Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case number: A 57 / 2009

In the matter between:

GORDON ALEXANDER LORIMER Appellant

versus

THE STATE Respondent

JUDGMENT : 18 MARCH 2010

BOZALEK, J:

[1] In the early hours of 2 April 2004 the police were summoned to the appellant's home in Brackenfell in the Western Cape. Upon arrival they found the body of the appellant's wife, Nicolette Lorimer. The appellant told the police that intruders had broken into the house and had tied him up. He had managed to free himself and was unharmed, as were the couple's 14-month old twins, but the intruders had killed his wife. Some 16 days later,

after being called in by the police for further questioning, the appellant admitted that the story of the break-in and the intruders was false and that he had been responsible for his wife's death.

[2] In March 2007 the appellant, then 29 years of age, stood trial in the Cape Regional court on charges of the murder of his wife and obstructing the course of justice, in that he had deliberately misled the South African Police by claiming that a break-in and robbery had taken place at his dwelling which had led to his wife's death, well knowing that this had not been the case.

[3] The appellant was legally represented throughout his trial. He pleaded guilty to the charge of obstructing the course of justice but not guilty to the count of murder. In his plea explanation the appellant relied on self-defence claiming that he had been the victim of an unlawful attack by the deceased, that in protecting himself against her attack he had grabbed her around her neck and throat with his arm and applied pressure in order to stop her attack and subdue her. This choking had led to the deceased's death, but without any intent upon his part to kill her. The appellant stated further that he considered that he was in real danger of being seriously injured or killed by the deceased and had been gripped with the "utmost fear" when he saw her state

of mind. In the same plea explanation, in admitting the elements of the charge of obstruction of justice, the appellant averred that he had engaged in the subterfuge in question as a result of the state of panic in which he found himself after his wife's death.

[4] The appellant was duly convicted on his plea of guilty to the lesser charge. He was acquitted on the charge of murder but convicted of culpable homicide. On 5 March 2008 the appellant was sentenced to 10 years imprisonment for culpable homicide of which 4 years imprisonment was suspended for a period of 5 years on condition that he was not convicted of culpable homicide deriving from an assault upon another person, committed during the period of suspension. On the charge of defeating the ends of justice the appellant was sentenced to one years imprisonment, to run concurrently with the sentence imposed for culpable homicide.

[5] With the leave of the magistrate the appellant launched an appeal against sentence which came before Davis J and Goliath J in this Court on 7 November 2008. At that hearing, the State successfully applied to lead new evidence in the form of a social worker's report prepared by a Mrs. L Wood. The report was wide ranging but its main thrust was an investigation into the

best interests of the appellant's two minor children, with particular regard to the implications for them should the appellant be required to serve a custodial sentence. Mrs. Wood testified at the hearing and was cross-examined by appellant's counsel. The presiding judge then declared that the Court had been unable to agree and that a full bench of three judges would have to be convened.

[6] The appeal was duly reargued before this Court on 27 January 2009.

[7] On behalf of the appellant, Mr. Mihalik submitted that the sentence imposed on the culpable homicide conviction elicited a sense of shock and that there was a marked difference between such sentence and that which a court of appeal would impose. He contended, furthermore, that the sentence was more akin to that for a conviction of murder and, most importantly, that the interests of the appellant's minor children had not been properly considered by the magistrate in coming to the conclusion that an effective sentence of 6 years imprisonment was appropriate. Relying on *S v Balfour*[1] Mr. Mihalik contended further that, in considering sentence, it was appropriate to take into consideration circumstances as they

[1] 2009 (1) SACR 399 (SCA) at 404.

presently exist rather than rely solely upon the information that was available to the magistrate at the time of sentencing. It was further contended on behalf of the appellant that, having regard to all the prevailing circumstances, and in particular to the interests of the minor children, a sentence of correctional supervision in terms of s 276(1)(h) of Act 51 of 1977 should be imposed or, failing that, a sentence in terms of s 276(1)(i), namely, a sentence of imprisonment which could be converted into correctional supervision by the commissioner of prisons after the appellant had served at least one sixth thereof.

