FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 103/2009

In the review between:

THE STATE

versus

BONGANI PRECIOUS MFANA

CORAM: MOCUMIE & MOLEMELA, JJ

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 11 JUNE 2009

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[1] The matter came before me on automatic review in terms of section 302 read with 304 of the Criminal Procedure Act, 51 of 1977 (" the CPA"). The accused, a 19 year old young man, appeared in the Magistrate's Court Virginia on a charge of contravention of section 1(1) of the General Law Amendment Act, 50 of 1956, to wit the use of a motor vehicle without the owner's consent. On 14 November 2008 he pleaded guilty to the charge and was correctly convicted as charged. He was

sentenced to R3 000,00 (three thousand rand) or 12 (twelve) months imprisonment which was wholly suspended on certain conditions.

[2] I was of the view that the sentence imposed was too harsh even if it was suspended. I sent a query to that effect. The presiding officer has since responded and I thank him.

[3] The undisputed facts of this case as gleaned from the accused's plea of guilty in terms of section 112 of the CPA is as follows: On 14 November 2008 the accused was at his home studying for his matric/grade 12 final examination. At around 22h00 he stopped studying and went to his sister's bedroom where he took the keys of her car, an Opel Corsa valued at R85 000,00 without her permission or consent. He drove to the other part of the township and picked up his friends. He drove them to Welkom. At about 24h00 as fate would have it, he had a flat tyre. He left the car where it stopped and went to the township to get a spare wheel which he could not get. Instead of going home he slept at his friend's home. When he returned

to where he had left the car the following day he found his sister and the police. He was afraid to stop and only returned to his home in the evening whereupon the police were called and he was arrested.

[4] In his reasons for sentence the presiding officer stated the following on page 20 of the record:

> *"Dit is duidelik dat u weens u jeugdigheid 'n gebrek aan oordeel aan die hand gelê het en dat u eie selfsugtige begeertes aanleiding gegee het dat u hierdie voertuig sonder toestemming gebruik het. Sou hierdie geval nie gewees het dat dit u suster se voertuig was nie het ek u 'n aansienlike swaarder straf opgelê vandag. Die feit egter dat u 'n algehele eerste oortreder is, dat u nie in staat is om 'n boete te betaal nie, wat u wil studeer aan die technikon in Pretoria wys dat u iemand is wat 'n oordeelsfout begaan het en om te keer dat u 'n verdere oordeelsfout begaan gaan ek vir u die volgende vonnis oplê....."*

[5] The presiding officer continued in his reasons to say:

"Na oorweging van al die relevante vonnisopsies is die hof van oordeel dat die volgende 'n gepaste en gebalanseerde vonnis is volgens die eise van ons tyd....."

[6] In mitigation of sentence the accused called his sister, the owner of the car to plead for him. It was established during cross-examination that the insurance had paid for the damages to the car. However the sister had to pay R4 800,00 as excess. It was further established that the accused has never taken his sister's car without her permission before. None of the passengers who travelled with him were injured.

[7] The accused's personal circumstances are as follows: He is 19 years of age; he was doing Grade 12 in 2008 at Mamelo Senior Secondary School in Meloding, Virginia when he was arrested for this transgression; he had applied for admission at University/Technikon in Pretoria where his father was residing to study accounting; the complainant is his sister and she is employed by the local municipality. It is not recorded whether his mother was employed. Both the accused and his sister are

staying with their mother. He is a first offender. He pleaded guilty.

These are the favourable conditions which convinced the presiding officer, correctly so, that the accused was not material for prison.

[8] Bosielo J in **S v Shilubane** 2008 (1) SACR 295 (T) at 296 i – j reiterates the basic triad to be adopted when imposing sentence in the following words:

> *"The guiding light when sentencing still remains the oft-quoted dictum in **S v V** 1972 (3) SA 611 (A) at 614D (also **S v Zinn** 1969 (2) SA 537 (A)) where it is clearly stated:*
> *'Punishment must fit the criminal, the society and be blended with mercy..."*

