

SOUTH AFRICA / JUDGMENT

Killian v S (25/201/2021) [2021] ZAWCHC 144; 2021 (2) SACR 371 (WCC) (3 August 2021) [2021] ZAWCHC 144

COURT

Western Cape High Court, Cape Town

BEFORE

R.C.A. Henney, M.I. Samela

CASE / FILE NUMBER

25/201/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Samela J et Henney, J)

High Court Ref No: 253/21

High Court Review Case No: 25/201/2021

In the matter between:

ZAKIR KILLIAN

and

THE STATE

JUDGMENT:

3 AUGUST 2021

Henney, J

Introduction

[1] The case came before me as an automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 (“the CPA”). The accused was convicted by the Magistrate Cape Town on 6 May 2021 of contravening section 17(a) of the Domestic Violence Act, Act 116 of 1998 (“the DMA”), because he contravened the conditions of a protection order that was issued on 21 August 2016 in terms whereof he was prohibited from entering the premises of

the complainant, who is his mother, whilst he was under the influence of alcohol. He was further prohibited in terms of the Protection Order, not to damage or remove the property of the complainant.

- [2] He pleaded guilty to a charge, that he on 5 March 2021 failed to adhere to the conditions of the protection order by entering the property of the complainant and threatened to kill her. He was properly convicted after he was questioned by the Magistrate in terms of the provisions of section 112(1)(b) of the Criminal Procedure Act (“the CPA”).
- [3] He was subsequently sentenced to a fine of R5000 or 6 months imprisonment which was wholly suspended for a period of two (2) years on condition that he is not again convicted of assault which is committed during the period of suspension. After having perused the record, I raised the following query to be sent to the Magistrate:

“The Magistrate is kindly requested to give reasons as to why he imposed a condition to the suspended sentence that the accused not be convicted of the crime of assault, which is a crime to which he had not been convicted.”

The accused was convicted of contravening section 17(a) of the Domestic Violence Act 116 of 1998, although the crime contained an element of assault in that he threatened to assault the complainant, when he failed to comply with the Protection Order.

The effect of this condition is that should the accused be convicted once again of contravening the conditions of the Protection Order in contravention of section 17(a) of the Domestic Violence Act 116 of 1998, it would not amount to a failure to comply with the condition of suspension.”

- [4] I received a reply from the Magistrate dated 29 July 2021, where he stated that he agrees with this court’s concern, although the crime contained an element of assault, because the accused also grabbed his mother’s arm, placed his finger in her face and threatened to kill her. He notes that it was an oversight by omitting the added condition that the accused should not be convicted of contravening section 17 (a) of the DMA.
- [5] 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, is that, that offence should be related or connected to the offence for which he is sentenced. In this regard, Hiemstra’s[1] Criminal Procedure with reference to the cases of R v Cloete[2] and S v Mjware[3] 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.” (emphasis added)

- [6] The learned authors further states that the second requirement developed by the courts is that the condition must be precisely formulated and I agree that the primary object is after all that the accused must know what he or she has to do or avoid in order to ensure that sentence imposed is not put into operation. And the second purpose is that the court which later has to consider the possible putting into operation must be able to determine the ambit of the conditions. The implications thereof would be that where the latter court doubts that the accused properly understood the condition or is itself not certain whether the later act or omission fall within the ambit of the condition, the court must give the accused the benefit of the doubt.
- [7] This particular case, clearly illustrates, how the conditions of a suspended sentence should not be formulated. In this case, although there might be a connection between the offence of assault and a contravention of section 17(a) DMA because the contravention thereof contained an element of violence, this would not always be the case. To the accused, it would not be clear what would happen should he be found guilty of contravening section 17(a) of the DMA and have not committed the crime of assault.
- [8] In my view, the latter court in terms of section 297(9) of the CPA, that would be considering whether a further contravention of section 17(a) of the DMA, was a breach of the conditions of suspension would not be able to make a finding that the accused breached the conditions of suspension, because he was not convicted of assault. A contravention of section 17(a) of the DMA even if it can be argued that the crime of assault is clearly connected or related thereto, would not in all circumstances be in the form of an assault.
- [9] In my view therefore, the sentence imposed is not in accordance with justice because firstly, it is not sufficiently related or connected with the offence charged. And secondly, it was not clearly formulated to achieve the objectives of informing the accused for him to clearly understand, what he has to do or avoid in order to ensure
- that the sentence is not put into operation.
- [10] Furthermore, the formulation of the sentence would clearly create doubt in the mind of the court what it has to consider during a possible application for the suspended sentence, to be put into operation.
- [11] In the result therefore, the sentence imposed by the Magistrate is set aside and replaced with the following:

“The accused is sentenced to a fine of R5000 or six (6) months imprisonment which is suspended for a period of two (2) years on condition that he is not convicted of contravening section 17(a) of the Domestic Violence Act 116 of 1998 or assault and which is committed during the period of suspension.”

R.C.A. Henney

Judge of the High Court

I agree.

M. I. Samela

[1] Latest update by Albert Kruger – May 2021 – Ch 28 – 79, 80

[2] 1950(4) SA 191 (EDL)

[3] 1990

(1) SACR 388 (N)

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