S v KWALASE 2000 (2) SACR 135 (C)

Citation	2000 (2) SACR 135 (C)
Court	Cape Provincial Division
Judge	Van Reenen J, Van Heerden J
Heard	April 26, 2000
Judgment	April 26, 2000
Annotations	

Flynote : Sleutelwoorde

Juvenile offenders - Sentence - Presiding officer's duties to ensure proper information before court.

Juvenile offenders - Sentence - Important to bear in mind international legal obligations under United Nations Convention on the Rights of the Child - Rules 5 and 16 of Beijing Rules particularly appropriate to position in present case. Headnote : Kopnota

The accused was convicted in a magistrate's court of robbery and was sentenced to three years' imprisonment, 18 months of which were suspended for three years on condition he was not convicted of housebreaking, attempted robbery or robbery committed during the period of suspension. At the time of the commission of the offence accused was 15 years and 11 months old and had, at that time, one previous conviction of housebreaking with the intent to steal and theft for which the imposition of sentence had been postponed for a period of three years. It was not clear from the record whether the accused was, or had been employed, where and with whom he was living at the time of the commission of the offence and thereafter. The magistrate failed to elicit any further details in this regard even though the accused was unrepresented. No pre-sentence report was obtained in respect of the accused from a probation officer or a correctional officer.

On review, the Court reiterated the importance of a pre-sentence report and noted that in terms of the post-1994 constitutional and international legal dispensation in South Africa had also to be borne in mind by South African courts in the determination of appropriate sentences for youthful offenders. Section 28(1)*(g)* of the Constitution Act 108 of 1996 provided that every child had the right 'not to be detained except as a measure of last resort' and then only for 'the shortest appropriate period of time'. South Africa had also ratified the United Nations Convention on the Rights of the Child (1989) and, by so doing, assumed an international legal obligation to put into effect in its domestic law provisions of this convention. Various provisions in the convention underline the policy that children are should, as far as possible, be dealt with by the criminal justice system in a manner that takes into account their age and special needs. The approach to the treatment of juvenile offenders set out in s 28(1)*(g)* of the Constitution and in the articles of the Convention on the Rights of the Child were echoed in the Beijing Rules, rules 5 and 16 of which were particularly significant. In terms of rule 5(1), the aims of a juvenile justice system were to 'emphasise the well-being of the juvenile and ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence'. Rule 16 required that, in all cases except those involving minor offences, 'the background and circumstances in which the juvenile was living or the conditions under which the offence had been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority'. The provisions of the South African Constitution governing the treatment of children in conflict with the penal law had to be interpreted having due regard to the provisions of the above-mentioned international instruments relating to juvenile justice.

The judicial approach towards the sentencing of juvenile offenders therefore had to be reappraised and developed in order to promote an individualised response which was not only in proportion to the nature and gravity of the offence and the needs of society, but which was also appropriate to the nature and interests of the juvenile offender. If at all possible, the sentencing judicial officer had to structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community. The Court held that the magistrate had failed to use the mechanisms at her disposal to elicit sufficient information concerning the personal circumstances of the accused before the imposition of sentence, thereby under- emphasising one of the elementary criteria for punishment. The Court indicated that it was aware of the practical problems encountered by magistrates relating to a shortage of probation officers, correctional officers and social workers but in the instant case the magistrate had not even considered of obtaining a pre-sentence report prior to the imposition of sentence. The magistrate had in addition erred in finding that the accused was no longer living the life of a juvenile: the mere fact that a teenager has not been at school for several months (or even years) does not show that he or she is living the life of an adult, particularly when it is entirely unclear where or with whom the teenager is living, whether he or she is or has been employed and so on. The sentence was in any event too severe. It appeared that the non-custodial sentencing option previously applied to the accused did not appear to have had the desired effect upon the accused. In the light of these facts an appropriate sentence would be a period of imprisonment in terms of s 276(1)*(i)* of the Act which meant that the prison authorities would have power to convert the accused's imprisonment to correctional supervision if he appeared to be someone who would benefit from correctional supervision and who should have the opportunity of avoiding further incarceration.

Case Information

Review.

Judgment

Van Heerden J: This is an automatic review in terms of the provisions of s 302, read together with s 304, of the Criminal Procedure Act 51 of 1977 ('the Act').