[8] On behalf of the State, Mr. Van Niekerk opposed the appeal contending that, in the absence of any misdirection on the part of the sentencing court or unreasonable exercise of its sentencing discretion, there was no warrant for this court to interfere with the sentence on appeal. Counsel for the State further contended that the guidelines laid out in the Constitutional Court case of *S v M*[2], which deal with the approach of a sentencing court where sentence was being considered in respect of a primary caregiver, had now been adequately dealt with through the introduction of the social worker's report. In the light of its contents, he argued, there was no clear evidence to suggest that the interests of the two minor

[2] 2007 (2) SACR 539 (CC).

children demanded the imposition of a non-custodial sentence in this particular case.

RELEVANT BACKGROUND FACTS

[9] In order to consider the appeal against sentence it is necessary to have regard to the facts and circumstances surrounding the death of the deceased as they emerged in the trial and were determined by the magistrate.

[10] At the relevant time the appellant and the deceased had been married for approximately a year and were the parents of two young boys aged 14 months. The appellant was unemployed whilst the deceased worked full time. She had recently commenced a new job working in a post which required her to do shift work. On the night in question both parents had arrived home at approximately 22h00, the deceased from work and the appellant from a meeting with a Ms Jolene Du Toit, the children's nursery school teacher. The appellant, accompanied throughout by the twins of whom he was taking care, had met Du Toit for coffee at a shopping mall. Du Toit testified at the trial and from her evidence it was clear that a relationship was developing between the appellant and her of which the deceased was unlikely to have been aware nor would she have approved thereof.

[11] At the trial the State was unable to lead any direct evidence of what took place in the Lorimer family home that night and as such it had to rely largely upon the evidence of the appellant. His evidence was that the deceased had been upset about him arriving home so late with the two children and this had resulted in a tense atmosphere. About half an hour after arriving home he had remonstrated with the deceased for handling one of the twins roughly whilst she was changing him. This led to an outburst from her as a result of which the appellant pushed her away. In turn this caused the deceased to lose her temper completely and to attack him with kicks and punches. He retreated into another room followed by the deceased who continued her attempts to kick and punch him. When the deceased stumbled the appellant saw his opportunity to grab her from behind, seizing her in choke-hold using his right arm thereby applying pressure to her neck and throat. The appellant testified that his holding the deceased in this manner appeared to enrage her and thus he maintained the pressure. When he felt her weaken he assumed that she was trying to fool him into letting her go and thus continued holding her in the choke-hold, maintaining the pressure, until she went limp in his arms and fell to the floor. Notwithstanding his attempts to resuscitate the deceased, she had drawn her last breath.

[12] In cross-examination the appellant first estimated that he could have held the deceased in the choke-hold for anything between one to five minutes. In later cross-examination he estimated that it took between 30 seconds and a minute of the choke-hold before the deceased began to grow weaker and what he interpreted as her attempts to break free and hit him, diminished. The forensic pathologist, Dr. Dempers, testified that the cause of death was not inconsistent with a form of asphyxiation. He testified further that, taking into account that the deceased was reasonably heavy, it could be postulated that there was reasonably strong or serious pressure which must have been applied to her neck since the cause of her death was consistent with *veinous occlusion* which vessel/s are situated quite deep in the neck alongside the vertebrae. Dr. Dempers was not prepared to speculate, however, for how long the pressure had been applied.

[13] The magistrate noted that the appellant's evidence was all that was available as to what had happened on the specific night and, despite finding various improbabilities and contradictions therein, accepted it for the purposes of the court's findings. He found further that, objectively speaking, the appellant was in no danger of being seriously injured or killed but nor was there any

evidence that the appellant had lost control of himself. He found that no intent to kill had been proved by the State but that the appellant was guilty of negligently causing the deceased's death since he knew or must have known that the choke-hold was dangerous and that holding the deceased long enough would incapacitate her. The Court found that a reasonable person in the position of the appellant would have foreseen the reasonable possibility of the deceased's death and would have taken steps to guard against the possibility thereof ensuing.

