IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A317/08

DATE: 19 March 2009

In the matter between:

MOYHADIEN PANGKAEKER Applicant

and

THE STATE Respondent

JUDGMENT

Leave to Appeal

WAGLAY, J

The appellant was convicted in the Regional Court in Bellville of the following charges; kidnapping, contravention of Section 51(a) of Act 74 of 1983, and culpable homicide. He was sentenced to an effective ten years of direct imprisonment on the above charges, and now comes to Court on appeal against the sentence imposed by the court *a quo*. The three charges all relate to a single victim and that was a two year and seven month old infant, Moyhadien Petersen, the illegitimate son of the appellant.

He apparently kidnapped this child from his mother, Rosetta Petersen, in April 2001, and kept the child in his custody until June 2001 when his actions led to the death of this child. While this child was with him between April and June the child was ill treated in that the said child was repeatedly beaten with a belt and open hand by the appellant. These facts led to the conviction of the second charge. The appellant's conviction on the lesser charge of culpable homicide appears to be consequent upon the beating administered by appellant on the deceased when the deceased complained of being hungry.

Having read the record I must say that the Court *a quo* was extremely generous to the appellant convicting him only of culpable homicide. The sentence imposed by the Court *a quo* as stated earlier was an effective term of ten years imprisonment, made up as follows; two years imprisonment for kidnapping, six months for contravention of Section 51 (A) of the Act and ten years for culpable homicide. All sentences were ordered to run concurrently.

The appellant contends that in imposing the sentence the Court *a quo* failed to exercise its discretion or properly considering the appellant's personal circumstances or give any weight to the possibility of rehabilitation. The Court *a quo* also overemphasized the gravity of the offence and the interest of

the community and consequently did not properly consider the mitigating factors of the appellant's case. Finally the appellant argued that the sentence was shockingly inappropriate in the given circumstances.

Sentencing is never easy, it is a discretionary process but a process that is guided by a number of factors. Because of the discretionary nature of the process a Court hearing an appeal against a sentence imposed by a lower court is not free to interfere with the sentence of that Court, even if the sentence is not one which the Appeal Court would have imposed. An Appeal Court would only interfere in the sentence of the lower court if it is satisfied that the lower court failed to exercise its discretion properly and reasonably and/or the sentence imposed invokes a sense of shock or outrage. Where lower courts fails to properly and reasonably exercise a discretion or fails to exercise a discretion in imposing a sentence it commits a misdirection allowing the Court of Appeal to set aside the sentence imposed and substitute there for a sentence it considers appropriate in the circumstances.

The Appeal Court would also set aside a sentence imposed by the lower court and substitute a sentence it considers appropriate where the sentence imposed by the lower court is grossly excessive or grossly insufficient. The factors that the

Court is obliged to consider in determining an appropriate sentence are the following;

(a) The crime for which the accused was convicted;

(b) The person who committed the crime; and

(c) The interest of society.

The above factors must be given equal weight, one factor should not take precedence over another nor must one factor be emphasized at the expense or to the prejudice of another. An appropriate sentence does not only reflect the severity of the crime, but also the mitigating and aggravating factors surrounding the offender, and the interests of society. The interests of society is equated to imposing a sentence which serves as a deterrent, is preventative, rehabilitative and also attributing. A sentence should not only deter the offender from recommitting the crime but also deter would be offenders. Where long term sentences are appropriate rehabilitation is not an important consideration. Prevention is part of the deterrent because it serves to dissuade a temptation to commit a similar crime. Retribution is relevant only insofar as society views the crime, the more abhorrent the crime in the eyes of society, the more severe is the sentence.

In this matter the apparent cause of death of an innocent two

year old child, his child, but that was caused by reason of the beating administered to him. One can only shudder to think how the child must have suffered. The child was defenceless, or obviously could not fend for himself. The punishment a Court imposes on offenders such as the appellant must not only be fair to him but society must also see it as being fair. It is in the interests of society that offenders should not be incarcerated so they can make contribution to society, and not be a burden to it. But the Court also needs to remember that while all life is sacred society owes a special responsibility to those amongst us who are vulnerable and defenceless, and the most vulnerable and defenceless are the very young and the very old. They have society's greatest sympathy and the greatest commitment to protect.

As against the above we have the appellant's personal circumstances. He was 36 years of age at the time that he committed the wrongs for which he stands convicted. He also did not have a schooling of any consequence and was raised by a single parent with eight siblings where he no doubt had to fight for every bit of attention, support, and necessities. His upbringing it is said was plagued by the ills of his immediate surroundings which included massive unemployment, drug abuse etcetera. However when consideration was given to all of the above, and I am satisfied that the Court a *quo* did so, it

cannot be said the term of imprisonment imposed on the accused displays a failure by the Court *a quo* to exercise a discretion in imposing the sentence it did. It is also clear that the Court *a quo* took into account five years when really in effect it was four years that the appellant was held in prison awaiting the finalisation of this matter.

I find no misdirection that the Court *a quo* committed that allows this Court to interfere with the sentence imposed by it. I am also satisfied that the mitigating factors present do not point to the inappropriateness of the sentence imposed, nor does the sentence in the circumstances of this matter impose a sense of shock or outrage.

In the circumstances I see no reason to interfere with the sentence imposed by the Court *a quo* and accordingly DISMISS THE APPEAL AND CONFIRM THE CONVICTION AND SENTENCE.

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WAGLAY, J

I agree,

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MAQUEBELA, AJ