**IN THE KWA-ZULU NATAL HIGH COURT, PIETERMARITZBURG**
**REPUBLIC OF SOUTH AFRICA**

**AR202/09**

**KHONZEKILE NDLOVU**

versus

**THE STATE**

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**Judgment**

Delivered on 2009

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**Steyn J**

[1] The appellant Ms Ndlovu, was arraigned before the Magistrates' Court Camperdown on two counts of assault with the intent to do grievous bodily harm. She was convicted on these counts on the 12th May 2008, and sentenced to two (2) years imprisonment.

[2] The appellant appeals against the sentence imposed. On behalf of the appellant it has been argued that the sentence over emphasised the seriousness of the offences and that the

Court *a quo* misdirected itself when it decided that direct imprisonment is the only appropriate sentence under the given circumstances. Ms Jacobs, acting on behalf of the Respondent conceded that *ex facie* the record there appears to have been a misdirection.

[3] I shall now turn to the sentencing judgment and the reasons that informed the mind of the presiding officer when he sentenced the appellant:

> *"Now I notice that the correctional officer recommended correctional supervision. I'll tell you, I will not consider correctional supervision because that sentence is a mockery as far as I'm concerned because they are really making a mockery of that type of sentence. They don't comply with it. That sentence, people can do whatever they please. They continue drinking. Correctional officers never even go there so – just the other day in parliament, they said that of the 68 000 people or the 64 000 in South African who has correctional supervision, the correctional officers does not even know what happened . . . ."*[1]

[4] What is seriously disturbing in this matter, is that the presiding officer decided to request a report in terms of section 276(A)(1)(a) of the Criminal Procedure Act, 51 of 1977, whilst he decided that he will not consider correctional supervision as a

1 See transcribed record, page 37.

sentencing option. The views expressed by the learned Magistrate show that he had prejudged the case and that he had certainly not applied his mind to what would be a suitable sentence. I am satisfied that he misdirected himself when he excluded correctional supervision as a possible sentencing option.

[5] Nothing in the sentencing judgment shows that the Court had truly considered all sentencing options, including correctional supervision. The sentencing judgment demonstrates how the Court closed its mind to the option of correctional supervision. It is evident that the legislature by providing for correctional supervision has distinguished between two types of offenders: those deserving of direct imprisonment and those deserving of punishment but who need not be removed from society.[2]

[6] In light of the aforementioned misdirection of the Court *a quo*, this Court will have to determine afresh on the facts of this case, paying due consideration to the existing personal

2 See *S v Bergh* 2006 (2) SACR 225 (N) at 235e and the discussion of correctional supervision by the learned authors, DuToit et al 'Commentary on the Criminal Procedure Act' Juta (Service 40, 2008) at 28 – 10 E.

circumstances of the appellant, an appropriate sentence. In doing so I shall be mindful of all relevant factors, including the fact that assault with the intent to do grievous bodily harm, is a serious offence, furthermore that each case should be decided upon its own facts and circumstances, as is so eloquently stated by Van den Heever JA in *S v Sinden*:[3]

> *". . . . it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. Each case should be dealt with on its own facts, connected with the crime and the criminal."*[4]

[7] The appellant *in casu* at the time of sentencing was 19 years old, had no previous convictions and a scholar. Further to this she has a fixed monitorable address and on all scores qualifies as a suitable candidate for correctional supervision. Correctional supervision is not a lenient sentencing option. In my view it sufficiently emphasises the seriousness of the offences and at the same time serves the community interest. I am not convinced that the appellant should pay the price of an inefficient correctional system. The comment of the learned

3 1995 (2) SACR 704 A.
4 *Op cit* at 708 A-B.

Magistrate are not new, the Department of Correctional Services has been severely criticised in the past, it is however not the duty of presiding officers to implement sentences, it remains their duty to impose appropriate sentences.

[8] The conviction is hereby confirmed, the appeal on sentence however succeeds.

[9] In the result I make the following order:

The sentence of 2 (two) years' imprisonment is hereby set aside and replaced with the following:

> *"In terms of s 276(1)(h) of the Criminal Procedure Act, 51 of 1977 the appellant is sentenced to 18 (eighteen) months correctional supervision.*
>
> *1. This sentence shall comprise of the following programmes:*
>
> *Appellant is placed under:*
> *a) House arrest at the place and during the times determined by the Commissioner of Correctional Services for the full duration of correctional supervision;*
> *(b) That the appellant attend programmes for the improvement of the following problem areas:*
> *(i) Orientation programme;*

*(ii)Life-skill programme;*

*(iii)Aggressive offenders programme.*

*(c) That the appellant abstains from the use of alcohol and drugs.*

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*2. The appellant may not leave the magisterial district in which she resides without the permission of the correctional supervisions official.*

*3. The appellant shall:*

*i) Report to the Correctional Supervision Officer at the Magistrates' Court, Camperdown on 30 September 2009 at 09h00.*

*(ii) Comply with any reasonable instruction or instructions given by the Commissioner of Correctional Services regarding the administration of an compliance with this sentence.*

*(iii) Notify the Commissioner of Correctional Services forthwith in writing of any change in her residential address."*

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Steyn J

Mnguni J: I concur

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Mnguni J

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| Date of Hearing: | 14 July 2009 |
| Date of Judgment: | 10 September 2009 |
| Counsel for Appellant: | Adv Z Dyasi |
| Instructed by: | Pietermaritzburg Justice Centre |
| Counsel for Respondent: | Adv T S Jacobs |
| Instructed by: | Director of Public Prosecutions, Durban |