

SOUTH AFRICA / JUDGMENT

S v Reay (161/86) [1986] ZASCA 135 (27 November 1986)

[1986] ZASCA 135

COURT

Supreme Court of Appeal

BEFORE

Joubert, Smalberger, Galgut

CASE / FILE NUMBER

161/86

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161/86

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the appeal of:

GEORGE REAY appellant

versus THE STATE respondent

Coram: JOUBERT et SMALBERGER JJA, et GALGUT AJA.

Date of Hearing: 7 November 1986 Date of Judgment 27-11-1986

J U D G M E N T

GALGUT AJA: The appellant pleaded guilty in the Regional Court, Johannesburg, to five counts of housebreaking with intent to steal and theft, and one count of pos-

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session of dagga in contravention of sec. 22(A)(10)(a) of Act 101 of 1965. He was duly convicted on all six counts. He was sentenced to one year's imprisonment on each of the five counts of housebreaking with intent to steal and theft; on the remaining count he was sentenced to a fine of R50,00 or three months' imprisonment. His appeal to the Transvaal Provincial Division against the sentences imposed in respect of the five counts of housebreaking with intent to steal and theft was dismissed, as was his application for leave to appeal to this Court. He thereafter petitioned this Court for the necessary leave, which was duly granted.

The offences were committed over a period of fourteen months from July 1981 to September 1982. Each instance involved breaking into a pharmacy and stealing a quantity of drugs. On four of the occasions the appellant also stole cash in amounts ranging from R163,00 to R1 800,00. The appellant was 19 years of

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age when he committed the first two offences, and 20 years old when he committed the remaining three.

The defence called Mr Basil Carnie, an experienced clinical psychologist, to give evidence in of mitigation/sentence. He also has knowledge of the treatment and therapy given to prisoners. This appears from the following extract from his evidence:

"I am familiar with this. One of my interns at Weskoppies is now Colonel Rina Nel of the Pretoria Central Prison and a lot of my colleagues are now in senior positions there and we liaise together. I have also trained a lot of the prison personnel. The prison personnel send two interns per year to Weskoppies Hospital for training as clinical psychologists, once they have completed the Honours Degree in Psychology. So I am pretty au fait with the circumstances as regards the treatment and therapy given to patients."

Mr Carnie had had interviews with the appellant and his parents. The opinions expressed by Mr Carnie were based mainly on information gleaned from the appellant

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and his parents. The State did not challenge the correctness of such information. The appellant did not testify.

It appears from Mr Carnie's evidence that the appellant had a serious drug dependency problem at the time of the commission of the offences. At the age of 7, while living in Newcastle in England, the appellant began sniffing petrol and later lighter gas. After moving to South Africa with his parents he started sniffing glue. He began using dagga and a variety of other harmful habit-forming drugs including Mandrax and LSD. He became particularly dependent upon a drug known as Welconal. His abuse of this drug was so severe that two fingers of his right hand became gangrenous and had to be amputated. As a result of injections of drugs that he administered to himself he developed an abscess on the inside of his right elbow which

necessitated an operation. He also contracted

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hepatitis as a consequence of his drug taking. According to Mr Carnie the appellant's drug abuse was more self-destructive than harmful to other people. The appellant passed standard 7 at school before undergoing some technical training. He worked for Escom for a while but lost his employment as a result of drug abuse. The appellant voluntarily attended SANCA (the South African National Council on Alcohol and Drug Dependence Organisation) but was unfortunately only seen on an irregular basis. The main problem underlying his drug abuse, namely an emotionally inadequate personality, was apparently never treated. In 1983 his parents, from sheer frustration because of his drug problem, sent the appellant to live with his ailing grandfather in England. He, however, continued his drug-taking overseas. He returned to South Africa in 1984. After his arrest he was seen by a district surgeon and the evidence is that he had

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to be given doses of Welconal because he was in a comatose condition.

At the time of his trial the appellant had been in custody for some six months and had not had drugs during that period. I quote the following passages from Mr Carnie's evidence. I make no excuse for doing so at length. These passages set out his views concerning the appellant's condition, how and where he should be treated and the probable long term prognosis.

