

SOUTH AFRICA / JUDGMENT

S v Kemp (44/2016, RCPE1478/13, 20160004) [2016] ZAECHGC 58 (17 February 2016) [2016] ZAECHGC 58

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Stretch, J Pickering

CASE / FILE NUMBER

44/2016, RCPE1478/13, 20160004

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

REPORTABLE

CA&R

44/2016

Case

no. RCPE 1478/13

High

Court case no. 20160004

Date

Delivery: 17/02/2016

In

the matter of:

THE
STATE
versus
DENVER
KEMP

JUDGMENT**STRETCH J:**

- [1] On 29 November 2013 the accused was convicted on a charge of malicious injury to property. According to the accused's guilty plea he had, in a fit of rage, kicked in the door of his parental home and had set alight items of linen therein while the house was occupied by his immediate family members. It is not in dispute that the accused was under the influence of dangerous, dependence forming substances such as "tik" and mandrax when he committed these offences. On 24 April 2014 he was sentenced by the regional court magistrate subject to pre-sentencing reports having been obtained.
- [2] In terms of the provisions of section 296 (1) of the Criminal Procedure Act,[1] read with the provisions of section 36 of the Prevention of and Treatment for Substance Abuse Act,[2] his sentence appeared to have been directed towards his admission to a rehabilitation centre, to be determined by the Director- General of the Department of Social Development. Pending his referral and removal to this centre, he was detained at St Albans prison.
- [3] During November 2015 his erstwhile legal representative discovered that the accused had not been admitted to a rehabilitation centre, but was still being detained as an awaiting trial prisoner at St Albans prison, despite the fact that his detention warrant had reflected the nature of the sentence, and despite the fact that the prison authorities and his probation officer had been informed thereof.
- [4] He was forthwith requisitioned to appear before the sentencing magistrate on 17 November 2015, on which date evidence was led in an attempt to explain why the sentence had not been put into operation, and in an attempt to rectify the situation .
- [5] According to the probation officer who testified (Ms Kani), the delay had resulted in Fort England rehabilitation centre only being in a position to accommodate the accused during March 2016, and only after an application to have him committed having been approved. Fort England also did not have an out-patient facility to accommodate the accused.
- [6] Ms Kani testified that she had promptly forwarded the necessary paperwork to St Albans correctional facility for the social workers there to facilitate the putting into effect of the sentence. She had received the completed referral forms on 6 August 2014.
- [7] She said that she had tried to raise these social workers to explain what had transpired thereafter, but to no avail. Attempts by the prosecutor to secure their voluntary attendance at court were met with a similar fate.
- [8] The enquiry was accordingly postponed to 1 December 2015 for subpoenas to be issued for the relevant role players.

- [9] According to the receptionist at St Albans (Mr Stuurman), the accused continued to be detained there after sentence, as the authorities were waiting for someone to collect him and to remove him to the rehabilitation centre. This was after various consultations had taken place amongst the prosecutor, the receptionist at St Albans, the social worker at St Albans, and Ms Kani.
- [10] Mr Stuurman testified that awaiting trial prisoners have access to drugs and other undesirable substances, but if the accused were to be transferred to the regional hospital (Fort England) situated on the prison premises, such access could be limited to some extent. This would however be an exceptional route to follow, and its main aim would be to limit access to undesirable substances, not necessarily to rehabilitate the accused.
- [11] His evidence was contradicted to some extent by Mr Eaton, a senior correctional official at the prison. According to Eaton, referral to the hospital would be and would have been an exercise in futility as the exposure to undesirable substances was no less prevalent there than in the prison itself. Eaton also explained that the facility at Fort England was for voluntary patients in the sense that a sentenced prisoner could not be detained there against his will. This was confirmed by Ms Kani's supervisor, Ms Totana.
- [12] In a nutshell, the upshot of the evidence as summarised by the magistrate was that the Director-General of Social Development had never received the documentation to make the referral in terms of the Substance Abuse Act, and that between the Department of Social Development and the Department of Correctional Services "the case basically fell through the cracks".
- [13] Notwithstanding this, the regional magistrate, in sending this matter on special review, concluded that despite his best efforts to provide for a sentencing regime which would emphasise the accused's rehabilitation, and despite the intention of the legislature in providing for such a sentencing option, it appeared that executively no structure had been put in place to make provision for such a sentence to be carried out effectively. In short, the system had failed both the accused and his family, who had been traumatised by his conduct.

The relevant legislation

- [14] Section 296(1) of the Criminal Procedure Act provides that a court convicting any person of an offence may, in addition to or in lieu of any sentence, order that a person be detained at a treatment centre established under the Drug Dependency Act, if the court is satisfied from the evidence or from any other information placed before it (which must include the report of a probation officer) that such person is a person as described in section 33(1) of the Substance Abuse Act, and such order shall be deemed to have been made in terms of section 35 of that Act, provided that such order shall not be made in addition to any sentence of imprisonment, unless the whole of such sentence is suspended.