THE SENTENCE IMPOSED BY THE MAGISTRATE

[14] At the time that the magistrate imposed sentence the appellant was 30 years of age, employed as a vehicle salesman and was the primary caregiver for his two sons, then aged five years old. Before the magistrate was the report of a correctional officer stating that not only was the appellant a suitable candidate for a sentence of correctional supervision but recommending such a sentence in terms of s 276(1)(h) of Act 51 of 1977. Also before him was a probation officer's report similarly recommending a sentence of correctional supervision in terms of s 276(1)(h) of the Act. Both reports were, in my view, one-sided and superficial, an example being the probation officer's finding that the appellant had been the victim of an abusive

relationship at the hands of the deceased. This finding appears to have been based solely on the appellant's say-so, unsubstantiated by any other evidence.

[15] In sentencing the appellant the magistrate observed that he was dealing with a tragic incident occasioned by the appellant's irresponsible and negligent behaviour and further that the court would not mete out a sentence ostensibly for culpable homicide but in fact having in mind a sentence for murder. He noted too that the death had occurred within the family sphere and that the deceased's death had a devastating effect on her family. The magistrate concluded that a sentence of correctional supervision was inappropriate as it would totally ignore several of the other objects of sentencing. The court considered that a sentence of correctional supervision would "give the green light to others". He found that more was involved in the deceased's death than merely negligence in that there had been a deliberate attack on her bodily integrity. The magistrate dealt briefly with the interests of the appellant's children, finding that he was the primary caregiver of the children but that their position had been adequately cared for.

DISCUSSION

[16] The overriding question as to whether the sentence imposed by the magistrate is appropriate or may be set aside on appeal appears to essentially comprise two interrelated issues, whether a non-custodial sentence is appropriate and the extent to which the sentence has regard to the best interests of the appellant's two minor children.

[17] In *S v M*[3] the Constitutional Court held that focussed and informed attention needed to be given to the interests of children at appropriate moments in the sentencing process. The objective was to ensure that the sentencing court was in a position to adequately balance all the various interests involved, including those of the children placed at risk. The form of punishment imposed should be the one least damaging to the interests of the children, given the legitimate range of choices available to the sentencing court.

[18] The Constitutional Court adopted guidelines to promote uniformity of principle, consistency of treatment and the individualisation of outcome. The first such guideline was that a sentencing court should determine whether an accused was a primary caregiver wherever there were indications that this

[3] Supra.

might be so. Secondly, the court should ascertain the effect on the children of a custodial sentence when such was being considered. Thirdly, if the appropriate sentence was clearly custodial and the accused was a primary caregiver, the court should apply its mind to the question of whether it was necessary to take steps to ensure that the children would be adequately cared for while the caregiver was incarcerated. Fourthly, where the appropriate sentence was clearly non-custodial, it must be determined bearing in mind the interests of the children. Fifthly, if there was a range of appropriate sentences, the court must use the paramountcy principle as an important guide in deciding which sentence to impose. The court held further that the two competing considerations, the importance of maintaining the integrity of family care and the State's duty to punish criminal misconduct, had to be weighed by the sentencing court. In this regard Sachs J, speaking for the majority of the Court, made the following statement, with which I respectfully agree and which I consider is most relevant to the present matter:

> *"As the Zinn triad recognizes, the community has a great interest in seeing that its laws are obeyed and that criminal conduct is appropriately prosecuted, denounced and penalised. Indeed, it is profoundly in the interests of children that they grow up in a world of moral accountability with self-centred and antisocial criminality is appropriately and publically repudiated".*[4]

[4] Supra at para 40.

[19] Having regard to the guidelines developed by the Constitutional Court and the need for the careful consideration of the interests of the children of a primary caregiver facing a possible custodial sentence, it appears to me that the magistrate may well have erred in devoting too little attention to this matter in the sentencing process and in his sentencing remarks. It is also questionable whether the issue received appropriate attention from either the defence or the State during the sentencing process. Fortunately these shortcomings were largely remedied by the report and evidence of Mrs. Hood, the social worker whose evidence was introduced on appeal by the State. Mrs. Hood's report is a model of thoroughness and comprehensiveness and bears testimony to the value, in such circumstances, of a careful investigation of the entire social milieu by a social worker and the value of the resultant report as a resource for the sentencing official.

