any precaution or consideration on appellant's part. Fifthly, it was argued that in most instances, if not all, the complainants must have been willing and consenting parties. The magistrate accepted that that inference could well be drawn but he held, rightly, in my view, that the statutory provision contravened by appellant is there specifically to protect minors from

their inherent impressionability and gullibility and their lack of judgment and control. That they reacted as the lawgiver expected them to is no mitigating circumstance. Finally, it was stressed that there were no incidents of violence, coercion or sodomy. Given the nature of the offence charged, it would have been aggravating if there had been. It is not mitigating that there were not.

The features which do constitute mitigating circumstances are appellant's clean record; the fact that his victims were as old as they were and not materially younger and more vulnerable; his susceptibility to compulsion; the personal qualities stressed by Mr Liebenberg; and appellant's impressive employment history.

As far as the nature of the indecency offences is concerned, it is true, as the magistrate held, that they tend more often than not to be committed

clandestinely. This makes detection and solution exceedingly difficult. Furthermore, society resents detrimental interference by adults with the young and innocent. Violation of that innocence arouses the community's indignation and prompts it to call for measures to protect its youth. The penalties provided for are therefore understandable and reflect the seriousness with which the legislature viewed any contravention of the provision. However, the obvious need to deter would-be offenders, and society's desire for retribution, must be balanced against the primary need in this type of case and that is, to my mind, where at all reasonably feasible, to try first and foremost to achieve, in the long-term interests of society, the offender's rehabilitation.

The evidence accepted by the magistrate reveals clearly enough that treatment is urgently necessary and will best be implemented within society

while appellant can be surrounded, as far as possible, by that which is familiar and supportive. Given that evidence, and given the role which appellant's career plays in his life, it is seriously open to question in this case whether the imposition of any unsuspended imprisonment was appropriate in the past or is fitting now.

There are two consequences. Firstly, the cross-appeal cannot succeed. Secondly, the question whether some short period of incarceration was possibly the only appropriate punishment has become unnecessary to decide. The category of available sentences has been enlarged by the inclusion of correctional supervision under s 276 (1)(h) of the Criminal Procedure Act, 51 of 1977. This form of sentence was not in operation within the magisterial area of Johannesburg (where appellant lives) at the time of the trial or the hearing of either of the appeals. However it has since been brought into

operation there with effect from 1 October 1992 (see Proclamation R 115 published in Regulation Gazette 4955 dated 1 October 1992). The prospect of its implementation on that date was raised at the hearing of the appeal before this court and counsel were requested to make submissions as to the suitability of this sentence in appellant's instance. Appellant's counsel urged that it was wholly appropriate and should be imposed. Counsel for the State fairly accepted that if the cross-appeal failed and the appeal succeeded, correctional supervision would be an appropriate substitute for the magistrate's sentence. Both were ad idem that correctional supervision could now be imposed notwithstanding that it was not an available sentence before and both were agreed that for the imposition of such sentence remittal was unavoidable.

When a magstrate's sentence is set aside on appeal by reason of misdirection or because it is

disturbingly inappropriate and the question of a substitute sentence arises, a provincial division can impose a new, ameliorated form of sentence which has become competent since the trial, without the need for remittal: Prokureur - Generaal, Noord - Kaap v Hart 1990 (1) SA 49 (A). The appeal court is not limited to imposing such sentence as the trial court should have imposed. The ratio is that when the trial court's sentence is set aside the position is essentially the same as it would have been if the trial court had, after conviction, postponed the matter until after the commencement of the statutory provision which imported the new form of sentence. It makes no difference here that this court is the final court of appeal and not the first court of appeal.

The next question is whether correctional supervision is a suitable sentence in the present case. The nature and implications of that form of punishment

have been discussed in the as yet unreported judgment of this court in R v Die Staat, case no 132/91, 20 - 36. What is clear is that correctional supervision is no lenient alternative. It can, depending on the circumstances, involve an exacting regime, even virtual house arrest. Its advantage is that it is geared to punish and rehabilitate the offender within the community, leaving his work and domestic routines intact, and without the obvious negative influences of prison. It can also involve specific rehabilitative treatment and community service.

