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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Case No: A01/16
Worcester Case No:A959/14
DPP Ref No: 9/2/5/1-22/16

SOPHIA DU PLESSIS **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: LE GRANGE & ROGERS JJ

Heard: **3 JUNE 2016**

Delivered: **8 JUNE 2016**

JUDGMENT

ROGERS J (LE GRANGE J concurring):

[1] The appellant was charged on one count of housebreaking with intent to commit a crime unknown to the State. She was legally represented. The State called two witnesses. The appellant closed her case without presenting evidence. In terms of s 262(2) of the Criminal Procedure Act 51 of 1977 the magistrate convicted her of housebreaking with intent to trespass in violation of s 1(1) of the Trespass Act 6 of 1959. After hearing ex parte submissions the magistrate sentenced the appellant to a fine of R3000 or 9 months' imprisonment suspended for five years subject to two conditions: (i) that she was not found guilty of housebreaking with intent to commit an offence or of contravening s 1(1) of the Trespass Act committed during the period of suspension; (ii) that she vacated the premises into which she had broken, namely 2… O… A….. in Worcester, by 18h00 on 21 August 2015.

[2] On 21 August 2015 the appellant, represented by a another attorney, sought leave to appeal against conviction and sentence. This the magistrate refused.

[3] On 24 August 2015 the appellant launched an urgent application in the High Court for an order that the sentence not be put into effect pending the finalisation of proceedings for appeal or review. An urgent interim order was granted on 24 August 2015 and extended by further order dated 11 September 2015.

[4] On 22 September 2015 the appellant filed a petition which stated that she sought leave to appeal against conviction and sentence. The accompanying affidavit stated that she only sought leave to appeal against sentence. On 27 November 2015 this court granted her leave to appeal against conviction and sentence.

[5] The circumstances of the alleged offence, as disclosed by the evidence of the two State witnesses, is in summary the following. The property in question is part of the province's rental housing stock which it makes available to qualifying persons

according to a waiting list. When the premises at 2…. O…. A….. became vacant in December 2013, the provincial authorities boarded up the house pending repair and allocation to the next person on the list, a Ms Cupido. They also got a contractor to cut off the water and electricity supply. While the house was in this condition the appellant, with the assistance of men whom she brought to the property by car, forced open the door. This was on 28 February 2014. Subsequently some of the window boardings were removed. Since then the appellant and her son have been living in the house. She has failed to vacate despite numerous requests and despite having initially said that she would.

[6] According to the evidence of the provincial official who testified on behalf of the State, the appellant told him that she and her children needed a place to stay and she had nowhere else to go.

[7] Despite the faint submissions to the contrary made by the appellant's counsel, Mr Colenso, I am satisfied that the State proved beyond reasonable doubt that the appellant broke into the premises without the permission of the provincial authority, which was the owner or lawful occupier or entity in charge of the premises, with a view to entering upon and remaining on the premises, and that she had no lawful reason to be on the premises. The appellant did not adduce evidence which raised as a reasonable possibility that she had lawful reason to be on the premises.

[8] The fact that an occupier might be protected from eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') does not mean that the person has lawful reason to be on the premises. On the contrary the supposition of the PIE Act is that the occupier is in unlawful occupation.

[9] The conviction was competent in terms of s 262(2) of the Criminal Procedure Act. The appeal against conviction thus cannot succeed.

[10] In regard to sentence, the personal circumstances placed on record by the appellant's attorney in the court a quo were the following. She is 40 years old, unmarried and has a 15 year old son who lives with her. She completed Grade 10 in

Upington. She spent a long time unemployed as a result of ill health. In May 2015 (about 15 months after taking unlawful occupation) she found work as a cashier, earning R1280 per month. She also gets a social grant for her son of R320 per month. She previously stayed at a hostel in E….. P….. but had to move out when the authorities required that building as a boarding house for schoolchildren. She had nowhere else to go and thus moved into 2…. O… A…. out of need. Her name is on the provincial housing list.

[11] Mr Colenso's main submission was that the condition of suspension relating to the vacating of the house was indirectly aimed at eviction and that the imposition of such a condition was contrary to this court's decision in *S v Koko* 2006 (1) SACR 15 (C). That case was factually similar to the present one except that the conviction was for trespassing rather than housebreaking with the intention of trespassing. The magistrate convicted the appellant of trespassing and sentenced him to a fine of R1000 or 100 days' imprisonment plus a further 9 months' imprisonment suspended for five years on condition (i) that he not be convicted of contravening s 1 of the Trespass Act committed during the period of suspension; (ii) that he vacate the premises by 30 June 2004. Of the second of these conditions, Van Reenen J (with Traverso DJP concurring) said the following (para 13, citation of authority omitted):

'Although the second condition of suspension was, strictly speaking, not an order for the eviction of the accused from the premises, it obliged him to vacate the same by 30 June 2004, failing which he, as happened, could be arrested and brought before a competent court in terms of the provisions of s 297(9)(a) of the Criminal Procedure Act for the purpose of having the suspended portion of the sentence put into operation or further suspended in the exercise of the court's discretion… As the obvious purpose of the imposition of the second condition of suspension was to indirectly achieve the same result as an order of ejectment, it, for practical purposes, in my view, should be equated there with and, in any event, would ensure that the full measure of the protection afforded by s 26(3) of the Constitution is accorded the accused…'

(See also *S v Samuels* [2016] ZAWCHC 33 paras 25-26.)