- [15] Section 296(2) states that where a court has referred a person to a treatment centre under subsection (1) and he is later found to be unfit for treatment in such a centre, he may be dealt with *mutatis mutandis* in accordance with the provisions of section 276A(4).
- [16] The upshot of section 276A(4) is that a court which has imposed the aforesaid punishment on an accused person (whether the court is constituted differently or not) may at any time, if it is found from a motivated recommendation by a probation officer, or the Commissioner (who in terms of section 296(2)(b) shall be construed to be the manager of the treatment centre or a person authorised by him), or the parole board, that the person is not fit to serve the imposed punishment, reconsider that punishment and impose any proper punishment.
- [17] This brings me to the relevant provisions of the Substance Abuse Act.
- [18] Section 36 thereof is basically a repetition of what is set forth at sections 296 and 276A (4) of the Criminal Procedure Act to which I have already made reference.
- [19] In order for the magistrate to make a competent order, referring a person to a treatment centre as part of his sentence, the court must comply with the following (see sections 33 and 35 of the Substance Abuse Act):
- a. It must be satisfied that the accused is an involuntary service user living within the court's jurisdiction.
 - b. It must be satisfied that the accused is a danger to himself or to the immediate environment, or that he causes a major public health risk or in any other manner does harm to his own or the welfare of his family and others, or that he has committed a criminal act to sustain his dependence on substances.
 - c. To this effect an enquiry must be held in the accused's presence, at which enquiry the prosecutor and the accused (or his representative) are entitled to lead evidence and to cross examine witnesses.
 - d. A report from a social worker as contemplated in terms of section 33(4) of the Act must be placed before the magistrate regarding the social circumstances of the accused and any other matter which the prosecutor may consider relevant, and the accused or his legal representative must be afforded the opportunity to examine or cross-examine the deponent to the report.
 - e. If it appears to the magistrate on consideration of the evidence and of the social worker's report that the accused is a person referred to hereinbefore and as contemplated in section 33(1) of the Substance Abuse Act, and that he requires and is likely to benefit from treatment and skills development provided in a treatment centre, or that it would be in the accused's interest or in the interests of his dependants or the community that he be admitted to a centre, the magistrate may order that the accused be admitted to a treatment centre (i.e. a private or public treatment centre registered or established for the treatment and the rehabilitation of service users who abuse or are dependent on substances) designated by the

Director-General (i.e. the head of the Department of Social Development in the national sphere of government), for a period not exceeding 12 months.

- f. The magistrate may in addition order that the accused be admitted in custody or that he be released on bail or on warning until such time as effect can be given to the court order.[3]
- g. A magistrate who makes an order referring an accused to a treatment centre must, before such referral, order that the accused be admitted for detoxification at a health establishment or a treatment centre authorised to provide detoxification in terms of the National Health Act[4] (i.e. a medically supervised process by which physical withdrawal from a substance is managed through administration of individually prescribed medicines by a medical practitioner in such a health establishment or treatment centre).

- [20] Section 39 of the Substance Abuse Act also provides for a useful alternative remedy in particular circumstances. It is this. If it appears to a magistrate at the aforesaid enquiry that the accused is an appropriate candidate for referral to a treatment centre, the magistrate may postpone the making of such an order for a period not exceeding three years, and must release the accused on condition that he submits himself to supervision by a social worker or a probation officer specialising in substance abuse and undergoes any prescribed treatment. In addition to such an order, the magistrate may further order that the Director-General, may unconditionally discharge the accused in respect of whom such an order has been made.
- [21] Where the making of an order has been postponed for less than three years, the Director-General may, after considering the social worker's report, at any time before the expiry of the period make an order extending the period of postponement for such further period (not exceeding the difference between three years and the period for which the making of the order has been postponed) as he or she may deem fit.
- [22] If at the end of the new period the Director-General is satisfied that the accused has observed the conditions of his release, he may be discharged unconditionally. If however, he has failed to comply with his release conditions, any magistrate may make an order for his arrest without a warrant by a police official, upon which an order in terms of section 35(7) of the Substance Abuse Act may be made as if the making of such order had never been postponed.
- [23] Sections 39 and 40 of the aforesaid Act provide a step by step guide regarding the procedural and substantive application of these sections.

Application of the relevant legislation in the court a quo

- [24] In a letter addressed to the registrar of this court (dated 21 December 2015), the regional magistrate has requested me to set aside the sentence dated

24 April 2014, and to substitute it with an appropriate wholly suspended sentence, ante-dated to that of the original sentence; alternatively, to refer the matter back to the regional court for such a sentence to be imposed. After providing a useful summary of what had transpired before him, the regional magistrate comments as follows:

"Unfortunately this matter is an unusually shameful example of how the criminal justice system has failed not only an Accused person, but also the communities the courts are supposed to serve. Sadly, it also does nothing to enhance or complement our Constitutional imperatives. Although intended as an earnest attempt to assist the Accused person and his family, it proved to be a futile exercise.

