REPORTABLE
Case number: 135/2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

M E MAKHUDU **APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

CORAM: MARAIS, CAMERON JJA, *et* MTHIYANE AJA

DATE OF HEARING: 16 FEBRUARY 2001

DELIVERY DATE: 16 MARCH 2001

Reconstruction of record - *ex tempore* judgment on sentence unable to be reconstructed - consequence in considering appeal against sentence.
Sentence - police sergeant shoots and injures member of public at police station using service pistol after provocation - appropriate sentence.

JUDGMENT

MTHIYANE AJA

MTHIYANE AJA:

[1] The appellant was charged with attempted murder and convicted of assault with intent to do grievous bodily harm in the regional court, Pietersburg. He was sentenced to seven years' imprisonment. An appeal against sentence to the Transvaal Provincial Division failed, and leave to appeal was refused. Leave to appeal to this Court was granted on application to it.

[2] The background to the conviction may be summarized briefly. The appellant, a sergeant in the South African Police Services, stationed at Seshego, had laid a charge of *crimen injuria* against the complainant. At the request of the investigating officer, one detective Makgakane, the complainant reported at the Seshego police station but found that Mr Makgakane was not available. He was then asked to wait for him in one of the offices. While the complainant was waiting for his return, the appellant entered

the office and shot him twice, once above the left knee and once in the right hip. One of the bullets penetrated the right hip and remains lodged in the left pelvis, and was not removed because it was considered too dangerous to do so. After the shooting, one of the appellant's colleagues took possession of the firearm and the complainant was removed to hospital.

[3] There was a dispute as to the events preceding the shooting. The appellant's version in this regard was recorded as follows by the magistrate:

> ". . . Oggend 29 Julie 1997 aan diens. Plus minus 08:00 alleen in my kantoor. My kantoor toegemaak. Iemand maak skielik die deur oop sonder om te klop. Toe ek na deur kyk sien ek die klaer. Hy beledig my toe hy begin inkom. Sê ek het vir kak, Sotho 'masipha' laat arresteer. Hy sê daardie dag wil hy my sy ware kleure wys. Gesê ek is dom. Ek kom van die plase af. Hy gaan niks met my praat nie. Sê sy prokureurs gaan my laat kak.
> Dit het vinnig gebeur. Ek sê hoekom elke keer as jy my ontmoet vertel jy my so iets. Hy sê voertsek hy praat niks met my nie. Hy trek deur hardop toe. Dit klap my uit. Ek gaan kyk waarheen gaan hy. Op daardie oomblik was ek baie kwaad gewees."

The appellant then went on to describe how he lost control of himself and how he shot the complainant.

[4] The complainant denied that he insulted the appellant. He testified that while waiting for Mr Makgakane's return the appellant entered the office and greeted him. When the complainant did not return the greeting, the appellant swore at him, drew out his service pistol and shot him twice. He alleged that the appellant said that he would kill him. He denied that he went to the appellant's office or that he knew where it was situated.

[5] It is not apparent from the reconstructed record (as to which more later) how the magistrate resolved the above disputes because that part of his judgment which gave his reasons for convicting the appellant is lacking and he is unable to recall what he said (and, presumably, found proved). In as much as the appellant does not question his conviction on appeal, no more need be said about this aspect of the

matter. For purposes of the intermediate appeal the court *a quo* (Van der Walt J *et* Coetzee AJ) accepted that the appellant was provoked because it considered that the appellant, a policeman of eight years' standing, would not otherwise have acted as he did.

[6] It is against this background that we are called upon to deal with the appeal against sentence. When the matter came before the court *a quo* what was placed before it was a partly reconstructed record. The magistrate's judgment on sentence was not available. It had not been mechanically recorded and the magistrate stated that his entire judgment on sentence was delivered *ex tempore*, and that he could not remember what he had said in that respect. Notwithstanding this, the magistrate declared that he had considered all the "vonnis opsies" and stood by the seven year sentence he imposed on the appellant.

[7] This then brings me to the two issues raised in this appeal. First, it was argued

that the court *a quo* did not have a proper record before it on which the appeal against sentence could be heard, yet it approached the matter as though there was an adequate record before it. By so doing, so the argument goes, the learned judges, instead of dealing with the question of the sentence on the footing that they were at large to consider the question afresh, applied the more restrictive test traditionally applied when considering appeals against sentence and consequently misdirected themselves. The second point raised was that by mistakenly thinking that the incident giving rise to the charge occurred on 29 July 1992 rather than on 29 July 1997, the court *a quo* was led to incorrectly exaggerate the extent of the pain suffered by the complainant (who testified in March 1998 that he was still suffering pain) and consequently over-emphasized the seriousness of the consequences of the offence.