[12] Ms Engelbrecht on behalf of the State did not seek to persuade us that *Koko* was incorrectly decided. I think we should thus apply it in this case.

[13] It is not altogether clear from *Koko* whether the court regarded such a condition as impermissible per se or only impermissible in the absence of an enquiry by the sentencing court into whether eviction would be just and equitable in the light of all relevant circumstances. Van Reenen J evidently considered that there had not been a sufficient enquiry into the relevant circumstances (para 14). The better view seems to me to be that such a condition is impermissible per se. The PIE Act not only requires the evicting court to make proper enquiry into a just and equitable order. It lays down the procedure to be followed before such an order is made, including due notice to the unlawful occupier on terms approved by the court. The procedure followed in criminal cases is not suited to compliance with the PIE Act's procedural requirements.

[14] In any event, and as in *Koko*, there was no adequate enquiry by the sentencing court into the circumstances relevant to the appellant's eviction. Furthermore, the first warning she and her lawyer had that the condition might be imposed was at the end of the brief submissions on sentence. The magistrate said that she was considering a suspended sentence with a condition that the appellant immediately vacate the premises, adding, *"So ek is bevrees dat haar verblyf daar nou die hof dit nou onmiddelik gaan beëindig.'* The appellant's attorney said that she could talk to the appellant again but that she had already spoken with her and asked whether she could move out if convicted. The appellant had replied that she had nowhere else to go. The magistrate proceeded immediately with her ex tempore judgment on sentence.

[15] In *Koko* the court also regarded the first of the conditions of suspension as objectionable. Its reasoning appears from the following passage (para 21):

' … The purpose of suspending the whole or any part of the sentence, on condition that an accused is not during the period of suspension found guilty of the offence of which he or she has been convicted, is twofold. The first is to avoid a repetition in the future of the criminal conduct of which an accused has been found guilty and the second is to obviate the deleterious consequences that direct imprisonment may have…. Judicial notice can be taken of the grave shortage of housing in the Western Cape for people living in disadvantaged circumstances. The desperateness of the accused's situation as regards housing is apparent from the evidence… Numerous approaches to the Municipality of

Stellenbosch resulted in no more than that the accused became another one of a multitude of people awaiting the allocation of housing, some undeterminable time in the future. In the absence of any evidence of whether any realistic choices are available to the accused and, if so, what they are, it is not possible to determine whether any of the above-mentioned purposes of the suspension of a sentence will be achieved by the first condition of suspension or whether it will merely delay the inevitable, namely, the incarceration of the accused for a period of nine months with its resultant hardship to his wife and their three minor children. As in the circumstances of this case the first condition of suspension is unlikely to achieve the intended purposes of sentence of that nature, its imposition, in my view, was wholly inappropriate.'

[16] *Koko's* case differs from the present one in that there the conditions of suspension related to a period of imprisonment which was not accompanied, as here, by the option of a fine. That does not, however, affect the principle, which is that a condition is only appropriate if it is likely to achieve its objects. The part of the first condition relating to future contravention of the Trespass Act is objectionable for similar reasons to those stated in *Koko*. The appellant's continued presence on the property would violate the Trespass Act and thus result in a triggering of the sentence if she has nowhere else to stay.

[17] On the other hand, the part of the first condition relating to future housebreaking seems to me to be acceptable. In this respect our case differs from *Koko* since here the charge (and conviction) was one of housebreaking with the intention to trespass, not trespassing directly. The appellant would not make herself guilty of housebreaking by remaining on the premises (if she is still there). The condition would, however, be a salutary inducement to her not to resort to similar conduct in the future.

[18] In *Koko* the court concluded its judgment by saying that the case was the clearest possible support for the viewpoint that the Director of Public Prosecutions should not allow prosecutions for trespass to be used as a means to procure a person's eviction without compliance with the onerous but salutary provisions of the PIE Act (para 24). Our judgment will be a reminder of this observation.

[19] The following order is made: (i) the appeal against conviction is dismissed. (ii) The appeal against sentence succeeds. The sentence is set aside and replaced with the following sentence: 'The accused is sentenced to a fine of R3000 or imprisonment of 9 months suspended for five years on condition that she is not convicted of housebreaking with the intention of committing any offence, committed during the period of suspension.' (iii) The substituted sentence is antedated to 19 August 2015.

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ROGERS J

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LE GRANGE (conc)

APPEARANCES

For Appellant	Mr P Colenso Instructed by Legal Aid Cape Town
For Respondent	Ms M Engelbrecht Office of the Director of Public Prosecutions Western Cape