

SOUTH AFRICA / JUDGMENT

S v Mankayi (243/2013) [2013] ZAECGHC 79 (15 August 2013) [2013] ZAECGHC 79

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen, CM Plasket

CASE / FILE NUMBER

243/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, GRAHAMSTOWN

CA & R NO: 243/2013

Date Heard: 7 August 2013

Date Delivered: 15 August
2013

In

the matter between:

THE
STATE
vs
SIPHESIHLE
MANKAYI

JUDGMENT

GOOSEN, J:

- [1] This is a review in terms of section 85 (1) (b) of the Child Justice Act 75 of 2008. The accused, who at the time of the commission of the offence was 17 years of age, was convicted of murder in the Molteno Magistrates Court. He was sentenced to undergo a period of 10 years imprisonment.
- [2] When the matter came before Pickering J the learned judge addressed a query to the magistrate concerned regarding whether the magistrate had not, in the absence of proof of previous convictions by the state, misdirected herself by having regard to an admitted previous conviction as disclosed in the probation officer's pre-sentence report. The

magistrate answered the query in the negative. The Director of Public Prosecutions has, in addition, furnished a very helpful opinion in relation to the conduct of the proceedings and has made a recommendation in regard to the court's approach to the matter on review. The opinion is to the effect that the magistrate did misdirect herself and that this court ought therefore to set aside the sentence.

- [3] I have considered the merits of the conviction of the accused and I am satisfied that it is in accordance with justice. The only issue under consideration is that relating to sentence. The relevant facts as disclosed in the record regarding the sentence proceedings are the following: The state did not prove any previous convictions. Prior to the sentencing of the accused a pre-sentence report was prepared. It appears from the pre-sentence report that the probation officer was told that the accused "stole a car and drove friends while he did not have the licence and was drunk and he bumped the car and was arrested and given five years suspended sentence." It also appears from the record that the accused admitted that he had received a postponed sentence for drunken driving in 2010. The record does not disclose when the accused was allegedly convicted nor what sentence, if any, was imposed.

- [4] In the magistrate's judgment on sentence the following is stated:

"Now your personal circumstances is (sic) before the court that at the time of the offence you were 17 years old pushing for 18, from the report it is also clear that although

you were by law still considered to be a minor a juvenile that you did not lead the life of a juvenile you participated in liquor at shebeens, you stole cars, you got involved in accidents you were not leading the life of a child anymore."

Further on in the judgment the following is stated:

"In all of this I read and I can understand that the parents always just want to put the best forward of a child specifically in circumstances where this child faces imprisonment but I also read between the lines it is quite clear here that despite them coming and telling the probation officer you such a model child you were not always a model because you did steal this car you did get involved in an accident you did drive this car while not having a licence etcetera, etcetera."

- [5] In her response to Pickering J's query the magistrate submitted that the information in the pre-sentence report was considered only in respect of the 'biased' view of the accused presented by his parents and that she had in fact treated him as a first offender for the purpose of sentence and had accordingly not misdirected herself.
- [6] The Director of Public Prosecutions in his submissions correctly points out that in circumstances where the state does not prove previous convictions it is irregular for the presiding officer to elicit such information even in circumstances where the accused admits the previous conduct (see *S v Hlangomva* 1999 (1) SACR 173 (E); *S v Kqawane* 2004 (2) SACR 80 (T)).
- [7] In the *Hlangomva* matter the court stated at 175 f-h

“The principle enunciated in the case referred to above applies with equal force in this matter. That the accused has, himself, volunteered the information concerning his previous brush with the law without being asked, should not change the picture; it does not give a magistrate the licence to proceed and to pose questions relating to the precise nature, dates and other information concerning the previous conviction, as was done in this matter. The only instance where a court can require particulars or further particulars or clarification of any previous conviction is that provided for in s 273 of the Act; this relates only to previous convictions that have been proved against an accused or those which an accused had admitted pursuant to s 271 (2) of the Act. Even s 212 of the Act cannot be utilised to prove previous convictions (S v Groenewald 1992 (1) SACR 254 (C) at 258 e-h).”

