**VAN ZYL v THE PEOPLE (1965) ZR 140 (CA)**

COURT OF APPEAL

BLAGDEN CJ, DENNISON AND WHELAN JJ

22nd October 1965

**Flynote and Headnote**

**[1] Criminal procedure - Appeal against sentence - judge's statement of intention to allow appeal not binding:**

A statement by a High Court judge that he intends to allow an appeal against a sentence to a reformatory is not binding on him if he later changes his mind in view of a welfare officer's report, the conditions at the reformatory, and other similar factors.

**[2] Criminal procedure - Sentencing - conditions in prisons and other penal institutions not relevant:**

Courts are not concerned with conditions prevailing in prisons and other penal institutions except in so far as the question arises whether defendant is a suitable subject for treatment given by a particular institution.

**[3] Criminal procedure - Hearing - right of accused or counsel to address court after changed circumstances:**

If circumstances materially change after the conclusion of the accused's case, the accused's counsel must be given an opportunity to address the court in light of the changed circumstances.

**[4] Evidence - Antecedents - for purpose of sentence - welfare officer's report should be introduced as evidence when crucial to sentence:**

A welfare officer's report that is relevant to the sentencing of the accused should be introduced into evidence, and an opportunity should be given to counsel on both sides to cross - examine upon it.

*Cunningham* for the appellant

*D P P Chuula* for the respondent

**Judgment**

**Dennison J:** The appellant in this case, Dan Martin van Zyl, aged 17, appealed against a reformatory order made against him by Mr Justice Charles. We allowed the appeal and substituted an order that the appellant be placed upon probation and announced that we would give reasons for this decision. These now follow.

The appellant was found guilty on his own plea before the senior resident magistrate's court, Livingstone, of breaking into Kohler's Garage, Livingstone, where he was in fact employed, together with two other persons who were charged with him, and of stealing therefrom a safe valued at £60 and money from that safe amounting to £124 4*s* 6*d*. The magistrate made a reformatory order in respect of the appellant and the appellant appealed against that order to Charles, J

The appeal was heard by Charles, J, at Lusaka on the 30th April, 1965, the appellant being represented, as he was before us, by Mr Cunningham. At that hearing, as at the hearing before the magistrate, no welfare report was available on the appellant.

Mr Cunningham informed Charles, J, that the appellant's employer was prepared to take the appellant back into his employment and exercise strict supervision over him if the reformatory order was cancelled. Apparently, the conditions prevailing at Katombora Reformatory were discussed at the hearing with particular reference to its suitability as an institution for the training and rehabilitation of the appellant. There seems to be a conflict between the judge's note of what was said and counsel's recollection, but it is unnecessary for us to attempt to resolve it. What is clear is that Mr Cunningham criticised the reformatory and represented that it was not a suitable institution for a person of the class and character of the appellant. [1] I have said before that the courts are not really concerned with the conditions prevailing in prisons and other penal institutions. In the instant case it was not a question of deciding whether the conditions at Katambora were suitable for the reception of this appellant, but whether in all the circumstances of the case the appellant was a suitable subject for reformatory treatment.

The judge stated that he proposed to allow the appeal. But there were still certain matters to be attended to which required the attendance of the appellant, in particular in regard

to the drawing up of a probation order. Mainly to save costs he adjourned the matter to Livingstone and intimated that it would not be necessary for counsel then before him to appear there. It was also accepted by counsel that the judge would obtain a welfare officer's report at Livingstone for the purpose of assisting him in making whatever order he thought fit. The appellant was released on bail, and there is no doubt in the minds of both counsel for the appellant and counsel for the State, the appeal had been allowed.

On the 28th or 29th of May, the matter came again before Charles, J, in Livingstone. The appellant was there represented by Mr Clark whose instructions were virtually only to attend for judgment. The State was represented by Mr Fitzpatrick Chuula.

At that hearing the judge had before him a lengthy and detailed report by a welfare officer on the appellant, the burden of which was that the appellant was not a suitable candidate for probation and that reformatory training was what was required. Attached to this report was a letter from the appellant's former employer stating that he was *not* now prepared to take the appellant back into his service.

Some days before the hearing the judge had visited the reformatory, inspected it, and spoken to the superintendent. As a result of that visit, he formed the impression that the reformatory was a well - run institution and quite suitable for the reception of persons of the appellant's class and character.

In the result the circumstances as they appeared before the learned judge at Livingstone were substantially different from those presented to him at Lusaka. [2] At this stage, in my view, the judge was still entitled to change his mind as to whether he should allow or dismiss the appeal and as to what orders he should make consequential thereupon. He dismissed the appeal. In coming to this decision the judge was clearly influenced by three factors:

1. The welfare officer's report, which pointed to the need for reformatory treatment and the unsuitability of probation.

2. The employer's change of heart in regard to taking the appellant back into his service.

3. The satisfactory conditions which the judge found obtained at the reformatory on his visit there.

[1] I have already referred to the fact that I do not think that the courts should concern themselves with the conditions which prevail in penal institutions, other than to have regard to them generally when considering whether an accused person would be a suitable subject for some form of penal treatment or reform. But in any case it must have been the first two factors which mainly influenced the Judge as they are the more important ones.

[3] The welfare report was prepared with great care. At Lusaka it had been agreed that a welfare report should be made available to the judge at Livingstone, but this provision was, as I understand it, to be in the nature of a formality to assist the judge in drawing up the conditions of a probation order, but the report which was presented to the judge was anything but a formality. It was material of an evidential character and should accordingly have been introduced as evidence, that is to say, the welfare officer should have been called as a witness to produce the report, and an opportunity should have been given to counsel on both sides to cross - examine upon it. [4] Apart from that, opportunity should also have been given to the appellant's counsel to address the court further in the light of the changed circumstances. These omissions may not have caused an actual injustice here, but they certainly brought about an apparent injustice.

The appellant and his parents, who had good reason to suppose the appeal had been successful and that a probation order would be made, suffered a profound shock when the appellant was taken back again into the reformatory. It was urged upon us by Mr. *Cunningham*that this shock alone amounted to sufficient punishment for the appellant. We can only hope that this will prove to be the case. There is something particularly despicable about stealing from one's own employer, and such an offence is deserving of condign punishment. If the appellant is a young man of any principle at all, he must realise this and will be anxious to devote all his energies to expunging the humiliation and shame which he has brought upon himself and his parents by his conduct. He can show no better

evidence of his good intentions in this respect than by complying faithfully with the conditions of the probation order to which he will be subject. If he is successful in this regard, he may find that he is relieved of the order altogether, well within the period for which it is ordered to run. *See*, in this connection, the Probation of Offenders Ordinance (Cap. 258), which by section 11 (1) provides that, upon application by the probationer or the probation officer responsible for his supervision, the court by which the probation order was made may discharge it.

In all the circumstances we came to the conclusion that the justice of this case would best be met if we allowed the appeal, set aside the reformatory order, and substituted therefor a probation order, the details of which would be drawn up by the senior resident magistrate's court at Livingstone, and we so ordered.

*Appeal allowed.*