[20] Mrs. Hood was at pains not to specifically recommend any particular sentence, confining herself to the following recommendation in the event that the appellant did ultimately receive a custodial sentence:

> *"In die lig van bogenoemde word aanbeveel dat die kinders soveel moontlik nie ontwrig word in hul huidige situasie nie en dat die reëlings tussen die groot ouerpare voortgaan daar dit reeds vir vier jaar effektief werk;*

- *die hof tydelike voogdyskap toestaan aan die Lorimer egpaar met geredelike toegang van die Du Toit egpaar soos reeds die reëling is;*
- *die groot ouerpare die finansiële kostes van die kinders deel deur middel van 'n kontrak;*
- *die betrokkenes (die kinders) deur die hof na 'n sielkundige verwys word;*
- *albei grootouer-pare vir sielkundige hulp en familieberading verwys word as a 'n verpligting;*
- *'n maatskaplike werker die situasie monitor en ondersteuningsdienste lewer aan beide Mnr. en Mev. Du Toit en Mnr. en Mev. Lorimer sowel as die betrokkenes".*

[21] In the report Mrs. Hood dealt with a variety of topics including the children's family background, their schooling history and present care, the appellant's present personal circumstances, the relationship between the appellant and the children and between the two sets of grandparents and the effect of the deceased's death upon both families. That report is now some 16 months old but remains the most up to date and comprehensive material to which this Court can have regard. From Mrs. Hood's evaluation it appears, unsurprisingly, that the deceased's death had, and will continue to have, a huge impact on her family, the appellant's family and, as the years pass by, the children. The appellant remains effectively alienated from his in-laws who have thus far been unable to come to terms with their daughter's death and the appellant's role therein. Nonetheless, both sets of grandparents, the appellant's being somewhat younger, went out of their way to place the children's interests above their concerns and

antagonisms. In this manner the children spent considerable time with both sets of grandparents and developed relationships with them.

[22] It would appear that the children have been affected by the consequences of their mother's death and have consistently exhibited behavioural problems. They were moved from school to school by the appellant and, in Mrs. Hood's view, had not enjoyed sufficient psychological assistance for such problems. The appellant appears, nevertheless, to be a good father who loves his children. Having regard to the fact that the paternal grandparents had played and continue to play a particularly important role in bringing up the grandchildren. Mrs. Hood was satisfied that, should a custodial sentence be imposed the children would be adequately cared for by the paternal grandparents, together with the maternal grandparents. Mrs. Hood's conclusion in this regard reads as follow:

> *"Almal stem heelhartig saam dat die betrokkenes (die kinders) se welstand belangriker is as die grootmense se belange ... alhoewel die grootouers vele onderlinge onderonsies het speel hulle 'n ondersteunende rol in die kinders se lewe. Alhoewel die situasie nie gesond is nie blyk albei grootouers hul bes te doen om die lewe vir die betrokkenes so gemaklik as moontlik te maak. Albei grootouerpare se ouderdom speel 'n groot rol in die situasie maar blyk hulle opgewasse te wees vir die taak wat hulle reeds vier jaar vertolk."*

We were advised at the hearing of this matter that since the last hearing the deceased's mother had passed away. This does not,

however, appear to affect the substance of Mrs. Hood's views as expressed in her report.

[23] An important fact which emerged from the report was that for the first two years after their mother's death the children had in fact resided with and been brought up by the paternal grandparents, the appellant's role during the week being limited to getting them ready in the morning for play school and readying them at night for bedtime. In contrast to the impression initially created, this shows that, after the deceased's death, the appellant was initially not the sole or primary caregiver to the children, much of this responsibility having been borne by his parents for the first two years thereafter.