"The drugs are physiologically out of his system but definitely not psychologically. Now, so would you still say that the accused is psychologically dependent on drugs at the moment?-- Definitely so. In the accused's case he has a serious susceptibility to the psychological dependence on drugs and by virtue of his personality make-up, will be again susceptible to the use of drugs and involve himself" (if he is not treated).

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"We have a case of a person who is adequately equipped in terms of his intelligence to differentiate between right and wrong, but emotionally inadequately equipped to deal with the stresses of life and that until he has received psycho-therapy and some emotional support, I do not believe his rational abilities will be able to prevent him from re-entering the world of drugs.

Now, what would the prognosis be for the accused should he undergo psycho-therapy on a professional basis?-- I believe the prognosis should be positive, providing that he is seen on a long-term basis and then preferably under strict supervision in a place like Magaliesoord near Cullinan, Pretoria, where he is kept there as a certified, where he is committed for a period of time, so as to keep that supervision. I do not believe he can be treated on an out-patient basis as

yet, because of his susceptibility to Welconal if he is motivated, which I believe he is, I believe the prognosis to be a lot better. I think also conducive to this is the fact that his parents seem to be one-hundred percent behind him and they are very supportive of this, and I believe with the fact that he has an average intelligence, that he has realised how destructive his drug-taking habits

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have become, I believe that long-term there should be a reasonable prognosis.

(As) he is still inadequately equipped to control his drug-taking, I believe that without support, without control, without strict supervision over a period of time, there should be little prognosis for him; in other words, he will not be able to do this on his own accord. Now obviously you would not recommend that the accused be treated while in society itself, that he is for instance, should he get a suspended sentence, that he would not — Definitely not. So he should be in a place where there is some form of strict discipline? — That is correct.

Taking the prison setting where they have behaviour modification techniques, I do not believe that with the accused and his personality structures, I do not believe he is receptive to that type of treatment or that he will respond. I believe that he has got to be in an

institution where the therapeutic milieu is geared for drug rehabilitation as

in the case of Magaliesoord where there

is strict supervision. Also, unfortunately,

I do not believe the prisons are adequately equipped with personnel to deal with each individual case, whilst Magaliesoord

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is monitored by psychiatrists and clinical psychologists and they have group therapies on the go, they have detoxification units, which they do not have in the prison setting.

What would be the disadvantage of the accused receiving his treatment in prison? — Solely because of the milieu within the prison setting and the treatment process is geared towards people who have a chronic history of irresponsible behaviour the whole atmosphere is not geared or directed towards drug-taking or the alleviation of drug dependency but to the changing of behaviour per se. Now, within the setting at Magaliesoord for instance, where we have alcoholics and drug dependents, we have a situation there, all the people have one thing in common, they are all people who have been involved with habit-forming drugs. It is a sort of Alcoholics Anonymous situation, which is more conducive to the rehabilitation of these people and this is a more specialised form of therapy which is not available in the prison setting.

There are no facilities for drug dependency per se in the prison setting. There are a few clinical psychologists and social workers but the therapy is on an individual basis and it is definitely not directed towards drug dependency."

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The magistrate stated that he accepted Mr Carnie's evidence. In sentencing the appellant he took into account the fact that the appellant was a first offender, and that he had a drug dependency with an underlying personality problem. He regarded the fact that the appellant had pleaded guilty as indicative of remorse on his part. The following extracts from the magistrate's reasons for sentence indicate why he decided to impose a prison sentence (the lettering is mine):

(a) "... the Court must bear in mind that

in all the counts except count No 4, you did not only steal drugs, but in four of the counts you stole apart from drugs large amounts of cash as well. So this is not merely and purely a case of a person break-ing into pharmacies to steal only the drugs that he needed."

(b) " the Court must bear in mind as of

late there are quite a large amount of simi-

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lar cases, where drug addicts have broken into pharmacies and other shops and the Court therefore today does not only have to impose a sentence which will punish you, but must to some extent also serve as a deterrent to others."

