

Mtabanengwe, J. *et* Maritz, J.

CRIMINAL PROCEDURE

Sentence - youthful offenders - immaturity, lack of insight and self-control - potentially useful human material - beneficial effect of suspended sentence - magistrate should have ameliorated the harshness of custodial sentenced by suspension of part thereof

CASE NO. CA 17/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JAFET-NOA NDJULUWA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: MTAMBANENGWE, J. *et* MARITZ, J.

Heard on: 2000.10.16

Delivered on:

2000.10.16

JUDGMENT

MARITZ, J.: The appellant was convicted in the Magistrate's Court, Luderitz of the crime of assault with the intent to do grievous bodily harm. He was sentenced to three years imprisonment. Dissatisfied with the severity of the sentence, the appellant applied for and obtained a judge's certificate as contemplated in Section 309(4)(a) of the

Criminal Procedure Act, 1977 granting him leave to prosecute his appeal against the imposed sentence.

The magistrate convicted the appellant on the basis of the complainant's evidence. The complainant testified that he and the appellant had a verbal altercation about certain clothes. Shortly afterwards, the appellant arrived at his house with a knife in his hands. The appellant declared that he was going to kill the complainant and stabbed the complainant on the head. The complainant unsuccessfully tried to defend himself during the ensuing scuffle. He could not avoid being stabbed again - this time on his back, just below his right shoulder blade. When other occupants of the house intervened, the complainant had an opportunity to escape. He ran to the hospital where he was admitted. According to the doctor, who examined the complainant, the wound to his head was not a serious one - more of a bruise to the scalp than an incision - but a deep stab wound to the back of the complainant required a surgical drain and stitches, necessitating his treatment in the hospital for a period of 8 days.

In sentencing the appellant, the magistrate referred to the gravity of the offence, the nature of the weapon used to inflict the wounds to the complainant, the force used during the assault and the part of the body on which the wound was inflicted. He regarded himself bound to protect the interest of the public and mentioned that he also took into consideration the personal circumstances of the accused.

The crime of assault with intent to do serious bodily harm, especially where a dangerous weapon such as a knife has been used, is undoubtedly a serious one. More often than not and, depending on the circumstances of the case, the commission thereof justifies the imposition of imprisonment without the option of a fine. The crime is a prevalent one and the magistrate quite appropriately referred to the Court's duty to take the public's interest into account by imposing deterrent and preventative sentences.

The concern of this Court in this appeal is therefore not whether a custodial sentence should have

been imposed in the circumstances of this case (the manner in which the magistrate exercised his sentencing discretion in that regard cannot be faulted), but rather whether the magistrate should not have considered the suspension of a portion of the custodial sentence imposed. It is not apparent from the magistrate's judgment that he considered that possibility. Notwithstanding the judge's certificate having been expressly granted on the basis that there was "a reasonable prospect that an Appellate Court may consider that part of the sentence should have been suspended" and the fact that the magistrate was given an opportunity to amplify his reasons for the sentence imposed, he declined to do so. Whilst I accept that judgments can never be all-embracing and that a Court of appeal should not easily infer that the Trial Court failed to take a particular consideration into account when sentencing an accused simply because it had not been expressly mentioned, the failure of the magistrate to amplify his reasons in view of the express concerns of this Court is a significant factor in the circumstances of this case.

The appellant was an 18-year-old first offender whose acts, unlawful as they were, were undoubtedly prompted to some extent by the earlier altercation about the clothes and the fact that the complainant had taken his cap. When a Court is required to sentence a youthful offender, it must always consider whether the commission of the offence was not related to the immaturity or lack of insight or self-control on the part of the accused. After all, as Mr Justice Steyn pointed out in *S v Makkahela*, 1975 (3) SA 788 (C), when the Court is dealing with youthful offenders, it should remind itself that, especially in the case of first offenders, one is dealing with potentially useful human material. If, due to the seriousness of the offence and the interest of the society the only appropriate sentence for such an offender is a period of imprisonment without the option of a fine, then the Court should consider whether it is not perhaps appropriate to ameliorate the harshness of a custodial sentence by the suspension of a part thereof.

The deterrent effect of a partially suspended sentence is trite: As was pointed out by Hathorn, J.P in *Persadh v R*, 1944 NPD 357 "(t)he man has a sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself he will have to serve it. That there is a very strong deterrent effect cannot be doubted."

In addition, a partially suspended sentence also facilitates the sentencing objective of rehabilitation:

The effective term of the accused's removal from society is reduced and he is encouraged by judicial sanction to retake his place in society as a law abiding citizen and to refrain from committing similar offences.

Given the age of the appellant and the fact that he is a first offender, the magistrate should have considered the reduction of the effective term of imprisonment by the partial suspension hereof. The Respondent (quite properly, in my view) conceded that much during argument. The sentence, when compared to that which this Court would have imposed had it heard the matter as a Court of first instance, shows such a significant disparity that it justifies the interference on appeal with the manner in which the magistrate exercised his sentencing discretion.

In my view the appeal against sentence should be upheld; the sentence imposed by the magistrate should be set aside and substituted for the following sentence:

A handwritten signature in black ink, appearing to be 'S. D.', followed by a small flourish.

"Three (3) years imprisonment of which 18 months imprisonment is suspended for 3 years on condition that the accused is not convicted of the crimes of assault with intent to do grievous bodily harm or common assault committed during the period of suspension for which imprisonment without the option of a fine is imposed."