[8] I proceed to deal with the first issue. The effect of the magistrate's inability to reconstruct the record in so far as it related to providing the reasons for having

imposed the sentence which he did, was that when the matter came before the court *a quo* on appeal it was not possible to assess whether or not the sentence was possibly vitiated by misdirection or to assess whether there had been a proper exercise of judicial discretion. That notwithstanding, the learned judges dealt with the question of sentence on the footing that there could be no interference with the sentence in the absence of material misdirection or unless the sentence imposed differed so substantially from that which they thought appropriate that it could be said to be startlingly inappropriate. In so doing the court *a quo* applied a wrong test and unjustifiably inhibited itself in regard to the extent to which it could interfere. That much is evident from its ultimate conclusion that "the sentence imposed by the magistrate is not shocking" and from what was said in refusing leave to appeal, namely, "Ek is nie oortuig dat die landdros nie sy diskresie behoorlik uitgeoefen het toe hy hierdie vonnis van 7 jaar vir hierdie misdaad opgelê het nie." By adopting the

approach which it did, the court *a quo* failed to recognize the insuperable obstacles it was placing in the way of the appellant in prosecuting his appeal in a meaningful way. In the circumstances (for which the appellant was not to blame) the court *a quo* was obliged to regard itself as being at large to consider the question of sentence entirely afresh and without regard to the sentence imposed by the magistrate. Its failure to do so necessitates this Court having to undertake that task.

[9] Because of the view which I take of the first issue I do not consider it necessary to consider the materiality of the court *a quo's* mistaken view of the date of the offence. In any event, it is not that court's sentence which is being appealed against but the magistrate's sentence.

[10] It is clear that if the appellant is to be afforded the unfettered right of appeal to which he was then entitled, this Court must of necessity be at large to consider the question of sentence afresh in the light of all the circumstances. The absence of the

magistrate's reasons for sentence and his inability to recollect them has disabled the appellant from demonstrating the existence of any misdirections or any other failure to exercise a proper sentencing discretion. The possibility that the judgment on sentence did suffer from such defects cannot simply be arbitrarily excluded. See *S v Masuku and Others* 1985(3) SA 908 (A) at 912 G - I.

[11] Tempting as it is to seek to also draw support for that approach from the decision in *S v Adams* 2001(1) SACR 59, I am constrained to say that I consider the adoption and application of that approach in that case to be clearly wrong and, because its implications for the reviewing process are serious, it is necessary to say so. The reasoning there adopted, namely, that simply because a magistrate has given an oral judgment which has not been recorded in any manner, a reviewing court is at large to decide the case on the recorded evidence, is based upon a misunderstanding of the principles laid down in the decided cases cited in the judgment and a

misapplication of them.

[12] Those principles do not apply where the magistrate did in fact give an oral judgment at the trial and is in a position, if required by a reviewing judge to do so, to furnish again *ex post facto* the reasons for judgment or sentence. Neither the common law nor any statute obliges a magistrate to ensure that his or her judgment is recorded in such a way that a contemporaneous record of it comes into being. Indeed there are magistrates' courts where neither recording facilities nor shorthand writers are available and magistrates have perforce to record the evidence and their rulings, verdicts and sentences in longhand. They cannot be expected to do the same while orally delivering judgment. If a reviewing judge entertains doubt about the correctness of a conviction or a sentence in such a case he or she must call for the magistrate's reasons for the conclusions reached. If a magistrate furnishes them, the reviewing court is in the same position as if those reasons had been recorded at the time they were given in court and

[13] Where, as in the present case, the magistrate is unable to furnish his or her reasons that is an entirely different matter and the principles applied by the court in *Adams's* case come into play. In the latter case there is nothing to suggest that the magistrate was unable to furnish reasons and the decision to invoke those principles must be regarded as erroneous.

[14] The decision in *S v Masuku and Others* (*supra*) on which the court in *Adams's* case relied is not in point. The judicial officer there was a judge, not a magistrate. The judge had given no reasons at all either orally or otherwise for his decision at the time and was entirely *functus officio*. It was not competent for him in law to give his reasons for the first time *ex post facto*. A magistrate who did give reasons at the time but whose reasons were not recorded, is not entirely *functus officio* in the same sense in that express statutory provision is made for his reasons to be furnished again *ex post facto*, if required. (Rule 67(5) of the Magistrates' Courts Act 32 of 1944; s 304(2)(a)

upon which the court in *Adams's* case also relied for the proposition that a magistrate is obliged to have his or her judgment recorded in some or other form is in fact authority for the proposition that he or she is not so obliged.

[15] In considering the question of sentence afresh I bear in mind the following mitigating factors. The appellant is a first offender. He has lost his employment as a result of this incident. He will have to live with the knowledge that his folly will cost his wife and three children dearly. There is also the probability that he had been subjected to insulting and humiliating provocation in the past and that more of the same on the day in question enraged him.

[16] As against that, there are strongly aggravating features. The appellant was a police officer at the time. He shot twice an unarmed member of the public in the police station in full view of his colleagues, using a weapon issued to him to enable him to protect the public. He was no longer a very young man (he was 33 years of age)

better of him. His behaviour was utterly reprehensible and calls for a severe response.

[17] In my view, considering all the circumstances and balancing the seriousness of the offence against the appellant's personal circumstances, and taking into account the interests of the community, a sentence of five years' imprisonment would be appropriate. It will suffice, I believe, to bring home to the appellant and to anyone who may be tempted to follow his example, the seriousness of the matter.

[18] It follows that the sentence of seven years' imprisonment imposed by the magistrate cannot stand and must be set aside.

[19] I make the following order:

1. The appeal succeeds.
2. The sentence of seven years' imprisonment is set aside and replaced with a sentence of five years' imprisonment.

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K K MTHIYANE
ACTING JUDGE OF APPEAL

MARAIS JA)Concur
CAMERON JA)