

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

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.