The accused was charged in the magistrate's court for the district of Cape Town with the crime of robbery. He was correctly convicted by the magistrate, on a plea of guilty, and was sentenced to three years' imprisonment, 18 months of which were suspended for three years on condition that the accused was not convicted of housebreaking, attempted robbery or robbery committed during the period of suspension.

When this matter was placed before me on automatic review, I queried the sentence. The magistrate subsequently furnished me with her reasons for the sentence imposed. It appears from the record that, although the accused was arrested on 21 October 1998, his trial only took place on 13 October 1999 and he was only sentenced on 12 January 2000. The delay between the date of the accused's arrest and the date of his trial was due to the accused's failure to appear before the Court, despite due warning, on the day after his arrest. Thereupon, a warrant for his arrest was issued. It also appears from the record that, whilst the accused was 'at large', he committed a further crime of robbery during March 1999, for which crime he was sentenced to three months' direct imprisonment on 20 September 1999.

On the date of his trial in the matter currently under review, the accused was convicted of a contravention of s 72(2)*(a)* of the Act and was sentenced to a fine of R200 or, in default of payment, one month's imprisonment. The accused was apparently unable to pay this fine and was therefore serving his second period of imprisonment at the time when he was convicted in the matter now on review before this Court. At the time of the commission of the offence, the accused was only 15 years and 11 months old. He had,

at that time, one previous conviction (dated 30 March 1998) of housebreaking with the intent to steal and theft. In respect of the latter offence, the magistrate concerned had postponed the imposition of sentence for a period of three years, in terms of s 297(1)*(a)*(i)*(cc)* of the Act (read together with s 297(1A)), on condition that the accused perform 120 hours of community service. From the accused's statement in mitigation of sentence, it appears that he left school in June 1999, at which time he was either in standard three or had already passed standard three. The accused stated that he wished to return to school in order to enable him ultimately to support his mother. It is not clear from the record whether the accused was, or had ever been, employed, or where and with whom he was living at the time of the commission of the offence and thereafter. Despite this paucity of information concerning the personal circumstances of the accused, the magistrate failed to elicit any further details in this regard, even though the accused was unrepresented. The magistrate also did not obtain a pre-sentence report in respect of the accused from a probation officer and/or a correctional officer.

The importance of a pre-sentence report in the process of sentencing young offenders has been repeatedly emphasised by our courts. As pointed out by Terblanche *The Guide to Sentencing in South Africa* (1999) at 378: 'Although not statutorily required, it is a requirement of common sense that the sentencing court should be even more fully informed regarding the person of a juvenile offender. Pre-sentence reports can provide the necessary background to the juvenile offender and attempt to explain commission of the crime, enabling the court to find the most appropriate sentence for that offender. The purpose is therefore to individualise the sentence, not with the idea that a light sentence should be imposed, but to find a sentence which is fair both to the young offender and to society.'

In the case of *S v Jansen and Another* 1975 (1) SA 425 (A) at 427H-428A, Botha JA emphasised the importance of the Court's properly taking into account the personal circumstances of the offender in the determination of sentence and the salutary practice of calling for a probation officer's report in respect of juvenile offenders: 'In determining the appropriate sentence to be imposed upon an accused person in any particular case, it is the duty of the Court to have regard, not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender . . . In the case of a juvenile offender it is above all necessary for the Court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form 2000 (2) of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. To enable a Court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report on the offender by a probation officer in, at least, all serious cases . . .'

The desirability of obtaining a pre-sentence report in respect of a youthful offender also appears clearly from the judgment of Erasmus J in *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (E). In this case, the learned Judge set out detailed general guidelines for sentencing youthful offenders. Of particular relevance to the circumstances of the case presently before this Court are the following guidelines: '3. Die hof sal dinamies handel ten einde volledige besonderhede van die beskuldigde se persoonlikheid en sy persoonlike omstandighede te bekom. Die hof sal waar nodig 'n voorvonnisverslag van 'n proefbeampte en/of 'n korrektiewe beampte aanvra. So 'n verslag is aangewese waar die beskuldigde 'n ernstige misdryf gepleeg het, of vorige veroordelinge het. Dit is onvanpas om 'n beskuldigde gevangenisstraf, ook opgeskorte gevangenisstraf, op te lê sonder die voordeel van 'n voorvonnisverslag. 4. Die hof sal met sorg en verbeelding sy wye diskresie gebruik ten einde 'n vonnis te bepaal wat paslik is vir die beskuldigde gesien sy eie besondere omstandighede en die misdryf waaraan hy skuldig bevind is. Dit behels *eerstens die bepaling van die mees gepaste vorm van straf en tweedens* die

aanpassing van daardie straf om aan die behoeftes van die bepaalde beskuldigde te pas.' (at 441*c-e*).