[9] The Appellate Court and High Courts have repeatedly implored presiding officers to seriously take the personal circumstances of the accused or the accused as a person with his or her own unique characteristics, weaknesses and strengths into account

when imposing sentences and not just to pay lip service to the notion. Emphasis has also been made by the courts that of all the mitigating factors which should count in favour of the accused, youthfulness should invariably be a strong mitigating factor. In **S v Mohlobane** 1969 (1) SA 561 (A) at 565 C – E Rumpff CJ stated that in general a court will not punish an immature young person as severely as it would an adult. Authors in this field in particular **SS Terblanche** in his book: **The Guide to Sentencing in South Africa, 2nd edition, 2007** agree with him that the younger the offender, the clearer the evidence needs to be about his background, education, intelligence and mental abilities in order to enable the court to determine the level of his maturity, and therefore, his blameworthiness. See too **S v Lehnberg en 'n Ander** 1975 (4) SA 553 (A) at 561A where Rumpff CJ was at pains to explain why young offenders are treated differently when he stated:

> *"Youthfulness is immaturity, lack of experience, indiscretion and susceptibility to the influence of others...."* (*Translated.)*

[10] Bosielo J in **S v Phulwane and Others** 2003 (1) SACR 631 (T) at 634 h to 635 states the following aptly:

> *"When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officers invested with the task of sentencing such a youth to ensure that she or he receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best suit the needs and interests of the particular youth. It is, after all, a salutary principle of sentencing that sentence must be individualised. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote the rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community."*

[11] Legodi J in **S v Nyambosi** 2009 (1) SACR 447 (T) at 449 c – d states more or less the same when he states that :

> *"There are other options of sentencing to direct imprisonment. For example, the introduction of correctional supervision as a sentencing option has ushered in a new phase in the South African*

criminal justice system. As a whole, punishment, whether it be rehabilitation or, if need be, highly punitive in nature, is not necessary or even primarily attainable by means of imprisonment. The legislature having expressed itself clearly, regarding correctional supervision in terms of section 276A of the Criminal Procedure Act 51 of 1977, it is the duty of the presiding officers to use these ample means of sentencing at their disposal."

[12] See too remarks made by Kriegler J in **S v R** 1993 (1) SACR 209 (A) at 476; **S v D** 1995 (1) SACR 259 (A); **S v Potgieter** 1994 (1) SACR 61 (A).

[13] The presiding officer in his reasons for sentence refers, correctly so, to the youthfulness of the accused. He shows that he considered this factor because it was the most favourable compared to all other factors. Of even greater significance, he acknowledges, correctly in my view, that this was but an error of judgment on the accused's part and not evidence of a propensity to commit crime. This is so because accused is a first offender. But surprisingly (he) imposes a fine coupled with

imprisonment albeit suspended in line with the prosecutor's plea captured in the following paragraph:

> *"The sentence should be one that prevents him from committing this kind of offence or any other offence for that matter and further that will send a message to his peers and friends and the community that it will not be tolerated by the court…".*

[14] It is relevant to quote part of what the accused and his sister said in mitigation of sentence as recorded on pages 11 to 15 of the court record:

> *"Hoe vorder u op skool?---Ek gaan more Pretoria toe Edelagbare ek wil net daar gaan registreer,ek het eintlik gister teruggekom. Waarvoor wil u registreer---Ek wil 'ouditing' daar gaan doen."*

This is what the sister said:

> *"…Ja, ek vra die hof om hom 'n vonnis te gee die wat hom sal toelaat Edelagbare om terug skool toe te gaan Edelagbare.---(Accused) En ek wil hê my suster moet bevestig dat ek sal nie weer voor die hof kom nie Edelagbare.---(Sister) Ek belowe*

Edelagbare dat,en ek glo ook dat nou dit is die eerste en die laaste keer dat hy nou voor die hof verskyn." (My underlining)

[15] This is a young man who aspires to be an accountant who says to the court he has learnt from his mistake. He promised the court that it was the last time that he would be seen in a court of law. His sister, the aggrieved party, expressed the same sentiments.

[16] In the light of his guilty plea and what he told the court in mitigation of sentence as well as what his sister put before the court I do not gain a sense that he was not accepting responsibility for his wrongful conduct. He was remorseful and said so in many words. The presiding officer acknowledged all that was said in mitigation of sentence. There is nothing that barred the presiding officer at this point to request more information that will assist in determining a more suitable sentence.

