

SOUTH AFRICA / JUDGMENT

S v Jansen (186/2023) [2024] ZAWCHC 14 (19 January 2024)

[2024] ZAWCHC 14

COURT

Western Cape High Court, Cape Town

BEFORE

Ralarala, Lekhuleni

CASE / FILE NUMBER

186/2023

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In the High
Court of South Africa
(Western Cape
Division, Cape Town)
High Court Ref: 186/2023
Magistrate Ref: 414/2022

In the matter between: THE STATE
 And
 THOMAS JANSEN
 ACCUSED

JUDGMENT

RALARALA, AJ

INTRODUCTION

[1] This matter was placed before this Court by way of special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (“the CPA”), following the accused’s plea of guilty on contravening the provisions of section 17 (a) of the Domestic Violence Act 116 of 1998 (“the Act”), dealt with in terms of section 112(2) of the CPA on 24 October 2022. Pursuant thereto, the accused was convicted, and a Probation Officer’s report was acquired prior to the imposition of sentence. Upon consideration of the Probation Officer’s report, the court postponed the passing
of sentence in terms of section 297(1)(a) of the CPA.

- [2] The passing of sentence was postponed for three years on condition that the accused submit himself for treatment and monitoring by a social worker in the service of the Department of Social Development, Picketberg. The accused was also ordered to appear before the Magistrate Court if called upon during the period of postponement.
- [3] Thereafter, in terms of section 297(9)(a)(ii) of the CPA, the prosecution applied for a suspended sentence imposed in a previous case against the accused to be put into operation. At this stage, it was brought to the attention of the court that the accused may be suffering from a mental illness. This prompted the referral of the accused to the local hospital for provisional assessment. Upon examination of the accused, Dr Young, recommended a psychiatric evaluation of the accused.

FACTUAL

BACKGROUND

- [4] The state alleged that a protection order was issued by the Magistrate of Picketberg on 20 May 2022 in terms of which the accused was prohibited and or ordered to not assault, threaten to assault, or swear at the complainant. It was further alleged that the protection order was served on the accused. Pursuant thereto, the state alleged that on or about 23 September 2022 at Wittewater Clinic in the District of West Coast, the accused unlawfully and intentionally contravened the provisions of the protection order by swearing and threatening the complainant. The accused who was legally represented, pleaded guilty to the charge and a statement in terms of section 112 of the CPA was handed in as an exhibit.
- [5] The facts gleaned from his statements in terms of section 112(2) of the CPA were that the accused admitted that on 22 May 2022 a protection order was granted against the accused in favour of the complainant. The protection order prohibited the accused from assaulting; threatening to assault or swearing at the complainant. The accused admitted that the protection order was still valid and admitted the contents thereof as described in the charge. The accused admitted that on the aforementioned day, while the complainant, the accused sister was visiting the local clinic, the accused confronted her in relation to money that she owed him. Amid the aforementioned confrontation, an argument ensued. The relevant part of the section 112(2) statement reads:
- “On the aforementioned day my sister, the complainant was at the Clinic. I went there to confront her about the money she owed me. I was also angry because my sister keeps saying things that hurt me and treating me badly. On the day she also told me she is going to tell the ambulance to take me away. I got angry and swore at her saying to her jou poes and also said “vir jou donner ek.”*
- [6] The accused admitted that he unlawfully and intentionally contravened the conditions of the protection order.

RELEVANT LEGAL PRINCIPLES AND ANALYSIS

- [7] It is apparent from the record of proceedings that the accused had previously been convicted on a similar charge and the court had accordingly imposed a suspended sentence. Prior to the plea proceedings, in August 2022, the accused was referred for mental observation in terms of section 77 read with section 79 of the CPA. Subsequent to an examination conducted by Professor S.Kalisky, a forensic psychiatrist in Valkenberg Psychiatric Hospital, a report was compiled and presented before the Magistrate Court.
- [8] The report was based solely on information obtained from the accused. It was noted that there were no symptoms of mental illness at the time of the report, even though the accused had experienced voices and persecutory ideas in the past. The report stated that the accused appeared to have low average intelligence. Professor Kalisky ultimately concluded that the accused is not mentally ill and therefore cannot be certified under the Mental Health Care Act 17 of 2002.
- [9] It was during the consideration of putting into operation the latter sentence that the question of the accused's mental status resurfaced. The magistrate referred the accused for mental observation, on the strength of Dr Young's remarks and recommendation of 12 December 2022, to the effect:

"Above mentioned patient has been assessed multiple times at Radie Kotze. This is a complex case and specialist review, in my opinion, is needed at tertiary level (e.g Valkenberg). "