The evidence and circumstances in the instant matter, to which I have already referred, show plainly, in my assessment, that correctional supervision is the preferable alternative to incarceration in this case.

That being so, as counsel properly accepted, remittal to the trial court for the imposition of correctional supervision must follow. It will be

necessary for the report of a probation or correctional officer to be obtained so that the sentence can be tailored to appellant's particular circumstances and the requirements of such rehabilitation program as is called for in his case. The relevant procedure permits the mere handing in of such a report. It is self-evident that handing in could suffice if nothing in the report were in issue. If any material dispute were to arise it would be necessary for the officer concerned to testify. And obviously the parties and the court would be at liberty themselves to call evidence in any event on the question of the terms of an appropriate correctional supervision order. In this regard it is necessary to record that the suspended imprisonment imposed by the trial court was subject i a to two conditions in particular. One was that appellant render community service. The other was that he undergo psychotherapy. When the matter come before the court a quo it was

agreed between appellant and the State that the court could take note of, and act upon, the fact that appellant had already, ahead of time, as it were, completed the required community service and commenced psychotherapy. The investigation and report consequent upon remittal, as also the consideration by the magistrate of a fitting correctional supervision order, will obviously take account of those considerations.

There remains the sentence on count 11. From what has already been said, it follows that direct imprisonment is inappropriate on that count. Counsel submitted, rightly, I think, that remittal was not necessary in this instance and that a suitable sentence should be substituted by this court.

Appellant's contravention of the section in question was a serious one. The fact that he actually showed the films to the complainants has already been taken into account in regard to the first ten counts.

However it is permissible to have regard to the fact, as an aggravating circumstance on the present count, that he obviously possessed the films not merely for his own viewing but with the intention to show them to others, including boys of the complainants' age group. The statute provides for a fine of R1000 or imprisonment up to one year or both. It was enacted in 1967 and the penalty provision has remained the same since. R1000 was then a substantial maximum fine. It is no longer so. It is necessary, in my opinion, to impose, in addition to a fine in that amount, a suspended prison term. There are two reasons for doing so. One is to give the overall sentence appropriate punitive impact. The other is, in view of appellant's history and, hopefully past, inclinations, to provide a deterrent against a repeat contravention. I may say that appellant's counsel had no objection to the imposition of such a sentence, nor did he suggest that it involved

an increase in the magistrate's sentence. There is obviously no increase if appellant does not offend similarly in future. Only if the suspended imprisonment were to be implemented would he, having paid the fine, sustain more punishment than the magistrate imposed. However, that would not be a result solely attributable to his present conviction. Furthermore, assuming an increase were involved, appellant was adequately forewarned that an increase in sentence generally was being sought by the state both in the court a quo and in this court.

In the result the following order is made:

1. The appeal is allowed and the cross-appeal is dismissed.

2. The order of the court a quo is set aside.

3. The sentences imposed by the regional court are set aside.

4. In respect of counts 1 to 10 taken together, the matter is remitted to the regional court (if possible, the magistrate who presided at the trial) for the imposition of correctional supervision in terms of s 276 (1) (h) of the Criminal Procedure Act, 51 of 1977 consequent upon-

(a) investigation and report by a probation or correctional officer, and

(b) the hearing of such evidence, relevant to such imposition, as the parties may seek to adduce and/or the regional magistrate may see fit to call.

5. In respect of count 11 the following sentence is imposed -

A fine of R1000 with an alternative of six months' imprisonment and a further six months' imprisonment suspended for five years on condition that during the period of suspension the accused commits no contravention of s 2 (1) of Act 37 of 1967.

C T HOWIE

AJA

NESTADT, JA)

CONCUR

F H GROSSKOPF, JA)