[24] On behalf of the appellant Mr. Mihalik contended that the crisp issue in the appeal was whether the maternal grandparents' desire to see the appellant incarcerated outweighs the interest of the children to have their father look after them. This, however, is certainly not the issue in this appeal. For one thing the question of the appropriateness of the sentence in the eyes of the deceased's family is no more than an aspect of the interests of the community, one of the elements in the *Zinn* triad which must be taken into account in arriving at the appropriate sentence. As far as this aspect of the triad is concerned, the

appellant's personal circumstances are largely favourable. He is a first offender in steady employment generally carrying out his parenting duties towards his two children responsibly. It is unlikely that he will find himself at odds with the law again in future. Also counting in the appellant's favour is that there was no previous history of him having used violence against the deceased. It must also be taken into account that, irrespective of the sentence which the appellant has to serve, he will have to live with the knowledge that the deceased died as a result of his conduct and he will have the burden of having to explain to his children his role in the death of their mother. He will in addition, carry the stigma of this conviction for the rest of his life.

[25] As far as the offence itself is concerned, the magistrate in my view was entirely correct in regarding it in a very serious light. Although convicted of culpable homicide the inescapable fact is that the appellant caused the death of his wife with devastating psychological consequences not only for her family but for his own children. The magistrate placed particular emphasis on the fact that the death occurred within the family or marriage sphere and, furthermore, at the hands of the appellant who bore a responsibility to protect both his wife and his children. These are legitimate considerations and were

recently expressed in similar circumstances in *S v Nesani*[5] where the appellant was convicted of his wife's murder. On appeal the conviction was substituted with one of culpable homicide and the sentence reduced to 8 years imprisonment. The Court first set out the "numerous weighty mitigating factors" present in the matter including the fact that the deceased was the aggressor and the appellant's expression of deep remorse for the deceased's death as reflected in his suicide notes and his attempt to kill himself after the shooting. It went on to say however:

> *"However, regardless of these circumstances which count strongly in appellant's favour, the fact remains that he took a human life. The deceased was a mother and actively partook in the rearing of her child. She was a highly skilled and educated lecturer rendering a valuable contribution to the community as a key figure in sports development. She was in the prime of her life and was working hard to improve her life and that of her child ... any sentence that his Court imposes must reflect the sanctity of her life. Taking into account the interests of society and its concerns about fatalities resulting from the use of firearms, the interests of justice clearly dictate a custodial sentence."*

[26] In the present case the deceased was a young mother, holding down a responsible job and rearing her young children. She was cut down in the prime of her life. Only the appellant knows exactly what took place that night and what led to the struggle between himself and the deceased. Even on his version, however, it is not difficult to see why the appellant may have flown into a rage when, returning home relatively late at night

---

[5] (079/2008) [2008] ZASCA 122 (26 September 2008).

after a full day's work, she found the appellant arriving home with their 14-month old children, and that after a frivolous assignation.

[27] The magistrate took into account, in the appellant's favour, the fact that he did not "beat around the bush" and "accepted his fate". This approach, in fact, erred in favour of the appellant. He pleaded not guilty to the charge of murder and tendered no plea of guilty to culpable homicide. Instead the appellant persisted, throughout, in claiming self-defence. It emerges from the evidence that the appellant was prepared to plead guilty to culpable homicide but only on condition that he received a non-custodial sentence. In this regard the attempts on the part of appellant's counsel to lay the blame for a protracted trial at the door of the deceased's family, are misdirected. It also emerged, furthermore, that more than five years after the deceased's death, the appellant had yet to apologise to the deceased's family for his role in the tragic occurrence. The evidence was that he intended to write a letter of apology to the deceased's family when the criminal proceedings finally concluded and was precluded from doing so by reason of his bail conditions. Given the impact of the tragedy upon the deceased's family and his own role therein it is troubling that the appellant seemed content, over such a prolonged period, to

accept this technical impediment to expressing his remorse to the deceased's family. In the circumstances I do not consider that the factors which the magistrate took into account weigh significantly in favour of the appellant or were strong indications of remorse on his part.

