

**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE No: **REV126/22**

Court *a quo* No: **ECR 334/21**

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED

Date: 1 March 2023

In the matter between:

THE STATE

And

LAZAROUS NTHUENG MODISE

REVIEW JUDGMENT

PILLAY AJ:

[1] The case was sent on special review by the Acting Head of Office Magistrate A Eckard in terms of S 304(4) of the Criminal Procedure Act as amended¹ ("the Act"). It was indicated that on inspection of the finalized cases at the Lephalale Magistrates Court, the abovementioned case, was identified as having an irregular sentence imposed by the Presiding Officer Magistrate Komape, and same had to be corrected.

[2] The factual background is the following: -

¹ Act 51 of 1977

2.1. The accused herein was charged with two counts, the first being Assault by way of threat and the second was Malicious Injury to Property.

2.2. The incidents occurred on the 13 August 2021².

2.3. The Accused, was legally represented and on the 5 January 2022, he pleaded Not Guilty to both counts³.

2.4. He was subsequently convicted on the 26 May 2022 in respect of both counts⁴.

2.5. On the 26 May 2022 the Accused was sentenced as follows;⁵

Count 1 Assault is fine (R3000,00) Three Thousand rand or

(1) One Year Imprisonment term.

Count 2 Malicious injury to property is fine (R3000,00) Three Thousand rand or (1) One Year Imprisonment term.

Of which half of the sentence is suspended for a period of (5) Five Years on condition the Accused is not convicted of **Theft** or Malicious Injury to Property committed during the period of suspension.

In terms of Section 103(2) Act 60 of 2000, Accused is not to be declared unfit to possess a firearm.

[3] Magistrate Eckard request that the sentence be corrected based on the fact that the Accused was not convicted of Theft, but rather Assault and the suspended portion of the sentence was for Theft and not Assault. The request is that this Court being competent can correct the sentence imposed specifically to

² See annexures to Charge Sheet

³ See JI5

⁴ As above

⁵ See JI5,

address this irregularity.

[4] In the instant case, I am satisfied that the proceedings in respect of the Conviction was in accordance with justice save for the Sentence itself from the J15 and record, it is clear that the Trial Court erred by imposing a suspended sentence for both offences together and then endorsed Theft instead of Assault in respect of the suspended portion of the sentence⁶.

[5] The suspension of sentence in the criminal courts is governed by section 297(1) of the CPA. This section provides as follows:

"Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion -

(a) postpone for a period not exceeding 5 years the passing of sentence and release the person concerned –

(i) on one or more conditions, whether as to - ...

(hh) any other matter, and order such person to appear before the court at the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding 5 years on any condition referred to in paragraph (a)(i) which the court may specify in the order ... "

[6] It is well established that when a Court imposes a suspended sentence, the conditions of such a suspended sentence must adhere to two overriding requirements. The first requirement is that the conditions of suspension relating to the offence that an accused person should not commit, should be related or

⁶ See pg 46 and 47 of Court record

connected to the offence for which he is sentenced. In this regard, Hiemstra's⁷ Criminal Procedure with reference to the cases of R v Cloete⁸ and S v Mjware⁹ states the following:

"If offences are specified which the offender may not commit without being exposed to the putting into operation of the suspended sentence, there has to be a measure of kinship between such offences and the offence of which the offender was convicted. In the case of theft, for example, it would be unacceptable to impose a condition of suspension requiring the accused not to drive recklessly. On the other hand, so it is submitted, there is a growing tendency to cast the net too narrowly."

[7] The second requirement is that the condition of the suspension must be properly drafted. This is to ensure that the Accused must know what he must avoid in order to prevent the suspended sentence being put into operation. Moreover, if the suspended portion of the sentence is triggered by the noncompliance of same, the Court which has to determine whether to put same into operation must be able to determine the ambit of the conditions. So if the suspended portion is not properly formulated and there is uncertainty the Accused will receive the benefit of that doubt.

[8] The manner in which suspended sentences are worded must be such that there can be no indication of being unfair or unjust to the Accused. In *S v Van den Berg*¹⁰ it was highlighted that where a Court exercises its discretion to suspend sentences, that it was undesirable that a large number of offences, even if there was a relationship between them, should be included in the condition of suspension. The condition of suspension must be related to the offence in question and must not be too wide to the extent that it has no connection with the offence concerned.

[9] In the abovementioned case the Presiding Officer, suspended the fine and direct imprisonment for both the offence of Assault and Malicious injury to property as follows;

⁷ Latest update by Albert Kruger- May 2021 - Ch 28 - 79. 80

⁸ 1950(4) SA 191 (EDL)

⁹ 1990 (1) SACR 388 (N)

¹⁰ 1976 (2) SA 232, (TPD)

[10] Outside of the obvious mistake in mentioning Theft, the further portion of the suspension was widely worded as to include both offences together, under one suspended sentence.

[11] This is exactly what the abovementioned cases warn against. It is always prudent that separate offences have individualised sentencing format to avoid such confusions from occurring. The learned Magistrate would benefit from such individualised sentencing structure, for each individualised offence, so as to avoid a repeat occurrence of these types of sentences which could lead to confusion, not only to the Accused, who will need to understand the consequence of the suspended sentence, but also the Court, when it is time to consider whether there was a breach of the suspended sentence. It is for these reasons that the sentence imposed needs to be reconsidered.

ORDER:

In the result, I propose that the sentence imposed by the trial court be corrected to read as follows:

(a) Count 1 Assault:

The Accused is fined (R3000,00) Three Thousand rand or (1) One Year Imprisonment of which (1/2) Half is suspended for a period of (3) Three years on the condition that the Accused is not convicted of assault committed during the period of suspension.

(b) Count 2 Malicious injury to property:

The Accused is fined (R3000,00) Three Thousand rand or (1) One Year Imprisonment of which (1/2) Half is suspended for a period of (3) years on condition that the Accused is not convicted of Malicious Injury to Property committed during the period of suspension.

In terms of Section 103(2) Act 60 of 2000, the Accused is not to be declared unfit to possess a firearm.

**K L PILLAY
ACTING JUDGE
OF THE HIGH COURT,
LIMPOPO DIVISION**