

SOUTH AFRICA / JUDGMENT

S v Martin (275/2021) [2021] ZAWCHC 229; 2022 (1) SACR 421 (WCC) (15 November 2021) [2021] ZAWCHC 229

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni, Dolamo

CASE / FILE NUMBER

275/2021

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“REPORTABLE”

In

the High Court of South Africa

(Western

Cape Division, Cape Town)

High Court Ref

No: 275/2021

Magistrate Serial

Number: B554/2021

In

the matter

between:

THE

STATE

And

EUGENE

MARTIN

JUDGMENT

DELIVERED 15 NOVEMBER 2021

LEKHULENI AJ

[1] This matter comes before this court by way of automatic review in terms of the provisions of section 302 of the Criminal Procedure Act 51 of 1977 (“the CPA”). The accused who was not legally represented after he elected to conduct his own defence was convicted in the Magistrates Court, Kuilsriver on 15 July 2021 on a charge of theft. It was alleged by the State that on 27 June 2021 and at Food Lovers Market Pinehurst, Kraaifontein, the accused unlawfully and intentionally stole a pack of sirloin steak to the value of R1112, 93 the property in the lawful possession of Food Lovers Market or Thabisa Nyameka. The accused pleaded guilty to the charge and pursuant to that plea, the magistrate convicted the accused after he questioned him in terms of section 112(1)(b) of the CPA. The trial court thereafter sentenced the accused to four thousand rand (R4000) or (4) months’ imprisonment which was wholly suspended. After perusing the record, this court was satisfied that the conviction of the accused was in accordance with justice. I was however concerned

with the sentence imposed by the trial court, in particular, the conditions the court imposed when it suspended the operation of the sentence.

[2] The court’s concerns were borne out by the following facts: In her ex tempore judgment, the magistrate stated that the sentence was suspended for a period of four months on condition that the accused is not found guilty of theft, attempted theft, fraud, robbery and contravening section 36 or section 37 of the General Law Amendment Act 62 of 1955 which is committed during the period of suspension. The four month period of suspension was repeated twice in her judgment. In the sentence annexure marked ‘Annexure B’ attached to the charge sheet, the magistrate noted that the whole sentence was suspended for a period of five years on similar conditions enunciated above.

[3] On 22 July 2021, this Court raised a query and requested the presiding magistrate to provide reasons and clarify the following:

“1. For how long was the sentence suspended. On page 15 of the transcribed record it is recorded that the period of imprisonment is suspended for four months. On Annexure B to the charge sheet dealing with sentence, it is stated that the period of imprisonment is suspended for five years.

2. Is the sentence of Four thousand Rand (R4000) or four- month imprisonment not too harsh? The magistrate is requested to give reasons for her

judgment.

3. Why was fraud and robbery made a condition of the sentence when the accused was only convicted of theft?”

- [4] The learned magistrate delayed in responding to the questions raised by the court as she stated that she was booked off sick and could not attend to the query immediately. In response to the questions raised above, the presiding magistrate indicated that she intended to suspend the sentence for a period of five years and that this court should accept it that it was a bona fide error on her part to say four months in her ex tempore judgment. She requested this court to correct the sentence accordingly.
- [5] As regard this court's query on the harshness of the sentence imposed, the magistrate held the view that the sentence was not necessarily too harsh under the circumstances, especially when one considers the previous convictions of the accused. The magistrate stated that the accused was convicted of a similar offence (theft) in preceding ten months prior to this case and he received a suspended sentence of R3000 or six -month imprisonment which was wholly suspended for five years. The magistrate alluded to the fact that although it was clear that the suspended sentence in respect of the previous conviction did not have the desired effect of deterrence to the accused, however she thought it prudent to impose a sentence similar in nature to afford the accused the opportunity to pay a fine. I find the explanation of the magistrate in this regard, plausible and persuasive.
- [6] Regarding the conditions of suspending the sentence, the magistrate stated that theft is a competent verdict of robbery. She also stated that from the record of previous convictions, the accused was found guilty of assault with intent to do grievous bodily harm. For this reason, she was of the view that it was appropriate to make fraud and robbery a condition of suspension of the sentence to deter the accused from committing crimes of dishonesty and violence.
- [7] I find the approach of the Magistrate in this regard problematic. It must be stressed that it is now trite that a condition of sentence must be fair and reasonable to the accused and must not be onerous. It must not lead to future unfairness or injustice. Most importantly, a suspended sentence must comply with the accused's right to a fair trial enshrined in section 35(3) of the Constitution. The right of an accused person to a fair trial requires fairness to the accused as well as fairness to the public as represented by the state – See *S v Jaipal* [2005] ZACC 1; 2005 (5) BCLR 423 (CC) par 29.
- [8] 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 ...”

