
SOUTH AFRICA / JUDGMENT

S v Horn (123/2016) [2018] ZAWCHC 27; 2018 (1) SACR 685 (WCC) (26 February 2018)

[2018] ZAWCHC 27

COURT

Western Cape High Court, Cape Town

BEFORE

Wille, Andrews

CASE / FILE NUMBER

123/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Wille, J et Andrews, AJ)

REPORTABLE

High Court Ref No: 17274

Magistrate serial no: 03/2017

Case No: 123/2016

STATE

V

ARCHIBALD HORN

REVIEW JUDGMENT: 26 FEBRUARY 2018

ANDREWS, AJ:

Introduction

- [1] This is a review in terms of the provisions of Section 302 of the Criminal Procedure Act 51 of 1977 (“the Act”). This matter was remitted to the High Court in February 2017 in the ordinary course pursuant to the court a quo imposing a reviewable sentence. It came before the Reviewing Judge Van Staden AJ, who directed certain queries to the Presiding Acting Magistrate. In December 2017, I was seized with the matter and directed further queries to the Acting Magistrate.
- [2] The accused in this matter were arraigned in April 2014 in the Laingsburg Magistrate’s Court on a charge of housebreaking with intent to steal and theft. According to the charge sheet, it is alleged that on or about 6 March 2016 and at or near Goldnerville in the District of Laingsburg the accused did unlawfully and intentionally and with intent to steal, break open and enter the house of Caliwyn van Rooyen and then and there wrongfully and intentionally steal items (which were listed) to the value of R1500.00 being the property or in the lawful possession of Caliwyn van Rooyen.
- [3] Accused number 1, Archibald Horn, who was legally represented by the Legal Aid Board, pleaded guilty to the charge on 18 October 2016 in terms of section 112 (2) and was subsequently found guilty. Accused number 2, Clinton Kruger was discharged. The Acting Magistrate then proceeded to impose a sentence of “R10 000.00 (Ten Thousand Rand) or 5 (five) years imprisonment wholly suspended for (8) years”
- [4] I have identified numerous irregularities in the record, which include:
- (a) that an incompetent sentence was imposed;
 - (b) the “discharge” of accused number two, when it was clear that the state withdrew the charges against him;
 - (c) the previous convictions of accused number one were not properly admitted;
 - (d) no section 103[1] enquiry was held, and
 - (e) a referral to the Department of Social Development after the sentence was already handed down.
- [5] Pursuant to the enquiries sent by Reviewing Judge Van Staden, the Acting Magistrate responded as follows:

‘B QUALITY CONTROL

During the process of quality control, it was brought under (sic) my attention that the sentence I imposed was an incompetent one; given that:-

- 4. I had exceeded my jurisdiction, and
- 5. that the sentence was incomplete

C REASONS

I fully concur with (sic) view expressed above during the quality control process, and respectfully request the Honourable Court to correct and reduce the sentence which should read as follows:

“The Accused is sentenced to a fine of R10 000 (Ten thousand rand); or 3 (three) years imprisonment which is wholly suspended for 3 (three) years, on condition that the accused is not found guilty of the crime of house breaking (sic) with intent to steal and theft, which is committed during the period of suspension”

[6] The record reflected that accused number one was unemployed. This raises a concern as the sentence imposed would potentially defeat the purpose of sentencing. It was against this backdrop, that I directed additional queries to the Presiding Officer wherein, inter alia, clarity was sought in relation to the considerations that were taken into account in determining the sentence. Furthermore, in deciding whether the proceedings were in accordance with justice, other queries were raised namely, the referral of the accused to the Department of Social Development after the sentence was pronounced; and also whether the accused's previous convictions were admitted and finally, the section 103 enquiry.

[7] The query was attended to by Magistrate CW Scott who responded as follows:

‘A.

