S v KIKA 1998 (2) SACR 428 (W)

Citation	1998 (2) SACR 428 (W)
Court	Witwatersrand Local Division
Judge	Cloete J
Heard	April 8, 1998
Judgment	April 8, 1998
Annotations	

Flynote : Sleutelwoorde

Sentence - Fine - Ability of accused to pay fine - Enquiry to be conducted to establish whether accused able to pay fine - Imposition of fine patently beyond means of accused open to criticism that it is exercise in futility, if not cynicism - Enquiry also to be conducted whether accused able to pay deferred fine - Deferred fine not a favour which may be withheld as covert form of punishment.

Sentence - Imposition of - Factors to be taken into account - Custody of minor child - Situation where imprisonment of accused who has custody of minor child contemplated - Sentencing court to make appropriate enquiries in respect of child with a view to having child brought before children's court - Sentencing court to bear in mind that if accused is mother of child she may be permitted to have child with her in prison.

Headnote : Kopnota

When a judicial officer considers the imposition of a sentence or a fine, he should conduct an enquiry to establish whether the accused will be able to pay a fine, or a deferred fine. The imposition of a fine patently beyond the means of an accused person is open to the criticism that it is an exercise in futility, if not in cynicism. As to a deferred fine, it is one of the mediums of punishment available to the judicial officer imposing sentence, and should not be regarded as a favour, which may be withheld arbitrarily or as a covert form of punishment. Consideration of the possibility of a deferred fine is an integral part of the determination of whether a fine is appropriate and, if so, what the amount thereof should be.

A judicial officer who imposes a sentence of imprisonment on an accused, who is the custodian of a minor child, must make appropriate enquiries with a view to issuing an order as contemplated in s 11(1) of the Child Care Act 74 of 1983, that is, that the child must be taken to a place of safety and thereafter brought before a children's court. In deciding to make such an order the judicial officer must bear in mind that if the accused is the mother of the child, she may be permitted, in terms of reg 94, made under s 94 of the Correctional Services Act 8 of 1959, and contained in Government Notice R2080 (*Regulation Gazette* 604 of 31 December 1965), to have the child with her in prison.

Judgment

Cloete J: The accused was convicted in the district court, Johannesburg, of assault with intent to commit grievous bodily harm and sentenced to a fine of R3 000 or, in default of payment, 18 months' imprisonment.

The conviction is in order. The sentence obviously is not. I am surprised that a magistrate of two years' experience is unaware of the limits of his jurisdiction which, in terms of s 92(1)*(a)* of the Magistrates' Courts Act 32 of 1944, was 12 months' imprisonment. Had the magistrate considered that a sentence beyond his jurisdiction was justified, he should have sent the matter to the regional court in terms of s 116(1)*(a)* of the Criminal Procedure Act 51 of 1977.

There were further irregularities. The magistrate conducted no enquiry to establish whether the accused would be able to pay a fine, much less whether the accused was in a position to pay a deferred fine. `(T)he discretionary imposition of a fine patently

beyond the means of an accused is open to the criticism that it is an exercise in futility - if not cynicism' - *per* Kriegler J (as he then was), Moll JP concurring, in *S v Kekana* 1989 (3) SA 513 (T) at 518F. (The remarks of the Court at 518 in *Kekana's* case must be read with the decision in *S v Mlalazi and Another* 1992 (2) SACR 673 (W).) The same learned Judge said the following about a deferred fine in *S v Mosia* 1988 (2) SA 730 (T) at 736D\ - F:

> `Dit is een van die middels wat die Wetgewer tot die beskikking gestel het van die wyse straftoemeter en nie 'n gawe wat as 't ware by wyse van 'n aalmoes afgesmeek word nie. Dit is ook nie 'n vergunning wat na willekeur of as bedekte straf weerhou kan word nie. 'n Beskuldigde se geldelike vermoëns, hetsy by wyse van onmiddellik beskikbare kontant hetsy wat binne 'n bepaalde tyd of oor 'n bepaalde termyn bygebring kan word, is 'n oorweging waar besin word oor die vraag of daar hoegenaamd 'n boete opgelê moet word en, indien wel, wat die omvang daarvan moet wees. Die moontlikheid van uitgestelde of paaiement betalings is part en deel van daardie besinning.'

See also *S v Motlaung* 1993 (2) SACR 214 (NC), where Buys J (Steenkamp J concurring) held (at 217*g*) that:

> `Die aanhoor van die beskuldigde oor sy vermoë om 'n andersins onbetaalbare boete paaiementsgewys af te betaal vorm 'n kardinale en inherente deel van die besinning van 'n hof oor die vraag van 'n gepaste vonnis.'