[28] A factor of considerable relevance in regard to sentence is the appellant's conduct in concealing the circumstances of the deceased's death for 16 days. In the first place, as the evidence of the deceased's father showed clearly, this calculated deception greatly magnified the already devastating impact of the deceased's death upon her family who in effect had to cope with two profound shocks: the first, the violent and unnatural death of their daughter and, some two weeks later, the revelation that the appellant had lied to all and sundry and was himself responsible for her death.

[29] The magistrate imposed a sentence of a year's imprisonment in respect of the conviction for obstructing or defeating the ends of justice and ordered that it run concurrently with the sentence for the culpable homicide conviction. In imposing this sentence the magistrate made passing reference to the difficulty of placing any monetary value on the inconvenience caused to the police in following the deliberately laid false trail for some 15

days. However, the magistrate failed to recognise that the true cost of this offence was the psychological impact the deception had upon the deceased's family. It must also be taken into account that the appellant's account of deception was carefully calculated. He led the police to believe that he had been tied up by the intruders and went to the lengths of manufacturing rope burns on his body. He removed valuable articles from the house and hid them in the garden to lend veracity to his version of a robbery having taken place. Finally, in this regard, it is instructive that the accused did not confess to his role in the deceased's death spontaneously. His admission came only after he was called in by the police and subjected to further questioning.

[30] The fact that the appellant is the primary caregiver for his two children is, in my view, the strongest factor mitigating in favour of a non-custodial sentence. From the evidence now available to the Court, however, it is clear that, should the appellant be required to serve a custodial sentence, the twins will be well looked after, primarily by their paternal grandparents but assisted also by the deceased's father and other members of his family. The children have now just turned six years of age and the passing of just less than five years since the death of their

mother has probably left them better equipped to deal with the difficulty and trauma of their father being incarcerated in prison.

[31] There can be little doubt that the incarceration of the appellant is likely to have a profound effect upon the children. However, should the appellant receive a non-custodial sentence in the form of correctional supervision or a very limited term of imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, there could very well be negative consequences for the children in the medium or long term, particularly as regards their relationship with the appellant. The children will face unique challenges as they grow up arising out of their mother's untimely and tragic death. These pressures may well find their epicentre in their relationship with the appellant. I am by no means persuaded that such hardship or trauma as the children will suffer should the appellant be incarcerated will ultimately be less than should he receive a non-custodial sentence. This is particularly so if, as envisaged by Mrs. Wood, the children find themselves in a stable household provided by the grandparents and receive the necessary psychological counselling and support which she recommends.

[32] There remains a third element to which any court must have regard in imposing an appropriate sentence and that is the

interests of the community. Here again I can find no fault with the magistrate's approach which was summed up by him in his observation that anything less than a substantial custodial sentence would justifiably be regarded by society at large as an unduly lenient response to the tragic consequences of the deceased's unlawful conduct.

[33] In *S v Nxumalo*[6] the Appellate Division, per Corbett JA, held that in determining an appropriate sentence in a case of culpable homicide, a court must have regard to the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Corbett JA quoted with approval from the judgment of Schreiner JA in *R v Barnado*[7]:

> *"Culpable homicide may often seem to operate hardly upon a person who has caused another's death since no greater moral blameworthiness arises from the fact that the negligence caused death. Nevertheless the sanctity of human life requires to be emphasised whenever a person is unlawfully killed, and drivers of motor vehicles must again and again be reminded that they are in control of an instrument that takes a dreadful toll of life on our highways."*

and went on to state:

> *"It seems to me that in determining an appropriate sentence in such cases the basic criterion to which the court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness will be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. If they have been serious and particularly if*

---

[6] 1982 (3) SA 856 (A).
[7] 1960 (3) SA 552 (A) at 557 D – E.

> *the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. It is here that the deterrent purpose in sentencing comes to the fore."*[8]

[34] In the present case not only were the consequences of the appellant's negligence extremely serious in that they led to the death of the deceased but they had and will have a devastating impact on a range of persons for years to come. Furthermore, the degree of culpability exhibited by the deceased in committing the negligent act was by no means slight. The deceased's death was not the consequence of a momentary oversight or act of carelessness upon the part of the appellant. Sight cannot be lost of the fact that the deceased's death took place in the course of an unlawful assault by the appellant upon his wife. It was the result of prolonged and powerful pressure applied by the appellant through a choke-hold around his wife's neck. The appellant could at any time have relaxed the potentially deadly hold but chose instead to accept the risk of not doing so.

