

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

High Court Ref No: 165/11
Magistrate's Serial No: 07/11
Special Review Case No: D418/10

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

16 September 2011

Magistrate
KEMPTON PARK

THE STATE v FRANCO JOHANNES NEL

REVIEW JUDGMENT

LAMONT, J:

[1] The accused was convicted of contravening section 5(b) read with various other sections of Act No. 140 of 1992 "the Act" in that on or about 15 February 2010 and at or near OR Tambo International Airport he had imported or exported 424,74 grams of cocaine. The accused was sentenced in terms of section 276(1)(h) of Act No. 51 of 1977 to 3 years correctional supervision.

[2] The Chief Magistrate forwarded the matter to us on review in terms of section 304(4) of Act 51 of 1977 as he doubted whether or not the sentence imposed was appropriate in the circumstances.

[3] In terms of section 17(e) of the Act when a person is convicted of contravening section 5(b) of the Act such person shall be liable to imprisonment for a period not exceeding 25 years or to both such imprisonment and such fine as may be deemed to be appropriate.

[4] The section stipulates the maximum term of imprisonment for a period of up to 25 years for an offender. Such imprisonment must be imposed in all such convictions. See *S v Tsita* [2003] JOL 11720 (E).

[5] Imprisonment means keeping in prison and on the face of it does not include being kept in a “prison” in the circumstances contemplated by correctional supervision. As to the definition of a prison see *Oxford English Dictionary*, 6th Edition.

[6] In order to determine whether or not correctional supervision constitutes an appropriate sentence even if it is not imprisonment as defined by section 17(e) of the Act it is necessary to have regard to the provisions of the Criminal Procedure Act No. 51 of 1977.

[7] Section 276 of the Criminal Procedure Act reads as follows:

“276. Nature of punishments.—(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—

- (b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);*
- (c) periodical imprisonment;*
- (d) declaration as an habitual criminal;*
- (e) committal to any institution established by law;*
- (f) a fine;*
- (h) correctional supervision;*
- (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.*

(2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed—

- (a) as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or*
- (b) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.*

(3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court—

- (a) from imposing imprisonment together with correctional supervision; or*
- (b) from imposing the punishment referred to in subsection (1) (h) or (i) in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51 (1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.*

276A. Imposition of correctional supervision, and conversion of imprisonment into correctional supervision and vice versa.—

(1) Punishment shall, subject to the provisions of section 75 of the Child Justice Act, 2008, only be imposed under section 276 (1) (h)—

- (a) after a report of a probation officer or a Correctional official has been placed before the court; and*
- (b) for a fixed period not exceeding three years, or in the case of a conviction for any offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, for a fixed period not exceeding five years.”*

[8] As appears from section 276(3)(b) correctional supervision is a sentencing option available to be imposed irrespective of anything else provided for in any other section in any law except where such other law requires the mandatory minimum sentence in terms of section 51(1) or (2) of Act 105 of 1997.

[9] Accordingly the option of imposing correctional supervision is available save where there is a mandatory minimum sentence as provided for in Act 105 of 1997.

[10] Once correctional supervision is available to the court the court must apply the normal sentencing rules and in its discretion consider whether or not such sentence is appropriate or not. Correctional supervision can be imposed in respect of any offence even the so-called more serious offences.

[11] The sentence was imposed after the appropriate procedural steps had been taken and in accordance with the magistrate's discretion duly exercised in relation to punishment.

[12] Courts have in the past imposed correctional supervision as an appropriate sentence in respect of convictions under section 5(b) of Act 140 of 1992. See for example *S v Harding* 1996 (1) SACR 503 (C) at 510.

[13] The Supreme Court of Appeal did not impose correctional supervision in the matter of *Abrahams* but considered it as a sentencing option. See *S v Abrahams* 1996 (1) SACR 570 (A).

[14] It is apparent from the foregoing that correctional supervision is a competent sentencing option in respect of a conviction in terms of section 5(b) of Act 140 of 1992.

[15] It is accordingly my view that the proceedings in this case are in accordance with justice.

[16] I accordingly confirm both the conviction and sentence.

C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

R MATHOPO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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NO APPEARANCE FOR ACCUSED