I regret having to admit that I am at my wits end regarding a suitable sentence, other than what I have already recommended. The period which the accused has already spent at a pre-trial detention facility, pending his removal to a rehabilitation centre, is probably more than what would have been required for some form of rehabilitation. For this reason, and pending the review proceedings,

Accused was released and warned to re-appear in this court on 25 Jan 2016."

[25] For some reason the review record was only received by the registrar of this court on 26 January 2016. I am however advised that on 25 January the matter was further postponed to 29 February 2016.

[26] I have little doubt that the regional magistrate made his best endeavours to give effect to a punishment regime, the primary purpose of which would have best fitted the facts and circumstances of this particular matter, namely that of rehabilitation, deterrence and restorative justice .

[27] There are however, a number of aspects germane to this matter which are of concern to me, and which may have inadvertently been overlooked by the magistrate, or which may have escaped his prudent consideration:

a. Accordi ng to the assessment report by correctional official Mr C.

Goeda which served before the regional magistrate and which was admitted by the accused, he was in the process of serving a three-year correctional supervision sentence for robbery in terms of section 276(1)(i) of the Criminal Procedure Act. According to Goeda the accused was placed under correctional supervision on 13 September 2013 to be released on 9 January 2016, and had accordingl y committed

the offence in question whilst serving his correctional supervision sentence. This sentence was not reflected in the accused 's criminal record, which does however reflect an alarming list of previous convictions for theft, escaping or attempting to escape from custody and the possession of an unlicensed firearm and ammunition (commencing in 2007).

b. These facts, as well as the previous correctional supervision

sentence and the default position in which the accused found himself after having committed the offence in question, were formally

admitted by the accused subsequent to his conviction and before sentence was imposed in this matter.

c. The trial record reflects that after the accused pleaded guilty on

29 November 2013, and in the presence of his legal representative Ms Terblanche, he uttered the following words directed at his natural mother, the complainant, who was also present:

'BESKULDIGDE: (Onduidelik) sy moenie praat nie, sy moet net die fokken terugtrek.

HOF: U kan maar sit dankie meneer.

BESKULDIGDE: (Onduidelik) as sy nie die saak gaan terugtrek (onduidelik) haar doodrnaak. Ek gaan haar doodrnaak. (Onduidelik).

MEY TERBLANCHE: Meneer bly sit.

BESKULDIGDE : (Onduidelik). Ek gaan jou doodrnaak jy (onduidelik) my klere weg hierso. Ek gaan jou doodrnaak jy (onduidelik).'

d. With respect to these threats the regional magistrate advised the

accused 's mother that this type of thing happens in cases of this nature and that the nature and extent of these threats would be dealt with in the reports of the correctional services officer and the social worker. However, only oblique mention of this was subsequently made in the report of the social worker where she states that the accused 'threatened ' his mother in court and that she still lives in fear and 'pleads with the Court not to release the accused.'

e. According to this pre-sentence report of the social worker Ms B. Kani, the accused (24 years old at the time of her interview with him) had admittedly showed signs of misconduct from the age of 15 when he joined a gang called 'Dust Life' and began smoking substances such as tik and madrax, and had commenced living with this gang. He participated in criminal activities such as 'robbing and shooting people', and robbed his peers at school. The accused 's family reported that they were afraid of him and that he had no insight into his own condition. Despite having admitted to the social worker that he had smoked tik and mandrax before he committed the offence in question, the accused did not believe that he has or had a drug problem . The social worker concluded that the accused posed a danger to himself and to his family.

f. It seems that both Goeda and Kani recommended a sentence of correctional supervision in terms of section 276(l)(i) of the Criminal Procedure Act (i.e. imprisonment from which the accused may be placed under correctional supervision in the discretion of the Commissioner).

[26] The regional magistrate, after having conducted his own enqumes regarding the facilities available for rehabil itation, elected to sentence the accused by referring him to a rehabilitation centre in terms of section 296(I) of the Criminal Procedure Act. This sentence appears to have been supported by the prosecution and the accused's representative. The sentence itself reads as follows:

'U word dan ingevolge die bepalings van Artikel 296(1) van die Straiproseswet VERWYS NA N REHABILITASIESENTRUM. Die betrok.ke

rehabilitasiesentrum en die beskikbaarheid daarvan en u opname daarin sal gereel word deur die Direkteur- Generaal van die Departement van Maatskaplike Ontwik.keling. U sal intussen aangehou word by die St. Albans gevangeni s totdat u dan nou verwyder word na die rehabilitasiesentrum. '