Introduction

1. I would like to inform the Honourable Reviewing Judge that I was not the presiding Magistrate in this case, but was tasked to reply to the query. The Presiding Magistrate in this case was Adv. F. Seria who acted on contract for 6 months.
2. During the last part of her contract another Magistrate was send (sic) to assist and evaluate her cases and on his instructions some of her cases were send (sic) on special review as they were not in accordance with justice. I was sent from Cape Town to Laingsburg to replace the acting Magistrate whose contract was not extended.
3. In her undated reasons for the special review (marked I) she recorded the incorrect details of the case (Par ‘A’ Introduction). This was then followed by the query of the Honourable Judge Van Staden (marked II). The acting Magistrate's response thereto is marked III and IV respectively. This was then followed by the current query (marked V).

B. REPLY TO CURRENT REVIEW QUERY:

Ad Para 1: It is clear that the Magistrate did not apply the law correctly. The sentence imposed was not only incomplete but also incompetent. The request by the Magistrate for such a huge fine or 3 years imprisonment are also not a correct and just sentence. I am in agreement with the remarks by the Honourable Reviewing Judge.

Ad Para 2: Previous convictions were proved but not correctly signed and admitted.

Ad Para 3: Section 103 of Act 60 of 2000 is applicable- No explanation can be given why an enquiry was not held except that it must have been an oversight by the Magistrate.

Ad Para 4: The Magistrate did not apply the law correctly nor did she keep a proper record of the proceedings. It should have read: 'withdrawn by Public Prosecutor' and not 'discharged'.

Ad Para 5: I refer to the Magistrate's letter (marked III) paragraph 2. It should have been part of the sentence. (page 15 of the case record)

C. CONCLUSION

The sentence should be replaced with a sentence the Honourable Judge deem fit in the circumstances.

I wish to express my sincere apology to the Honourable Judge for the way in which the Magistrate dealt with this case'

[8] It is most peculiar that the sentencing pro forma which the Acting Magistrate used also encapsulated her sentencing judgment which reads as follows:

'Sentences must operate as a deterrant (sic). In other words it must deter members of the community from committing such acts. Society must be vindicated and individuals must not be tempted to act in such a manner again; contrary the restorative justice system in *S v Maluleke* 2008 (sic) emphasised the need for reparation. Our system also seeks to make sure that the punishment fits the crime. It took the accused a total of 6 months in this instance to come forward and tender a plea. This court does not look @ the finality of the Plea as something of a mitigating circumstance it should have been done earlier. In hindsight. The Accused has a history of offences to which he admitted, two of which are similar to the present offence. To which he pleaded guilty. He accordingly proceed to commit another crime while still on the wrong side of the law. In the circumstance you must be deterred from committing crimes & Rehabilitated

Your sentence is as follows: - A fine of R10 000.00 (Ten Thousand Rands); or 5 (Five) years Imprisonment wholly suspended for 8 (eight) years; on condition that no similar offences are committed. But I've gone a step further. *Referral from. Report to DSD = see if you are a candidate for crime prevention program'

Legal Principles

[9] It is trite that the institution of automatic review, which is unique to South African criminal procedure, fulfils an important function as it aims to ensure validity and fairness of the convictions and sentence in certain categories of lower-court proceedings.[2] It is also a developed principle in our law that a reviewing judge is not limited to the investigation of irregularities but may also devote attention to all matters which are subject to appeal.[3]

[10] The powers of the High Court to review proceedings of the Magistrate's court are set out in section 304(2) (c) of the Act.[4] These powers include:

‘...

- (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
- (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate’s court;
- (iii) set aside or correct the proceedings of the magistrate’s court;
- (iv) generally give such judgment or impose such sentence or make such order as the magistrate’s court ought to have given, impose or made on any matter which was before it at the trial of the case in question;
- (v) remit the case to the magistrate’s court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and
- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or proceedings in regard to such person as to the court seems likely to promote the ends of justice.’