- [8] It matters not, in my view, that the admission relating to the existence of a previous conviction was elicited by the probation officer nor that the information appears to have been voluntarily provided by the accused's parents. The evidence relating to the alleged conviction, such as it is, is clearly adverse to the interest of the accused, was irregularly elicited in evidence and is in any event hearsay in nature. It ought therefore to have been wholly disregarded.
- [9] When once the fact of a previous conviction emerges in circumstances such as these the magistrate may afford the prosecution the opportunity to prove the conviction in terms of section 271 of the Criminal Procedure Act. If the prosecution elects not to do so the magistrate is obliged to deal with the matter by treating the accused as a first offender (see Hlangomva (supra) at 176 e). In this instance the magistrate clearly did not do so. The magistrate accepted as a fact that the accused had “stolen cars” when no such conviction had been proved. The magistrate then went on to utilize this ‘fact’ to make adverse findings regarding the accused's character and, on the strength of such findings, to treat the accused's youthfulness as a less significant mitigating factor. In so doing the magistrate committed a serious misdirection.
- [10] In the light of this finding the sentence imposed by the magistrate falls to be set aside. The question arises whether the matter should be remitted to the magistrate for the imposition of sentence afresh. The Director of Public Prosecutions submitted that such a course may give rise to unfairness for the accused since remitting the matter may have the consequence that a previous conviction or convictions are in due course proved at trial and that the accused may notionally be sentenced to a longer term of imprisonment. It is accordingly argued that the principle of fairness dictates rather that this court should impose a sentence which it considers to be appropriate having regard to all of the circumstances of the case. The Director of Public Prosecutions further submits that an appropriate sentence, having regard to the fact that the accused is a juvenile first offender would be 10 years imprisonment of which two years are conditionally suspended for a period of 4 years.

- [11] I agree with the approach suggested by the Director of Public Prosecutions. The prosecution elected at the trial, for reasons known only to it, not to prove any previous convictions. Remitting the matter on account of the magistrate's misdirection would undoubtedly now expose the accused to the proof of previous convictions which may adversely affect his interest. To allow that would be unfair. In the circumstances I consider that this court should impose an appropriate sentence rather than remit the matter.
- [12] The accused was convicted of murder. It appears from the record that he was part of a group of persons drinking at a tavern. There was an altercation between members of this group. Later the deceased was stabbed by the accused outside of the tavern. The post-mortem report indicates that the deceased, a young man of 19 years, died as a result of a stab wound to the chest which resulted in huge internal bleeding.
- [13] The offence for which the accused was convicted is undoubtedly a very serious offence and one that is, tragically, all too prevalent. The combination of alcohol and knives regularly spells death in communities across this province, and the courts have to deal with the bitter consequences for all concerned. The senseless killing of a young man in these circumstances undoubtedly warrants a lengthy period of imprisonment. In determining an appropriate sentence regard must of course be had to the provisions of the Child Justice Act and the accused must be treated as a juvenile offender. This requires that imprisonment should be considered only as a last resort. In this instance imprisonment is unavoidable given the very serious nature of the offence. Justice and the interests of the community demand that the accused be appropriately punished.
- [14] It is in my view unnecessary to set out in detail the particular factors that fall to be considered nor is it necessary to repeat here those factors properly considered by the magistrate. In my view when proper consideration is taken of the fact that the accused is a first offender and when regard is had to his status as a juvenile it would be appropriate to order that a portion of the sentence imposed is conditionally suspended. That would not only meet the requirement that such period of imprisonment as is imposed upon a juvenile offender is kept to the minimum that the circumstances of the case demand, it would also serve as a longer

term inducement acting upon the accused to refrain from any criminal conduct in the future.

In the result I make the following order:

The conviction of the accused is confirmed.

The sentence imposed by the Magistrate is set aside and replaced with the following:

"The accused is sentenced to a period of 10 years imprisonment of which two (2) years is suspended for a period of 4 (four) years on condition that the accused is not again convicted of an offence in which violence is an element for which imprisonment without the option of a fine is imposed and which offence is committed during the period of suspension."

G GOOSEN

JUDGE OF THE HIGH COURT

PLASKET J:

I agree.

C.M PLASKET

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