[27] As I have already said, no further steps were taken for a period of 19 months, during which period the accused was simply further

detained as an awaiting trial prisoner. The regional magistrate, in referring the matter on special review, has expressed the view that the sentence which he imposed had proved to be unworkable. I am not sure that this is altogether correct. It appears to me rather, that the sentence could have been more precise and detailed to fully and clearly meet the provisions of section 33 of the Substance Abuse Act, and particularly those set forth at subsections (7) and (9) of the section. It seems to me that subsection

(7) for example only provides for the Director-General to designate a treatment centre, and not necessarily to participate in specifically making a place available for the accused and to arrange his actual transfer. The logistics of the actual transfer are surely matters which ought to have been arranged or dealt with by the prosecutor acting in conjunction with the prison authorities and those responsible for the intake of the accused at the designated treatment centre. The sentence could also (for purposes of clarity), have specified that the admission to the treatment centre should not exceed 12 months, and that the accused should be admitted for detoxification in advance as provided for in the Substance Abuse Act. For these reasons the accused should be sentenced afresh.

[28] I am alive to the regional magistrate's concern that the accused has already spent a further 19 months in jail in the facility for awaiting trial prisoners. I also agree that this is a matter which reeks of lamentable inefficiency, of indifference and of a dereliction of duty. However, quite where the blame lies is still not apparent from the record before me and it serves no purpose to delay the matter any further while such a witch hunt is being conducted.

[29] The record reveals, and experience has established, that not only are drugs more readily available to awaiting trial prisoners than to others, but also that these prisoners are not exposed to the rehabilitation facilities which correctional services have to offer to sentenced prisoners.

[30] The record does not reflect whether the accused has now been rehabilitated. To me, this was an important, carefully contemplated

and integral purpose of the sentence imposed by the regional magistrate. If he has not been rehabilitated, he may still pose a

risk to himself and to others in spite of the fact that he has been in custody for 19 months.

[31] In *S v Katu*[5] the accused was 15 years old when he was convicted of housebreaking with intent to steal and theft. He was sent to a reform school in terms of section 290(1)(d) of the Criminal Procedure Act. It was directed at the time that he be detained in the juvenile section of the local prison pending his referral. More than two years later, in December 2000, a magistrate discovered that the accused was still in custody pending his removal to the reform school, and that there were no reasonable prospects that the accused would be so admitted in the foreseeable future partly due to the unavailability of an appropriate facility.

[32] Although the case had already been submitted on automatic review and the proceedings had been certified to have been in accordance with justice, the review Court held (after having obtained an opinion from the Director of Public Prosecutions to the effect that the reviewing judge should set aside the sentence and substitute it with another) that although justice demanded that the accused no longer be detained, the trial court remained in the best position to impose sentence, and that the trial magistrate could properly inquire into the accused's present (my emphasis) circumstances, and impose an appropriate sentence, obviously taking into account the accused's extended detention. In the circumstances the review Court withdrew its previous certificate, set aside the sentence and remitted the matter to the magistrates' court for sentencing afresh.[6]

[33] Had the matter before me been on all fours with *Katu*, I may have been tempted to likewise postpone the finalisation thereof by similarly obtaining an opinion from the Director of Public

Prosecutions. However it is not. The accused in this matter is not only a 26 year old repeat offender who at the time of sentence had admittedly been using dangerous dependence producing drugs for nine years. He is also a young man who, somewhat arrogantly threatened the life of his mother *in facia curiae*. He also placed his mother's life and the lives of those present at his parental home at risk during the commission of this offence, which offence he committed whilst serving a sentence for robbery in terms of section 276(1)(i) of the Criminal Procedure Act. These are aspects of this case and of the accused's profile which are cause for concern. I have little doubt that these are aspects which the Director of Public Prosecutions will be constrained to emphasise in the event of an opinion having been sought from that office.

[34] I do not intend substituting the sentence. Having considered the facts, the circumstances and the history of this particular case, the regional magistrate remains to my mind to be in the best position to impose an appropriate sentence.[7] The trial court is empowered and has the facilities at its disposal to properly inquire into the present circumstances of the accused, having regard to the relevant factors which I have highlighted as apparent from the record.

[35] In the circumstances I make the following order:

35.1 The sentence imposed on 24 April 2014 is set aside.

35.2 The case is remitted to the regional magistrates' court for sentencing afresh.

I T STRETCH

JUDGE OF THE HIGH COURT

I agree

J PICKERING

[1] 51 of 1977.

[2] 70 of 2008 (the Substance Abuse Act).

[3] See section 35(8) of the Substance Abuse Act.

[4] 61 of 2003.

[5] 2001 (I) SACR 528 ECD.

[6] Ibid at 531i- 532c.

[7] See R v Maphumulo and Others 1920 AD 56 at 57.

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