- [10] Pursuant to the referral in terms of section 77 of the CPA, on 22 March 2023, the accused was examined by two Psychiatrists, namely Drs S Lintnaar and C De Clercq, on 17 April
2023. A unanimous report was compiled and presented to the presiding magistrate. The report was based on the information obtained from the accused during the interviews conducted with him, as well as the observations of ward psychiatric nursing staff. As far as the mental state of the accused is concerned, it was noted that the accused needed prompting to perform tasks including personal hygiene and dressing. He took longer to execute simple instructions.
- [11] According to the assessment, the accused stopped taking his psychiatric treatment. As a result, he relapsed, and the clinical diagnosis is Schizoaffective Disorder, Bipolar type. Ultimately, the Psychiatrists unanimously concluded that the accused was not able to appreciate the wrongfulness of the alleged offence or able to act accordingly. They recommended that he be admitted as an involuntary patient at Stikland Hospital under Chapter v of the Mental Health Care Act.
- [21] Fundamentally, section 297 forms part of chapter 28 of the CPA which governs sentencing in criminal proceedings. It follows that section 297 (1) (a) has to be considered and construed within the context of Chapter 28. The heading of Chapter 28 is 'Sentence'. Importantly, the context to which one refers in the process of interpretation must be inclusive of the chapter headings. Bato Star Fishing (supra) para 90. Intelligibly, the provision is enacted for the purposes of sentencing within the context of the CPA.

[22] Properly construed, and in congruence with the principles espoused above, section 297 envisages two separate instances. First, Section 297(1)(b) envisages a case where the sentence is imposed but the execution of the whole or portion thereof is suspended in terms of paragraph (b) thereof.

Secondly 297(1)(a) envisages a case where the sentence is postponed for a period not exceeding five years either subject to condition or unconditionally. A court may postpone a sentence in terms of section 297(1)(a) for all offences save those for which the legislature prescribes a minimum sentence.

[23] Crucially, in terms of section 297(1)(a)(hh), the court may order an accused person whose sentence was postponed to appear before court at the expiration of the relevant period to determine if the accused complied with the conditions set by the court. Where the court is satisfied on such appearance that the conditions of the postponement were met, in terms of section 297(2), the court must discharge the accused without passing sentence. In terms of section 297(2), the discharge has the effect of an acquittal, except that the conviction will be recorded as a previous conviction.

[24] Thus, the postponement of a sentence in terms of section 297 of the CPA does not amount to an imposition of a sentence. Notwithstanding that a sentence has been postponed, the court remains endowed with the discretion to impose an alternative sentence if the accused concerned does not comply or observe the conditions the court imposed. If he complied with those conditions, the court must discharge him without passing sentence.

[25] In my opinion, section 297 aims to deter or prevent future criminal conduct rather than to punish offenders who have been convicted of committing serious crimes. See *S v Mokasi and Others* 2002 (2) SACR 609 (T). In all instances where immediate execution of a sentence will not achieve the three main objectives of punishment, the postponement of sentence should be considered. See *S v S* 1977 (3) SA 830 (A).

[26] It is also important to bear in mind that in this instance, only after the court has convicted the accused person in criminal proceedings, is it permissible for the court to invoke the provisions of section 78(6) of the CPA. I am conscious that this case deviates from the norm, as the invocation of section 297 should not have followed after conviction, had the magistrate at that stage been aware of the findings made by the Psychiatrists.

[27] In summary, an order in terms of section 297 of the CPA permits the court to postpone the passing of sentence, conditionally or unconditionally, and confers the court with discretion to attach conditions to the postponement of the passing of sentence that the convicted person must comply with. Further, the section makes provision for the procedure to be followed in the case of breach of the conditions, so attached. Discernibly, in the case of breach of the conditions, the court may then impose any competent sentence. Conceivably the court may make orders to be complied with by the convicted person, as envisaged in section 297(1) (a) of the CPA as is the case in this instance.

[28] In my view to the extent that the passing of sentence was postponed subject to conditions, this does not detract from the fact that the court did not impose a sentence as envisaged in the CPA. The court would have passed the sentence if the accused breached the conditions imposed by the court. I am of the view that this case falls squarely within the purview of section 78(6)(b) of the CPA.

[29] Considering the determination by the Psychiatrists, it was incumbent upon the magistrate to set aside the conviction and found the accused not guilty by reason of his mental illness.

ORDER

[30] In the result, I would propose the following order:

[30.1] The matter be remitted to the magistrate to properly comply with the provisions of section 78(6) (b) of the CPA.

RALARALA NE

ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered.

LEKHULENI JD

JUDGE OF THE HIGH COURT

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