REPORTABLE

136/96

Case No 214/1996

In the Supreme Court of South Africa

(Appellate Division)

In the matter between:

CRAIG LESLIE SIEBERT.....Appellant

and

THE STATE.....Respondent

Before: Nestadt, Olivier, Scott JJA

Heard: 18 November 1996

Judgment delivered: 27 November 1996

JUDGMENT

Olivier JA:

The appellant was charged in the Southern Transvaal Regional Court with contravening section 36 of Act 62 of 1955. It was alleged that the appellant had been found in possession of a BMW 325i motor vehicle in respect of which there was a reasonable suspicion that it had been stolen and that he had been unable to give a satisfactory account of such possession. The appellant pleaded guilty. In a statement handed in to

the court in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 (the Act), he said that he knew that it was a stolen vehicle, but that he was unaware of the precise circumstances of the theft. The vehicle was returned undamaged to its lawful owner.

The appellant was convicted of the offence as charged.

The appellant did not testify in mitigation of sentence, but his personal circumstances were explained by his legal representative, an attorney, who also enquired, whether, if imprisonment was going to be a real possibility, the position as regards 'correctional periodical service' as an alternative sentence could not be determined and a probation officer's report be obtained. The presiding magistrate refused these requests.

The magistrate sentenced the appellant to two and a half years' imprisonment of which twelve months were suspended for five years on condition that the appellant was not convicted of theft committed or of contravening sections 36 or 37 of Act 62 of 1955 during the period of suspension.

The magistrate took into account the circumstances that the appellant was a young man, 23 years of age, with only one previous conviction, viz. the driving

of a motor vehicle under the influence of liquor; that he earned a salary of R2000,00 per month, and lived with his parents; that he had co-operated with the police in the investigation; and that he must have been severely tempted by the opportunity of purchasing a luxury car worth R105 000 for a mere R9 000.

On the other hand the magistrate also took into account the high level of serious crime in our country, and the fact that the purchase of stolen vehicles actively assists thieves creating a ready market, while it also frustrates the efforts of the police in combating crime. The sentence alluded to above was then imposed.

The appellant noted and prosecuted an appeal to the Witwatersrand Local Division of the Supreme Court against the sentence imposed by the magistrate.

Goldstein J (with whom MacArthur J agreed), in dismissing the appeal, held that the magistrate erred in failing to consider the possible option of correctional supervision. Referring to S v Pillay 1977 (4) SA 531 (A) at 534 H - 535 G, Goldstein J held that the question was not merely whether such error amounted to a misdirection, but whether the misdirection was of such a nature, degree, or seriousness that it showed, directly or

inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. In such a case the dictates of justice would clearly entitle the court of appeal to consider the sentence afresh.

Applying the approach laid down in S v Pillay, *supra*, Goldstein J held that the failure of the magistrate to consider correctional supervision as a sentencing option did not result in a misdirection which vitiated the sentence and permitted the court of appeal to consider sentence afresh. He based this conclusion on the following facts: the appellant committed a most serious crime; he did not give evidence; nor did it appear from the record why he pleaded guilty; he did not express remorse; he had no apparent compelling need to commit the crime; and he displayed a reprehensible disregard for the rights of others.

The appeal is before us with leave of the court *a quo*.

In S v Petkar 1988 (3) 571 (A) at 574 (C) Smalberger JA formulated the relevant powers of this Court as follows:

'This Court's powers to interfere with a sentence

on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate.'

In this Court the main thrust of the argument presented on behalf of the appellant was that the magistrate had misdirected himself in not considering correctional supervision in terms of section 276 (1) (h) of the Act as an appropriate sentence and in not calling for a report of a probation officer in terms of section 276 A (1) of the Act before imposing sentence.

Such a misdirection would, generally, justify the inference that the trial court had failed to exercise a judicial discretion in imposing sentence. The ensuing result would then render the imposed sentence liable to be set aside by a court of appeal, as was the case in S v Volkwyn 1995 (1) SACR 286 (A) at 291 f - h. The rule stated above is manifestly subject to the qualification that the particular sentencing option was one which, on the facts before the court, *prima facie* would have been appropriate and worthy of consideration. The facts of a specific case may be

such that judicial experience and common sense indicate that a particular option need not be considered at all. The present case is not such an instance. The effective term of imprisonment imposed (eighteen months) is half the maximum period of three years for which correctional supervision may be ordered - see section 276 A (1) (b). There could be no justification for rejecting this sentencing option out of hand and without careful consideration. Correctional supervision has been considered as an appropriate sentence for more serious crimes than the one now under consideration, including murder (*inter alia* S v Potgieter 1994 (1) SACR 61 (A); S v Larsen 1994 (2) SACR 149 (A); S v Ingram 1995 (1) SACR 1 (A)); corruption (S v Mtsi 1995 (2) SACR 206 (W), incidentally a judgment of Goldstein J)); theft (S v Kruger 1995 (1) SACR 27 (A); S v Kasselman en 'n Ander 1995 (1) SACR 429 (T)); and rape (see S v A en 'n Ander 1994 (1) SACR 602 (A)).