The post-1994 constitutional and international legal dispensation in South Africa must of necessity also be borne in mind by South African courts in the determination of appropriate sentences for youthful offenders. Section 28(1)*(g)* of the Constitution of the Republic of South Africa Act 108 of 1996, provides that every child has the right '*not to be detained except as a measure of last resort*' and then only for '*the shortest appropriate period of time*'. This constitutional provision applies to all persons under the age of 18 years (see s 28(3)).

Furthermore, on 16 June 1995, South Africa ratified the United Nations *Convention on the Rights of the Child* (1989) ('CRC') and, by so doing, assumed an international legal obligation to put into effect in its domestic law the provisions of this Convention (see article 4). Various provisions in CRC '*underline the policy that children under the age of 18 years who are accused of committing offences should, as far as possible, be dealt with by the criminal justice system in a manner that takes into account their age and special needs*' (see Van Heerden *et al Boberg's Law of Persons and the Family* 2nd ed (1999) 865 *in notis*). Thus, article 40(1) embodies the right of a child in conflict with the penal law '*to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*' In terms of article 37*(b)*, children must be arrested, detained or imprisoned '*only as a measure of last resort and for the shortest appropriate period of time*'.

The Committee on the Rights of the Child (the supervisory body provided for by CRC for the international implementation of its provisions) has stated categorically that the provisions of CRC relating to juvenile justice have to be considered in conjunction with other relevant international instruments, for example the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (1985) ('*the Beijing Rules*'), the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (1990), and the United Nations *Guidelines for the Prevention of Juvenile Delinquency* (1990) ('*the Riyadh Guidelines*'). (See, in this regard, Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* (1998) 490-1, 540, 542-4.)

The approach to the treatment of juvenile offenders set out in s 28(1)*(g)* of the South African Constitution and in the above-mentioned articles of CRC is echoed in, *inter alia*, the Beijing Rules. For the purposes of the case presently under review, the provisions of rules 5 and 16 are particularly significant. In terms of rule 5(1), the aims of a juvenile justice system are to '*emphasise the well-being of the juvenile and (to) ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.*' Rule 16 requires that, in *all* cases except those involving minor offences, '*the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated* (prior to sentencing) *so as to facilitate judicious adjudication of the case by the competent authority.*' The Commentary to this rule indicates that these so-called '*social enquiry reports*' (ie what would be known as a pre-sentence report in South Africa) are '*an indispensable aid*' in legal proceedings involving juveniles.

Proportionality in sentencing juvenile offenders (indeed, all offenders), as also the limited use of deprivation of liberty paricularly as regards juvenile offenders, are clearly required by the South African Constitution (see, for example, Chaskalson *et al Constitutional Law of South Africa* (1996, with looseleaf updates) 28-5-28-6). Furthermore, s 39(1) of the Constitution provides that a court, when interpreting the Bill of Rights (Chapter 2 of the

Constitution), '*(b)* must consider international law; and *(c) may consider foreign law*'. Thus, the provisions of the South African Constitution governing the treatment of children in conflict with the penal law (namely, s 28(1)*(g)*, read together with ss 12 and 35) should be interpreted having due regard to the provisions of the above-mentioned international instruments relating to juvenile justice. *The judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an individualised response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the sentencing judicial officer must structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community.*