[11] Section 92(1) of the Magistrates’ Court Act[5] sets out the jurisdictional limitations in relation to matters of punishment which states that:

‘...the court, whenever it may punish a person for an offence –

- (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years...
- (b) by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette for the respective courts...’[6]

[12] It is trite that courts cannot impose forms of punishment which do not fall within their jurisdiction as ‘a court of law is still limited to its own prescribed jurisdiction’.[7] An accused has the Constitutional right to a fair trial which includes the benefit of the least severe of the prescribed punishments.[8] Of course, the objects of punishment and the trite legal principles akin to sentencing proceedings remain a crucial consideration.[9]

[13] A suspended sentence serves to deter offenders from committing similar offences in future and have been regarded as a useful sentencing

option for a judicial officer in order to achieve the aims and objectives of sentence. It is trite that when direct imprisonment is imposed which is coupled with a fine which is wholly suspended for a period of time, it should afford an accused person a realistic opportunity to avoid incarceration.

[14] It is also a fundamental legal principle that '[t]he sentence for all offences may be suspended in whole or in part for a period not exceeding 5 years, save where a law prescribes a minimum punishment ...'[10] Additionally, it is settled in our law that no sentence may be suspended for a period longer than 5 years.[11]

[15] It is also trite that every court shall be a court of record.[12]

[16] Turning to the failure by the Presiding Magistrate to hold a Section 103 enquiry, it was stated in *S v Mkhonza*[13] that

'...A trial court that has convicted an accused person of an offence falling under section 103(1) of the Act must be mindful of the fact that in seeking to ensure that unfitness to possess a firearm should automatically follow on a conviction of certain serious offences, the legislature brought within the ambit of section 103(1) cases that may not be very serious. The circumstances of the particular offence may be such that when regard is had to the personal circumstances of the accused there is no justification for disqualifying the accused from the right to possess a firearm.

[22] In my view when the legislature vested in the courts of this country the jurisdiction to determine that the statutory unfitness to possess a firearm imposed under section 103(1) of the Act should not apply, it did not intend the courts to adopt a supine approach to these matters dependent entirely upon whether the accused had the knowledge, means and resources to place a proper case before it that the disqualification should not apply to them, and in all other cases for the disqualification to apply as a matter of rote. At the very least it was the intention of the legislature that the court should have regard to all relevant factors concerning the offence, however feeble and limited the case advanced by the accused, and to consider the issue of whether it should determine otherwise in the light of all the facts. In other words there is an obligation on the trial court to consider properly, having regard to all relevant factors, whether the case is one where the statutory disqualification from possessing a firearm should remain in place or whether it should determine otherwise. In approaching that task the court should have regard to any factor that bears on the issue and if there is reason to believe that all material facts bearing on that decision are not before it to cause those facts to be discovered and placed before it. Without attempting to be comprehensive, I agree with the court in *S v Phuroe en Agt Ander Soortgelyke Sake*[14] that amongst the important issues that should be considered are:-

- (a) the accused's age and personal circumstances;
- (b) the nature of any previous convictions or the absence thereof;
- (c) the nature and seriousness of the crime of which he has been found guilty and the connection that the crime has with the use of a firearm;
- (d) whether there is any background which suggests that the accused may make use of his or her licensed firearm for the purpose of committing offences;

- (e) whether it is in the interests of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.

I would add to that list that consideration should be given to the period during which the accused has possessed a licensed firearm and whether there is any indication of previous irresponsibility in regard to that possession and use.’