(c) "The Court also cannot only bear in mind your personal circumstances, because that is but one leg of the triad which the Court has to consider. The other aspects are, the seriousness of the crimes to which the Court has already related, as well as the interests of society. If you are given a suspended sentence today, or if you are merely referred to a rehabilitation centre to get rid of your own problems, the Court cannot keep in mind the interests of society, because that will only look after your needs and not the interests of society as well." (d) "It is clear from the evidence of Mr Carnie that there are to some extent professional facilities to help you in prison, although they may not measure up the same standard as those offered in other places."

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I turn now to deal with each of the above reasons.

Ad (a) above: The appellant was a first offender. The evidence of Mr Carnie indicated that he is not a criminal type. There is also a statement by Mr Carnie to the effect that "the only problems that he (the appellant) has had have been related to his drug abuse". It is therefore highly probable that the real reason for breaking into the pharmacies was for the drugs and that the money was taken in order to enable the appellant to obtain drugs. The fact that the appellant did not give evidence does not detract from this probability. It follows that the magistrate placed undue emphasis on the fact that money was also taken.

Ad (b) above:

Where a crime is prevalent a severe sentence

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may be justified in order that it may act as a deterrent to others. This does not mean that where the personal circumstances of an accused and his reasons for committing the crime are such that in his case a prison sentence may not be appropriate, he should nevertheless be sent to gaol.

Ad (c) above: It seems to me, on the particular facts of this case that it would be not only in the interests of the appellant but also in the interests of society to seek to rehabilitate the appellant rather than to send him to gaol in which event he will not, on Mr Carnie's evidence, be cured of his dependence on and need for drugs. Moreover, it was not suggested by Mr Carnie that he "merely" be sent to a rehabilitation centre or given a suspended sentence without enforced treatment. What was suggested was a suspended sentence coupled with an order that he be sent to a rehabilitation centre.

/ Ad (d) above

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(Ad (d) above:

This statement by the Magistrate overlooks the fact that Mr Carnie's evidence relates to this particular appellant; that there was no doubt in his mind that the professional facilities would not achieve the desired result, viz, of curing the appellant of his drug dependency. The powers of an appeal court to interfere on appeal with a sentence imposed by a lower court are circumscribed. The Magistrate misdirected himself in the respects set out above thereby leaving this Court at large to impose what it considers would have been an appropriate, sentence.

In addition to what has been set out above, Mr Carnie also testified that the appellant "is a person who does not rationalise as I found in most other people's cases. He does not rationalise his use of drug-taking". He further testified that the appellant not only showed remorse but also realised that his drug-taking was self-destructive and that he was desirous of "undergoing

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intensive psycho-therapy as well as detoxification for his drug dependency". If one has regard to these factors and the fact that he was a first offender and his comparative youth, an appropriate sentence would have been one designed to keep the appellant out of prison as far as possible and to ensure that he receives the necessary treatment for his effective rehabilitation.

Having regard to what has been said above I am of the view that this is the very type of case in which the magistrate having had the benefit of and having accepted Mr Carnie's evidence (see *S v Mitchell* 1982 (3) SA 72 (T)), should have invoked sec. 296 of Act No 51 of 1971. A difficulty which faces this Court is that the appellant has already been in prison for two years serving the sentence imposed by the magistrate. We are informed that he has not received treatment during that period.

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16 It follows from the above that the sentence imposed by the magistrate must be set aside and an order made which will do proper justice to the appellant. This will be achieved by the order made hereunder.

The appeal succeeds and the following order

is made:

A. The sentences imposed upon the appellant by the magistrate in respect of counts 1 to 5 are altered to read:

1 (a) The accused is sentenced to

1 year's imprisonment on each of the counts 1 to 5.

(b) Such sentences are suspended for a period of five years, on condition, firstly, that the accused is not convicted of any offence of which the intention to steal or theft is an element, committed during the period of suspension, and, secondly, that the accused adheres to all the requirements of the rehabilitation centre referred to in para. 2 below.

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2 In addition to the above it is

ordered that the accused be detained at a rehabilitation centre established under the provisions of Act 41 of 1971.

3 The accused is to be detained in custody pending his removal to such a rehabilitation centre.

B. In addition to the above order this

Court orders that if the suspended

prison sentences are at any time
brought into force it is to be borne
in mind that the accused has already
served two years imprisonment which
period is then to be taken into
account.

O. GALGUT.

JOUBERT JA) SMALBERGER JA) concur.

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