[35] I remain aware that a non-custodial sentence of correctional supervision in terms of s 276(1)(h) is an appreciable, even a

---

[8] *S v Nxamalo* (supra) at 861G – 862A.

severe, sentence.[9] I am mindful, furthermore of the shift in emphasis in our penal system from retribution to rehabilitation referred to by Langa J (as he then was) in *S v Williams and Others*[10]. In assessing an appropriate sentence it is necessary to have regard not only to the main purposes of punishment namely deterrence, prevention, reformation and retribution but also to the individual concerned, the circumstances of the crime committed and society's interest whilst at the same time blending such sentence with a measure of mercy. No court of appeal can alter a sentence simply because it might have imposed a different sentence. In order to intervene it must be found that the sentencing official failed to exercise his/her discretion properly through a misdirection or irregularity relating to the law or the facts or, alternatively, imposed a sentence so different to that which the court of appeal would have imposed that it can be said that it is disturbingly inappropriate or that a sense of shock is caused.[11]

[36] Taking these principles and all the relevant circumstances into account, I am unpersuaded that the sentence imposed by the magistrate, although substantial, is disturbingly inappropriate or evokes a sense of shock. The full sentence of 10 years is

---

[9] See *S v R* 1993 (1) SA 476 (A) at 488 C – D and SS Terblanche *Guide to Sentencing in South Africa* 2nd Ed Lexis Nexis page 285 and the authorities therein quoted.
[10] 1995 (2) SACR 251 (CC) at para 66 to 67.
[11] See *S v Rabie* 1974 (4) SA 855 (A) and *S v Narker* 1975 (1) SA 583 (A).

ameliorated by the suspension of 4 years thereof and results in an effective sentence which in my view falls entirely within the range of reasonableness. Furthermore, although the magistrate may have erred in one or two minor respects, as has been pointed out, these errors did not constitute material misdirections or irregularities and, by and large, redounded to the benefit of the appellant. The magistrate's finding relating to the children, although based on insufficient evidence, were subsequently confirmed as correct by Mrs. Hood's report.

[37] For these reasons, then, I would dismiss the appeal against sentence.

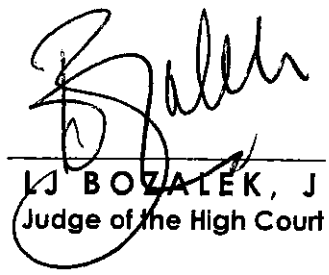
[38] This leaves the question of the recommendations made in the social worker's report regarding the best interests of the children as well as the question of making practical arrangements for their care and custody preceding the implementation of the sentence.

[39] Mrs. Hood's recommendations regarding temporary guardianship and custody over the children and further measures to protect their interests during such period as the appellant serves a custodial sentence are, in my view, well-founded. It would, however, be neither appropriate nor

competent for this Court to enshrine any of those recommendations in an order. Rather, they fall either within the purview of informal arrangements between the responsible parties or within the jurisdiction of another agency or this Court differently constituted. It will be prudent, however, to allow the appellant a period of time to make any such arrangements regarding some or all of these recommendations as he may wish to and, in any event, to allow the appellant and other family members to make appropriate arrangements for the care and custody of the children before the appellant commences serving his sentence.

[40] In the result I would make the following order:

> **"The appeal against sentence is dismissed. The implementation of the sentence may, at the instance of the appellant, be delayed for a period of up to four weeks from date hereof to allow him to make the necessary arrangements relating to the care and custody of his children whilst he is incarcerated.**



LJ BOZALEK, J
Judge of the High Court

S DESAI, J: I agree and it is so ordered.

S DESAI, J
Judge of the High Court

TC NDITA, J: I agree.

TC NDITA, J
Judge of the High Court