Discussion

- [17] The Acting Magistrate conceded that there were jurisdictional challenges in respect of the sentence imposed. In this regard, the Acting Magistrate suspended the sentence for a period of eight (8) years when she was not permitted to suspend the sentence in whole or in part for a period not exceeding 5 years. Additionally, the sentence was incomplete which renders the sentence incompetent. Although the sentence of R10 000.00 (ten thousand rands) or three (3) years imprisonment fall within the jurisdictional limits of the Magistrates’ Court for this offence, there are two glaring concerns namely, that previous convictions were not proven and the fact that the accused was unemployed at the time of the commission of the offence.
- [18] Notwithstanding the fact that sentencing falls within the discretion of the Presiding Officer, this judicial discretion cannot be exercised blindly without taking into account the crucial sentencing factors and considerations which judicial officers are enjoined to consider.
- [19] It is furthermore incumbent on the Presiding Officer to ensure that the aims of punishment are achieved. Even though the accused received a wholly suspended sentence I am not persuaded that same affords the accused a realistic opportunity to avoid incarceration, unless it was the intention of the Acting Magistrate that the accused serves a period of three (3) years imprisonment. If that were the case, then the intention of the Acting Magistrate should not be disguised in a manner which superficially appears to grant an accused an opportunity to circumvent imprisonment.
- [20] It has become evident that the Acting Magistrate was an Advocate who was appointed for a period of six (6) months on a contractual basis. Additionally, the Acting Magistrate should have called for a pre-sentence report from the Department of Social Development if the intention was to consider a non-custodial sentence aimed at rehabilitating the accused. Furthermore, the Acting Magistrate should not have completed a referral form after the sentence was handed down as she was then *functus officio*. It needs to be borne in mind that inexperience holds its own challenges, however, Judicial Officers perform a very important function and hold significant powers which could impact on the lives of the people who are protected by our country’s constitution and the law.
- [21] The entry of a discharge in respect of accused number two, may have insurmountable ramifications as it creates the impression that the accused was acquitted after evidence was led. It is trite that an accused person has the constitutional right to be protected against double jeopardy.[15] In this instance, the consequence of the endorsement of “discharge” on the record means that he could never be charged for the same offence again. The intention

by the state was to withdraw all charges against accused number two. If the endorsement on the charge sheet was to remain, it would essentially have the consequence of the accused never being able to be charged again for the same offence. I am therefore of the view that the Acting Magistrate's failure to keep a proper record, which she was obliged to do, is an irregularity and falls to be corrected.

- [22] In light of the serious nature of the charge and subsequent sentence imposed, it is clear that the deeming provisions of Section 103 (2) of the Firearms Control Act[16] have relevance. It is evident from the record that not all relevant factors were taken into consideration in relation to the prescribed

statutory disqualifications. The accused has a right to present evidence as to why he should be disqualified from possessing a firearm.[17] The audi alteram partem rule applies. In the circumstances, it would be prejudicial to the accused if an order to this effect were to be made in the absence of a proper enquiry.

Conclusion

- [23] I am not in agreement with the proposed correction suggested by the Acting Magistrate. I am of the view that a fine is not a suitable sentence given that the accused was unemployed at the time of the imposition of sentence. I am of the view that a term of imprisonment which is wholly suspended would be appropriate and encompasses all the relevant aims of punishment.
- [24] This, however, would trigger the provisions of Section 103 (1) of Act 60 of 2000. It would therefore be incumbent on me to ensure that the accused is not automatically declared unfit to possess a firearm in light of the fact that the accused was not given an opportunity to address the court in this regard. In the circumstances, it would be appropriate to specifically order that the accused not be declared unfit to possess a firearm.
- [25] I am not persuaded that the accused's previous convictions were proved as the SAP 69 was not signed by the accused. Consequently, his previous convictions were not admitted. I am therefore of the view that accused number one should be afforded the benefit of the doubt and be sentenced as a first offender. The charge to which the accused pleaded, however, remains serious. I am mindful of what was stated by Thring J in *S v Sunday and Another*[18] that ' [a] sentence which is shockingly or strikingly or disturbingly too light is as much a miscarriage of justice as one which is shockingly

or strikingly or disturbingly too heavy'. It is therefore imperative for the court to strike a balance in the three elements of the triad, blended with the element of mercy.