Against the background of the above-mentioned constitutional and international legal provisions concerning juvenile offenders, the South African Law Commission is presently engaged in the process of preparing draft legislation aimed at dealing comprehensively with juvenile offenders and creating a new structure to govern criminal proceedings against such offenders. In December 1998, the South African Law Commission Project Committee on Juvenile Justice (Project No 106) released a discussion paper (Discussion Paper 79), with a draft Child Justice Bill annexed (see, in this regard, Sloth - Nielsen 'Towards a New Child Justice System' (1999) 1 *Article 40* 4-5 and NICRO (National Institute for Crime Prevention and Re-integration of Offenders) *The Draft Child Justice Bill: 'What the children said'* (Community Law Centre, University of the Western Cape, 1999). In line with the constitutional and international law relating to youthful offenders, the Discussion Paper recommended that custodial sentences should be the last resort in children's matters and, where such sentences are passed, they should be for a minimum period and should be conducive to the return of children to society. Non-custodial measures should be explored and used as much as possible, in line with the policy of the Inter - Ministerial Committee on Young People at Risk concerning residential care (see paras 11.63-11.66 of the Discussion Paper and clauses 77 and 78 of the draft Child Justice Bill). It was also recommended that the consideration by the court of a pre-sentence report prior to the imposition of sentence upon a juvenile offender should be mandatory (see paras 11.90-11.95 and clause 70 of the draft Bill). (On the recommendations contained in the Discussion Paper, see further Sloth - Nielsen & Muntingh 'Juvenile Justice Review 1998' (1999) 12 *SACJ* 65-7.

The above-mentioned recommendations of the Project Committee relating to mandatory pre-sentence reports and the imposition of sentences involving a custodial (residential) element have been widely supported, and it seems likely that these recommendations will be repeated in the final Report and the final draft of the Child Justice Bill which will probably be released later this year.

In the light of the above, the magistrate failed, in my view, to use the mechanisms at her disposal to elicit sufficient information concerning the personal circumstances of the accused before the imposition of sentence, thereby underemphasising one of the elementary criteria for punishment. This is particularly so in view of the fact that, as indicated above, the accused was unrepresented (cf *S v Dlulani* 1991 (1) SACR 158 (Tk) at 160*c-d*). I certainly do not underestimate the practical problems encountered by magistrates in this country. These problems include a shortage of probation officers, correctional officers and social workers, often leading to delays in obtaining pre-sentence reports. However, as was pointed out by the Constitutional Court in *S v Williams and Others* 1995 (2) SACR 251 (CC), 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at 883, 'to the extent that facilities and physical resources may not always be adequate, it seems to me that the new dynamic should be regarded as a timely challenge to the State to ensure the provision and execution of an effective juvenile

justice system'. Moreover, it would appear from the record in the matter presently under review that the magistrate did not even consider obtaining a pre-sentence report prior to the imposition of sentence. To my mind, this is clearly unsatisfactory (see, in this regard, *S v Quandu en Andere* 1989 (1) SA 517 (A) at 522J-524D).

It appears from the reasons furnished by the magistrate for sentence that, in determining an appropriate sentence, the magistrate took into account the accused's previous convictions for housebreaking and theft *and* for robbery. I have no problem with this approach - even though the accused committed the robbery in question *after* the robbery forming the subject of the case now under review, the magistrate could properly take the accused's conviction for this '*second*' robbery into account in the sense that it was indicative of the character of the accused (see Du Toit *et al Commentary on the Criminal Procedure Act* (1987, with looseleaf updates) 27-2A and the authorities there cited).

However, one of the reasons given by the magistrate for the sentence imposed was that the accused was no longer living the life of a juvenile. In this, I think the magistrate misdirected herself. There was no real evidence to support any such finding. The mere fact that a teenager has not been at school for several months (or even years) does not show that he or she is living the life of an adult, particularly when it is entirely unclear where or with whom the teenager is living, whether he or she is or has been employed and so on (see *S v T* 1993 (1) SACR 468 (C) at 469*g-h*). It is these and other material aspects relating to the accused's personal circumstances which should have been clarified by the magistrate, preferably by obtaining a pre-sentence report.