[17] A pre-sentence report would have been beneficial to the presiding officer because it would have given the presiding officer a better view of the accused as an individual before him. It would have indicated his background, his level of maturity, his strengths and weaknesses. It would further have indicated to the presiding what other options the court had in this unique set of facts. The sister would have been interviewed and the impact this case had on her and her family would have been noted and integrated into the assessment of the accused. She would have had the opportunity to be heard and as a result her interests and aspirations as a victim in the criminal justice system in a would have been taken due cognizance of.

[18] In an article in the **Acta Criminologica 21(3) 2008** entitled **Restorative Justice: A contemporary South African Review, A Skelton and M Batley** express the following at 44 paraphrased:

> *"…restorative justice process could have been convened where the parties would have reached an agreement, the details of which could have been returned to court as a set of recommendations.*

They could be set as conditions for postponement or suspension of a sentence or of a caution and discharge …in terms of section 297 of the Criminal Procedure Act as amended or as conditions of correctional supervision section 276(h). The typical outcomes of a family group conference include: an apology, restitution, performance of service for the victim or community service for the benefit of the community, referral of the offender to some form of assistance programme to address some of his or her needs."

[19] In the particular context of this matter, where the accused, due to immaturity and lack of judgment wronged his own sister, I have no doubt that a family conference would have been an ideal way to solve this problem. The victim (sister) and the family would have had the opportunity to engage the accused who is a family member and to offer him an opportunity for introspection followed by a possible apology. Inevitably this would have restored the equilibrium in the disturbed family relations without sacrificing the accused on the alter of deterrence.

[20] Both Bertelsmann J in **S v Maluleke** 2008(1) SACR 49 (T) and Bosielo J in **S v Shilubane** 2008 (1) SACR 295 (T) have actively advocated for the use of restorative justice in sentencing and encouraged presiding officers to move away from imposing traditional sentences including, in my view, imprisonment coupled with a fine even if suspended as in this case, in circumstances where conventional sentences are patently inappropriate as in this case. They both encourage presiding officers to be innovative and proactive in opting for other alternative sentences to direct imprisonment in order to solve the problem of *inter alia* recidivism and overcrowding in our prisons. I share their view entirely especially in cases like the one at hand. See too Albie Sach's remarks in this regard in **M v S (Centre for Child Law *Amicus Curiae*** 2007 (12) BCLR 1312 (CC).

[21] It is clear that the accused committed this offence not out of inherent criminality but due to indiscretion or lack of judgment. Undoubtedly such an accused requires a sentence designed to help him acquire some measure of intellectual and emotional

maturity to deal with every day pressure brought on our youth by peer pressure and unrealistic expectations.

[22] To my mind an appropriate sentence would have been the one which would ensure that the accused is exposed to a programme where he would be taught life skills, better social values, respect for other people's rights. To sentence such an accused to a suspended sentence, is in my view, shortsighted and self defeating.

[23] In my view this is a typical case in which either correctional supervision under section 290 alternatively suspension of imposition of sentence in terms of section 297 of the CPA, should have been imposed especially considering the negative impact this sentence will have on the accused in future when he seeks employment. I can also not shut my eyes to the real possibility that, should the accused for whatever reason be in breach of some of the conditions of suspension of his sentence, he may have to serve this sentence.

[24] In view of what I have discussed in the preceding paragraphs I am of the view that the sentence imposed is inappropriate. As a result this court is entitled to tamper with and impose an appropriate sentence. Since the accused is already under the impression that his sentence was suspended, to bring him back to court to consider appropriate and relevant conditions under which he should have been released, will be inappropriate. In the interest of bringing finality to the matter I will tamper with the sentence without imposing any conditions which will make the sentence more onerous on him.

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

ORDER:

1. **The conviction is confirmed.**
2. **The sentence imposed is set aside and substituted by the following sentence:**

   "In terms of section 297(a) (ii) of the Criminal Procedure Act 51 of 1977 the imposition of sentence is suspended unconditionally for a period of 3 years."

3. It is ordered that this order be brought to the attention of the accused within a reasonable time from the date of this order.

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B.C. MOCUMIE, J

I concur.

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M.B MOLEMELA, J

BCM/sp