[26] In considering the conspectus of the evidence, I find that the trial court has exceeded its jurisdiction by imposing an incompetent sentence and as such, it is a nullity. The proceedings, as far as the sentence is concerned, are therefore not in accordance with justice and fall to be set aside and need to be corrected. I further find that the endorsement on the record in relation to accused number two was irregular.

[27] Magistrate CW Scott is thanked for his assistance in relation to the review queries in the absence of the Acting Magistrate.

[28] In the result, I would make the following order:

- (a) that the conviction of accused number one is in accordance with justice and is confirmed.
- (b) that the sentence of accused number one imposed on 18 October 2016 is set aside and replaced with:

“Two

- (2) years imprisonment which is wholly suspended for a period of three (3) years on condition that the accused is not convicted of the offence of housebreaking with intent to steal or attempt thereto or theft or attempt thereto to which the accused is not given the option of a fine, committed during the period of suspension”
- (c) that in terms of section 103 (1) of Act 60 of 2000, accused number one is not declared unfit to possess a firearm.
- (d) The narration in connection with accused number two is amended to read:

“All charges against accused number two are withdrawn by the state.”

ANDREWS, AJ

(Acting Judge of the High Court)

I agree, and it is so ordered.

Wille, J

Judge of the High Court

[1] Firearms Control Act 60 of 2000.

[2] Du Toit et al ‘Commentary on the Criminal Procedure Act’ (Juta) [SERVICE 59, 2017] at 30-8.

[3] Ibid at 30-8.

[4] Ibid at 30-16 “Section 304 not only lays down the procedures to be followed in regard to automatic review. It also establishes independent review

opportunities, together with its own procedure for submission, besides the institution of automatic review. But whether the

case comes before a judge via the institution of automatic review or whether it reaches him by way of the special review ground and procedures in s 304(4), the reviewing court has the same power. In addition, s 304 makes provision for the review of proceedings which until recently were dealt with by superior courts, pursuant to their inherent powers of review.” See also *Walhaus and Others v Additional Magistrate Johannesburg and Another* 1959 (3) SA 113 (A), with regards to the High Court’s inherent powers of review.

[5] Act 32 of 1944.

[6] R120 000 where the court is not the court of a regional division, and R600 000 where the court is the court of a

regional division – GN 217 of 27 March 2014 (GG 37477 of 27 March 2014).

[7] *Supra* at 28-9.

[8] Section 35 (3) (n) of Act 108 of 1996 ‘Every accused person has a right to a fair trial, which includes the right- ...(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of the sentencing...’

[9] *Supra* at 28-10 ‘A sentencing court has the rather difficult task of considering to what extent the above theories (objects, considerations) should be accommodated in deciding what sentence should be imposed on an individual offender, having regard to the nature of the offence, the interests of society and the personal circumstances of the offender. It is, ultimately, often a matter of reconciling competing interests in order to ensure a fair and just sentence. An appropriate balance must be struck. And a sentencing court “has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion”; See also *S v Mhlongo* 2016 (2) SACR 611 (SCA) at para 9.

[10] *Ibid* at 28-44.

[11] *S v Balfour* 2009 (1) SACR 399 (SCA) at 11.

[12] Section 4(1) of Act 32 of 1944.

[13] (AR357/08) [2009] ZAKZPHC 9; 2010 (1) SACR 602 (KZP) ; [2009] 3 All SA 358 (KZP) (24 March 2009)

[14] 1991

(2) SACR 384 (NC) at 387 a-d

[15] Section 35 (m) of Act 108 of 1996 ‘Every accused person has a right to a fair trial, which includes the right

- ...(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.'

[16] Act 60 of 2000.

[17] Section 35 (3) (i) of The Constitution of the Republic of South Africa, 1996 '(3) Every accused person has the right to a fair trial, which includes the right- ...(i) to adduce and challenge evidence'

[18] 1994 (2) SACR 810 (C) at 820d-e.

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