Correctional supervision being a sentencing option which could be appropriate to the crime and the criminal before the court, the first question then is whether the magistrate failed to consider this option. This question is rendered unnecessarily difficult by the ambiguous response of the magistrate to the respondent's pre-sentencing requests at the close of the trial. After his conviction, the appellant

admitted to a previous conviction. The prosecutor and the defence attorney then addressed the court. The appellant himself was not called upon to testify. The following discussion between the magistrate and the appellant's attorney, Mr Mazaham, then took place:

> 'COURT: In order to consider the question of sentence, I will sentence the accused at a later stage, a week or more than a week.
>
> MR MAZAHAM: Your worship, may I respectfully ask whether at this point confirmation of what has been settled, particularly with regard to his personal circumstances, if it be at all possible if imprisonment is going to be a real possibility, that perhaps we could determine what the position is with correctional periodical service or alternatively obtain a full probation officer's report so that this court can be truly satisfied as to the circumstances relating to this accused.
>
> COURT: I do not see any reason why I should call for a probation officer's report. You have placed all the facts before me.
>
> MR MAZAHAM: Thank you your worship. Until when will your worship wish to postpone the matter?'

Goldstein J in the court *a quo* came to the conclusion that the magistrate had failed to consider

the possible option of correctional supervision and that he had misdirected himself.

The request by Mr Mazaham was, at best, confusing and halfhearted. But at least the reference to 'a full probation officer's report' would have been understood by the regional court magistrate to refer principally to a request to consider correctional supervision.

On the approach of Goldstein J in the court *a quo* (i.e. that the magistrate had failed to consider correctional supervision as a sentencing option), the magistrate must be held to have misdirected himself (S v Volkwyn, *supra*, at 291 f - h).

It is, however, possible to interpret what passed between the magistrate and the attorney as indicating that the magistrate did consider correctional supervision as an option but rejected it. Even so, this does not mean that he did not misdirect himself in another sense. I have no doubt that the exercise of a choice regarding a possibly appropriate sentencing option, where there is insufficient factual material to substantiate and justify an exclusion of such option, amounts to a misdirection.

In the appeal now under consideration, there are,

in my view, insufficient facts to have enabled the magistrate to exercise a proper sentencing discretion. As regards both the crime and the criminal there are significant gaps in the knowledge one needs for responsible sentencing. We know virtually nothing of the circumstances relating to the crime, e.g. how did the accused come to know that the vehicle he was purchasing was stolen? How was the price of R9000,00 arrived at? How long did the appellant have possession and use of the vehicle? And of the appellant himself we know as little - e.g. what scholastic or other qualifications does he possess? Where and by whom is he employed, and what type of work does he perform? What is his work record? What are his familial circumstances: i.a. is he married, and does he have children? Is he the type of youngster that should be sent to gaol?

In my view, to have rejected the correctional supervision option without full information as to at least these matters amounted to a misdirection.

A further complicating factor was, however, raised in argument before us. It was argued on behalf of the state that where an accused is represented by counsel (as happened in this case) and sufficient facts to substantiate a clear choice are not placed before the court, then, in the absence of such facts favourable

to the accused, the court is entitled to accept that such facts do not exist (Kriegler & Hiemstra: Suid-Afrikaanse Strafproseswet, 5th ed, 657).

In S v Gough 1980 (3) SA 785 (NC) it was stated at 786 G - H:

> 'Vonnisoplegging is minstens net so belangrik as die verhoor en baie meer moeite moet deur praktisyns gedoen word om die hof ten volle in te lig oor feite en omstandighede wat ter sake kan wees by vonnis. Hulle ken hul kliënt se omstandighede en, as hulle dit nie ken nie, is dit hulle plig om hulself op hoogte te stel. Dit kan nie van 'n hof verwag word om, waar 'n beskuldigde verteenwoordig is, self ondersoek te doen oor moontlike versagtende faktore nie.'

Speaking for myself, I regard such an approach to be questionable, to say the least. Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to *onus* of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.

An accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance. If there is insufficient evidence before the court to enable it to exercise a proper judicial sentencing discretion, it is the duty of that court to call for such evidence. Especially as regards correctional supervision this duty can be discharged easily and without any cost to the accused, by calling for the probation officer's report required by section 276 A (1) of the Act.

An enlightened and just penal policy requires a broad scope of sentencing options from which the most appropriate option, or combination of options, can be selected to fit the unique circumstances of the case before the court. It requires a willingness on the part of the trial court actively to explore all the available options and to choose the sentence best suited to the crime, the criminal, the public interest, and also the aims of punishment.

