IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A35/2011

DATE: 15 APRIL 2011

In the matter between:

MICHIEL NICOLAAS KOCH Appellant

and

THE STATE Respondent

J U D G M E N T

BINNS-WARD, J:

In this matter the appellant was convicted on his plea of guilty of the attempted theft of an outboard motor. The offence was committed at a mooring jetty at Port Owen on the West Coast. No evidence on the subject was led, but according to a statement from the Bar by the prosecutor, which was apparently received without objection from the appellant's attorney, the value of the outboard motor was R15 000,00 and R3 600,00 worth of damage was occasioned to the complainant's property when certain cables to the engine were

severed in the course of the commission of the offence.

On 25 August 2010, the appellant was sentenced to a term of imprisonment of 15 months duration. His application for leave to appeal against that sentence was dismissed by the trial magistrate. Leave to appeal was granted on 2 December 2010, pursuant to the appellant's petition to the Judge President. The appellant was released on bail, pending the determination of this appeal in terms of an order made on 13 December 2010.

The appellant's personal circumstances, as they were placed before the trial court in address in mitigation by his attorney, are set out in the following terms, and I translate from the Afrikaans: Appellant was 34 years old, unmarried with no children. He lost his father when he was eight years old. His mother was present in court. His stepfather had been a victim of murder. His mother had again remarried and his second stepfather was in the police. He had attended Paul Roos Gimnasium in Stellenbosch, where he passed matric with additional subjects. He then went to London after school. He worked at Buckingham Palace for two years and then for British Telecom for one year. He came back to South Africa and had worked Pearly's Restaurant in Langebaan, where he was the head chef.

He had three years earlier begun to mix with inappropriate company and he began to use "TIK", which is the colloquial name for a well known forbidden narcotic substance. He lost his work as a result of his abuse of drugs and it was stated that presumably drug abuse was the main reason for his commission of the offence. He was a first offender and at the time of the trial, his mother had obtained a place for him at a rehabilitation centre outside Graaff-Reinet. His mother was at that stage ready to take him to that rehabilitation centre, where he would have to spend a minimum of six months and where he would be required, amongst other things, to undertake heavy physical labour.

The magistrate was informed that the institution guaranteed rehabilitation for those who were willing to stay longer. The attorney conceded that the offence was a serious one and requested a totally suspended prison sentence or a fine. It was pointed out to the magistrate that the appellant had spent 12 days in custody before the trial. It appeared from the information put before the magistrate, that the appellant had previously been at a rehabilitation centre in the Cape Peninsula, called Thabakulu that was two years previously but the programme offered there was not as intense apparently as that available at the centre in Graaff-Reinet.

The magistrate's sentence judgment was not transcribed and the notes concerning it, that are included in the record on appeal, are indecipherable. As the appellant is privately represented, it is the duty of his attorney to ensure that the record on appeal was put before us in good order. See Rule 51.3 of the Uniform Rules of Court. During argument this was pointed out to the appellant's attorney and he apologised for the deficiency in the record. Fortunately, the magistrate's judgment refusing the application for leave to appeal was typed out. In that judgment the magistrate rehearsed fully the reasons for the imposition of the sentence.

It is exceptionally, save in respect of the most serious category of offence, that a sentence of direct imprisonment is appropriate for a first offender. It is clear, however, that the trial magistrate considered the offence in question to be serious enough to warrant severe punishment. In this regard the magistrate, relying on his local knowledge, described the theft of boats and boat engines as the scourge of the West Coast. In that connection, the magistrate said the following in the course of his judgment refusing leave to appeal and again I translate from the Afrikaans.

Dealing with the interest of the community in respect the determination of sentence, the magistrate said on imposition of

sentence, the court stated clearly that the theft of boats and outboard motors currently is a serious problem on the West Coast. It is a crime which threatens to seriously prejudice the fishing and tourism industry. Boats and outboard engines are mainly stolen to be provided to perlemoen and crayfish poachers.

Turning to the issue of the crime itself, the magistrate dealt with that aspect as follows: "On the West Coast it is currently the number 1 crime to address. The theft of an outboard motor demands quite a bit of planning and effort. People who commit that sort of crime, run a great risk that they would be seen. It demands a large measure of determination to carry out the crime. Because of the weight of out outboard motors, the crime has to be perpetrated by two or more people who can carry the engines. It is common cause that the accused committed the crime with a co-suspect."

He then dealt with the appellant's personal circumstances, taking into account all the matters that I have already mentioned, and proceeded: The court has to ask itself the question what sort of sentence can be imposed which would have sufficient deterrent measure to protect the community to fight the commission of this sort of offence and which will ensure the accused does not again commit the same offence."

The magistrate then made the observation that the theft of boats and outboard motors is treated on the same level as the theft of motor vehicles which, he said, were usually referred to the Regional Court for sentence. He pointed out it is generally known that heavy sentences are imposed for this type of offence.

I must say that on the limited research undertaken by me, I was unable to find any reported authority which substantiated the equation by courts generally, or in coastal areas, of the theft of boats and outboard motors with the theft of motor vehicles. Be that as it may, it has been remarked more than once in the reported jurisprudence of the superior courts that it is not inappropriate for trial courts to take cognisance of local conditions in deciding matters of sentence. That observation has always been qualified by the requirement that if the trial court intends to do so, notice of the factual considerations that the court regards as relevant in that respect for the purposes of sentence, should be given to the accused so that the defence may, if so advised, deal with them evidentially. And in that regard, as referred to by Mr Van Dyk in his heads of argument, it is instructive to refer to the judgment of Mr Justice Wessels in the late Appellate Division in S v H 1977 (2) SA 954 (A) where the learned judge of appeal remarked as follows:

"Ordinarily, facts having a bearing on the question of sentence, either in mitigation or in aggravation thereof, ought to be placed before the court by way of a recorded admissions or evidence on oath. In the case where a court intends to rely on its personal knowledge of facts having a bearing on sentence, those facts should, in fairness to the defence, be communicated to an accused so as to enable him, if so advised, either to controvert them or to address the court thereon."