I am also of the view that the sentence imposed is too severe. In addition to the youth of the accused (who is currently 17 years and four months old), it must be borne in mind that the accused pleaded guilty and that the stolen property was immediately recovered by the police. Robbery is clearly a serious offence. However, while it is true that serious offences merit severe punishment, the Court must guard against an over-eager imposition of exemplary sentences and must not overemphasise the gravity of the offence and the interests of the community at the expense of the interests and the personal circumstances of the particular offender (see, for example, *Terblanche* (*op cit* at 219-20)). Every individual case must be judged on its own particular facts. The community expects that serious crimes will be punished, but also expects at the same time that mitigating circumstances will be taken into account and that the accused's particular position will be given thorough consideration. As was cogently argued by Hoexter JA in *S v Quandu en Andere* (*supra* at 522D - F): 'Dat by vonnisoplegging in die geval van ernstige misdade . . . die belange van die gemeenskap sterk na vore tree, behoef geen argument; en in 'n bepaalde geval kan dit ook meebring dat die persoonlike omstandighede van die veroordeelde in 'n mate voor die gemeenskapsbelang moet wyk. In hierdie verband moet twee sake egter nie uit die oog verloor word nie. *Eerstens is dit vanselfsprekend so dat by skuldigbevinding aan enige ernstige misdryf - wat ook al die aard daarvan - kennis van die veroordeelde se persoonlike omstandighede vir die straftoemetingsfunksie onmisbaar is. Ten tweede moet deurentyd gewaak word teen oorbeklemtoning van die gemeenskapsbelang ten koste van die veroordeelde se persoonlike omstandighede.'*

(My emphasis.) It is also important to note that, as indicated above, the accused was only 15 years and 11 months old at the time of commission of the offence. The youthfulness of the accused at *that* time is clearly one of the factors which must be taken into consideration by the court in determining an appropriate sentence. The moral culpability of the accused is judged by having regard to, *inter alia*, his or her age and level of maturity at the time when the offence is committed (see, for example, *Terblanche* (*op cit* at 224-5), Du Toit *Straf in Suid - Afrika* (1991) at 55-6 and the authorities there cited). On the other hand, the age and maturity of the accused at the

time of imposition of sentence is also a relevant factor in the determination of a sentence which will, *inter alia*, suit the needs of the individual accused. Thus, when a court has regard to the 'middle leg' of 'the triad consisting of the crime, the offender and the interests of society' (see *S v Zinn* 1969 (2) SA 537 (A) at 540G), the personal circumstances (including the age and level of maturity) of the accused at *both* the above-mentioned times must form part of the balancing exercise. This is particularly important in a case like the present, where a lengthy period of time has elapsed between the date of commission of the crime and the date of imposition of sentence. In view hereof, I reiterate that it is difficult to see how the magistrate could in this case properly determine the most appropriate form of punishment and the adaptation of that punishment to suit the needs of the accused without the consideration of a pre-sentence report.

Applying the above-mentioned principles of sentencing juvenile offenders to the case presently before the Court, it must be noted that, at the time of imposition of sentence, the accused was already serving his second sentence of imprisonment. He had thus regrettably already been exposed to the many detrimental effects of incarceration in a South African prison (see, in this regard, *Terblanche* (*op cit* at 244-6)). (The particularly prejudicial effects of imprisonment on juvenile offenders are graphically illustrated in De Villiers *(ed)* '*Children in Prison in South Africa - A Situational Analysis* (Community Law Centre, University of the Western Cape, 1998), as also by Erasmus J in *S v Z en Vier Ander Sake* (*supra* at 430*j*-434*h*).)

Moreover, the non-custodial sentencing option previously applied to the accused (viz the postponement of the imposition of sentence, on condition that the accused perform 120 hours of community service) does not appear to have had the desired effect upon the accused. In the light of these facts, and having careful regard to the above-mentioned 'triad' of relevant factors. I am of the view that an appropriate sentence in the case of this accused would be a period of imprisonment in terms of s 276(1)*(i)* of the Act. This means that the prison authorities will have the power to convert the accused's imprisonment to correctional supervision if the accused appears to be someone who will benefit from correctional supervision and who should have the opportunity of avoiding further incarceration. As pointed out by Marais J in *S v T* (*supra* at 470*d-e*): 'This will give the accused the opportunity of persuading the prison authorities, if he can, that he should be subjected to correctional supervision rather than incarceration.' Moreover, if the accused is indeed later placed under correctional supervision, this will fulfil the important purposes of monitoring and 'follow up' in respect of youthful offenders stressed by Erasmus J in *S v Z en Vier Ander Sake* (*supra* at 438*j*-439*b*) and will, it is to be hoped, assist in the reintegration of the accused into his community.

In all the circumstances, I would confirm the conviction, but would set the sentence aside and replace it with the following sentence:

Twelve (12) months' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.

Van Reenen J concurred.