It is not clear to me why the magistrate imposed a fine at all. The accused stabbed the complainant on the upper right side of his chest, close to the sternum. He was left with a scar about 5 cm long which required 12 stitches. The complainant was also operated on - he showed the magistrate a surgical scar 30 cm long. On the complainant's version, which was, correctly, accepted by the magistrate, there was no provocation for the assault. The assault was obviously serious, although how long the complainant was in hospital and what *sequelae* there were from the stab wound, if any, were not investigated.

I have not asked the magistrate for his reason for sentence as the sentence imposed was incompetent and must be set aside irrespective of what motivated the magistrate to impose it.

There is a further matter which must be mentioned. I feel it necessary to express disquiet about the fact that the magistrate apparently ignored the statement of the accused, made in mitigation of sentence, that `I have two children and I am their sole guardian and breadwinner, there is no one to look after them'. It was irresponsible for the magistrate to pass a sentence which could - or even might - result in the accused being imprisoned, without taking any steps for the welfare of the children whose ages were not even established. It is perhaps appropriate to refer in this context to s 28(1)*(b)* of the Constitution, Act 108 of 1996, which provides:

> `Every child has the right . . . to family care or parental care, or to appropriate alternative care when removed from the family environment.'

A judicial officer who imposes a sentence of imprisonment on an accused who is the custodian of a minor child must make appropriate enquiries with a view to issuing an order as contemplated in s 11(1) of the Child Care Act 74 of 1983. I am grateful to the Attorney - General for drawing that section to my attention. It provides:

> `If it appears to any court in the course of any proceedings before that court that any child has no parent or guardian or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety, that court may order that child be taken to a place of safety and be brought as soon as may be thereafter before a children's court.'

In deciding whether to make such an order, the judicial officer must bear in mind that if the accused is the mother of the child she may be permitted to have the child with her in prison. Regulation 94, made in terms of s 94 of the Correctional Services Act 8 of 1959 and contained in Government Notice R2080 published in *Regulation Gazette* 604 of 31 December 1965, provides as follows:

> `**Accommodation of a baby of a female prisoner**
> 94.*(a)* A female prisoner may be permitted, subject to such conditions as are prescribed, to have her

baby with her in prison during the period of lactation and for such further period as may be necessary. *(b)* The necessary clothing, food and medical treatment may be provided by the State for such period as a baby remains in prison.'

The Department of Correctional Services' Departmental Order B, chap IV, order 11, para *(a)*(i) provides:

`A female prisoner may be allowed to care for her baby/young child who accompanies her on admission to prison or who is born in prison during her detention, for such a period as may be necessary, prior to placement. The accommodation of a baby/young child in prison remains an interim measure and suitable placement needs to be addressed actively. The Department of Correctional Services is responsible for the sound physical, social and mental care and development for the duration of the baby/yound child's stay in prison.'

Paragraph *(b)* defines `baby' as:

`(A) person who is breastfed by his/her mother and/or is dependent on his/her mother's care until the age of approximately one year, whilst the mother is detained;'

and `young child' as:

`(A) toddler, in the age category 1-4 years, who is solely dependent on his/her mother's care on the latter's admission to prison.'

Paragraph *(c)*(i)*(aa)* provides:

`The admittance of a baby/young child with a mother is only permitted when no other suitable accommodation and care is available at that point in time.'

Paragraph *(j)* contains detailed provisions for the placement of babies and young children out of the prison setting, but is not directly relevant for present purposes.

I am informed by the Department of Correctional Services that a draft Correctional Services Bill is in the course of preparation, which may include the following provisions:

`(1) A female prisoner may be permitted, subject to such conditions as may be prescribed, to have her child up to the age of five years in prison with her.

(2) The Department is responsible for food, clothing, health care and provision for the sound development of the child for the period that such child remains in prison.

(3) Where practicable, the Commissioner must ensure that a mother and child unit is available for the accommodation of female prisoners and the children whom they may be permitted to have in prison with them.'

When the matter came before me on automatic review, I requested one of the Deputy Attorney - Generals to cause immediate enquiries to be made as to what had happened to the children of the accused. The police visited the accused's home and ascertained from the children's grandfather (the father of the accused), who is 71 years old and a pensioner, that the children were being looked after by a friend of the accused who is unemployed and that neither she nor the grandfather can support them adequately.

I give the following order:

1. The conviction is confirmed.
2. The sentence is set aside.
3. The matter is referred back to the magistrate for the purposes of sentence.
4. If the sentence imposed will result in the imprisonment of the accused, the magistrate is directed to conduct an enquiry with a view to determining whether an order in terms of s 11 of the Child Care Act should be made or otherwise to satisfy himself that proper provision is made for the welfare of the children of the accused.
5. The record of the further proceedings in this matter is to be typed and forwarded to the Registrar so that it can be placed before this Court as presently constituted.

Hussain J concurred.