Reference might also be made to a more recent judgment of the Gauteng North Court in S v Chipape 2010 (1) SACR 245 at 253b-e. As far as we are able to determine, that requirement was not complied with in the instant case. We are, therefore, as counsel for the state properly conceded, on the basis of the apparent material misdirection by the magistrate in that regard, entitled to consider the proper approach to sentence in this matter afresh.

I mentioned earlier that it is only exceptionally that a sentence of direct imprisonment is appropriate for a first offender. It is well documented that conditions in prison are frequently insalubrious, to say the least, and not conducive to rehabilitation or reform of the offender. It is also well known

that our prisons are overcrowded and that the public good is not served well in a number of respects by exacerbating the situation by too readily incarcerating offenders who might be amenable to socially restorative punishment.

It is no doubt considerations of that nature that led to the introduction of alternative penal provisions such as correctional supervision. It does not appear to me that the trial magistrate sufficiently appreciated the potential appropriateness of such alternative penal measures. On the contrary, the indications are that he regarded them as soft alternatives where hard punishment was required. He was misguided in that approach. It is wrong to misconceive of correctional supervision as a soft alternative. Correctional supervision is an extremely flexible sentencing option, which enables a court to craft a sanction for criminal behaviour that will be sufficiently punitive, while a the same time appropriately directed to affording the accused the opportunity to undergo a process of structured rehabilitation. It is a sentence option that called out for serious consideration in a case like the present.

In my view the magistrate should not have proceeded to the imposition of sentence in this matter without first requiring a report from a correctional official or probation officer on the

accused's suitability for correctional supervision. The magistrate should also have undertaken further inquiry into, and if necessary obtained relevant evidence in the circumstances of the information that was before him that the appellant was about to be admitted to a treatment centre in Graaff-Reinet, into the possible appropriateness of the imposition in lieu of, or as part of the sentence, and in terms of the provisions of section 296 of the Criminal Procedure Act, *viz* committal to a treatment centre.

The appellant had, as I have already observed, by the time leave to appeal against sentence was granted, already served a period of approximately three and a half months of the 15 ~~year~~ Months sentence imposed. In view of the conclusion to which I have come that the imposition of that sentence without proper regard to alternative options, was misdirected, it would be appropriate in the context of the magistrate's, vitiating misdirection referred to earlier in respect of the application of local knowledge for sentencing purposes without affording the defence the opportunity to deal therewith, to set aside that sentence. Obviously when it comes to the imposition of an appropriate sentence in lieu of that set aside, the period that the appellant has spent in custody pursuant to the sentence set aside, must be taken into account and given due weight.

We are not equipped as an Appeal Court, to substitute an appropriate sentence in this case. The matters that cry out for serious consideration are sentence options which cannot be availed of without material that is not available to us. It was the duty of the court below, before imposing sentence, to equip itself with the necessary material to properly consider those options.

In the circumstances, whatever appropriate sentence is determined upon, because as a result of the inadequacy of information before us, we are unable to do the task, the matter will be referred back to the trial court for this purpose. It seems to me inappropriate that any sentence imposed by the trial court, should require the re-incarceration by way of a sentence of direct imprisonment of the appellant. As I have already mentioned the magistrate's consideration, if it is an appropriate one in all the circumstances, that a severe and effective punishment should be imposed, can be accommodated within the options available under the correctional supervision rubric. And in that regard, the magistrate's attention is directed to the principles set out in Mr Justice Kriegler's judgment in S v R 1993 (1) SA 476 (A). The magistrate is directed to ensure that a probation officer or a correctional supervision official's report is obtained and considered before sentence is considered afresh and is

directed to give particular attention to the report of the rehabilitative effect of the rehabilitation programme to which the appellant, we were informed from the Bar today, is already enlisted in.

Mr Van Dyk, for the appellant, today expressed concerns that in remitting the matter to the trial court for reconsideration of sentence, that the programme on which the appellant is currently engaged might be undermined if the appellant were required to attend at court. This, depending on the content of the expert evidence to be placed before the magistrate, may be a legitimate concern. If it appears that it is, then the magistrate would, in those circumstances, be able and indeed enjoined, to apply the provisions of section 159(2) of the Criminal Procedure Act and be able to deal with the matter in the absence of the appellant on the basis of circumstances relating to what might be termed, for purposes of the provision, illness.

In my view, therefore, the appropriate order to be made in this matter is to uphold the appeal against sentence. To set aside the sentence of 15 months imprisonment imposed on the appellant and to direct that the matter be remitted to the trial magistrate for the imposition of sentence afresh with regard to the content of and directions given in the body of this

judgment.

SABA, AJ: I agree.

SABA, AJ

BINNS-WARD, J: It is so ordered.

POSTEA (IN CHAMBERS)

BINNS-WARD, J:

The reference to section 159 of the Criminal Procedure Act in my *ex tempore* judgment was per *incuriam*. Its provisions do not find a basis for application in the situation postulated. The error does not affect the determination of the appeal or the directions to the trial court or the reconsideration of sentence.

BINNS-WARD, J