This approach accords generally with the approach of this Court in S v Dlamini 1991 (2) SACR 655 (A) at 666 g - 668 f. In particular as regards the option of correctional supervision this approach was emphasized in S v R 1993 (1) SACR 209 (A) at 221 g - j.

Where imprisonment is an appropriate option there

has in the past been a tendency amongst sentencing officers to regard imprisonment in serious cases as the first, last and only option. As Nicholas AJA aptly described the situation in S v D 1995 (1) SACR 259 (A) at 265 d - e:

> '...many of those concerned in the administration of criminal justice had acquired a particular mind-set as a result of years of habituation to the idea that imprisonment is the punishment of choice for serious crime, and it required a basic mental shift to regard imprisonment "as the sentencer's last resort".'

As regards correctional supervision in terms of section 276 (1) (h) of the Act, a useful guideline is afforded by the decision of this Court in S v R *supra* at 221 g - i, viz. that a clear distinction should be drawn between those offenders who ought to be removed from society by means of imprisonment and those who, although deserving of punishment, and even severe punishment, should not be so removed. This principle imposes on the trial court a duty meticulously and comprehensively to ensure that all the available facts be placed before it in order to enable it to impose a fair and just sentence.

In my view, the trial court erred in this respect

and committed a misdirection.

This conclusion, however, is not the end of the enquiry before us.

Before a sentencing misdirection is regarded as legally relevant,

> '...it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirecion is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: one that "the dictates of justice" clearly entitle the appeal court "to consider the sentence afresh" (S v Pillay 1977 (4) SA 531 (A) at 535 F - G).'

The reference in the quotation above to the "dictates of justice" is a reference to the following *dictum* of Van Winsen AJA in S v Fazzie and Others 1964 (4) SA 673 (A) at 684 B - C:

> 'Where, however, the dictates of justice are such as clearly to make it appear to this Court

> that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh.'

Goldstein J in the court *a quo* came to the conclusion that the failure by the magistrate to consider corrective supervision did not result in a misdirection which vitiated his sentence. Consequently, he held, the dictates of justice did not clearly entitle him to consider sentence afresh.

His reasons for this finding were as follows: the appellant had committed a most serious crime; he had not given evidence; there was nothing upon which to base a finding of remorse; there was no apparent compelling, understandable need for him to commit this crime; and he had displayed a total disregard for the rights of others. Consequently, the present case justified the more severe sentence of imprisonment rather than that of correctional supervision.

I take a different view of the matter. All the factors mentioned by Goldstein J for upholding the magistrate's decision are important and should be taken into account. But so are the facts and circumstances which were not placed before the magistrate, some of which have been mentioned above, and without which, in my view, a responsible and sustainable judicial discretion could not have been exercised. Having reached the above conclusion it follows, in my view, that the sentence imposed by the magistrate should be set aside. It may well be that after sufficient pre-sentencing information has been obtained, the trial court will impose the same sentence yet again. But it is also possible that the trial court will impose a different sentence. And that is precisely why the sentence imposed cannot be sustained.

In the result I would make the following order:

1. The appeal is allowed and the sentence is set aside.

2. The matter is remitted to the court which imposed the sentence to impose sentence afresh after compliance with section 276 A (1) (a) of the Criminal Procedure Act 51 of 1977 and a report of

a probation officer or correctional official had been placed before the court and after the reception of all other relevant evidence.

P J OLIVIER JA

I concur

D G SCOTT JA

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CRAIG LESLIE SIEBERT Appellant

and

THE STATE Respondent

Coram: NESTADT, OLIVIER et SCOTT JJA

Date heard: 18 November 1996

Date delivered: 27 November 1996

JUDGMENT

NESTADT, JA:

It seems improbable that the magistrate failed to consider the option of correctional supervision. I shall, however, assume that this is what happened and that the omission constituted a mis-direction. But in my view this cannot avail the appellant. I do not

think that a sentence of correctional supervision would have been an appropriate one. As S v Sinden, 1995(2) SACR 704(A) shows, whether in a given case it is, has to be carefully weighed. The interests of society may be such that a more severe sentence is required. In the present matter I consider that the interests of society called for a sentence of imprisonment. And the one imposed was proper. It was considerably less than what would have been imposed for the theft of the vehicle. At the same time, however, the magistrate rightly regarded the offence in a serious light. It was, of course, closely related to the original theft of the vehicle. The prevalence of the latter type of offence need hardly be stressed. The fact that the appellant, when he purchased the vehicle, knew it was stolen is an aggravating feature. This shows, positively, dishonesty

on his part. I cannot agree that the appellant's plea of guilty and his co-operation with the police justified an inference that he was remorseful. He is not an immature youth. The magistrate took into account in the appellant's favour that he was subject to temptation, namely that he was able to purchase a car worth R105 000 for R9 000. But no other mitigating factors were placed before the court by or on behalf of the appellant (who was represented). There is no reason to think that they exist.

I would dismiss the appeal.

H H Nestadt
Judge of Appeal