[9] This provision in my view must be interpreted in tandem with section 35(3) of the Constitution which guarantees the rights of an accused person to a fair trial. Notably, this section must be interpreted purposively to promote the spirit, purport and objects of the Bill of rights as articulated in 39(2) of the Constitution. Section 39(2) of the Constitution requires judicial officers to read legislation, in this case the CPA, where possible, in ways which give effect to its fundamental values and in conformity with the Constitution. See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty*

Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (CC) at para 22.

[10] Mindful of the imperative to read and interpret legislation purposively in conformity with section 39(2) of the Constitution, I turn to consider the import of section 297(1)(b) of the CPA from a constitutional prism in the context of this case. It is trite law that a suspended sentence has two beneficial effects. First, the primary aim of a suspended sentence with a negative condition, that is, a condition that requires the offender not to repeat the crimes specified, is to keep the convicted person out of prison and avoid the deleterious effects of direct imprisonment. The second objective is to deter the offender from committing similar offences in that the suspended sentence hangs over the offender’s head and if he behaves he will not have to serve it. *S v Koko* 2006 (1) SACR 15 (C).

[11] In my view, the offences which are set as conditions that an accused may not commit, without him being exposed to the putting into operation of the suspended sentence, must be fair and reasonable and must not be wider than the offence of which the accused has been convicted. A derogation from this well-established principle in my view offends against the accused’s right to a fair trial enshrined in section 35(3) of the Constitution. I appreciate the fact that there has to be a measure of kinship between the offences set as a condition and the offence of which the offender was convicted as was recently restated by Henny J, in *S v Killian* 2021

(2) SACR 371 (WCC) at para 5, however in my considered view, offences set as conditions must not be more onerous and serious than the offence of which the accused was convicted.

[12] The condition for suspending a sentence must be fair, just and reasonable. In other words, it must be couched in such a way that it does not cause unfairness or injustice to the accused. In *S v Van den Berg* 1976 (2) SA 232, (TPD), in which certain guidelines for the exercise of the discretion to suspend sentences was laid down, it was held inter alia, 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. See also *S v Mdluli*, *S v Thage*, *S v Hlongwane* 2009 JDR 0395 (GSJ) at p.4. Similar sentiments were echoed in *S v Delubom*

[2009] JOL 24303 (Tk) at paras 6 and 7.

[13] In the present matter, the magistrate made the competent verdicts of theft as conditions for the suspended sentence but also included robbery and fraud as additional conditions. In my view, it was not legally competent for the trial court to include these two offences as additional conditions. Theft is a competent verdict of robbery in terms of section 260 of the CPA. Robbery is a more serious offence although related to theft. It would have been different if the accused was convicted of robbery. In that event, it would have been within the magistrate's power to make theft or attempted theft a condition of suspension.

[14] The trial court also made fraud a condition of suspension. According to the magistrate, this was because the accused had a previous conviction of assault and according to her, she thought it wise to make this order to deter the accused from committing crimes of dishonesty. In my view, it was impermissible for the trial court to make such a condition especially bearing in mind that the definitional requirements of fraud and theft are different.

[15] It should be emphasised that any condition imposed by the sentencing court must bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. The condition must be stated with such precision that the convicted person is placed in a position to understand the ambit of the condition. *R v Cloete* 1950

(4) SA 191 (E) at 192G. It must be stated in such manner that there should be no room for misunderstanding. In *S v Allart* 1984 (2) SA 731 (T), it was said that the conditions of suspension must be framed in such a way that they take account of human fallibility.

[16] More importantly, a suspended sentence should not be worded in such a way that a subsequent petty offence may trigger the operation of a severe suspended sentence. In my view, an appropriate qualification to a suspended sentence must be made to ensure that the operation of the sentence is not activated for relatively trivial offences. In other words, the conditions of suspension should be circumscribed in such a way that subsequent minor contraventions do not result in the suspended sentence coming into operation.

[17] The sentence imposed by the trial court in this matter is potentially susceptible to trigger the operation of the suspended sentence even in instances where the accused is sentenced for a petty crime of theft. In my view, this will not be fair or in the interest of justice. In *S v Allart* (supra) at 736B, the court held that it should not be left to the court considering the putting into operation of the suspended sentence to ensure fairness.

[18] In my opinion, the correct approach should be that the conditions imposed by the trial court must be formulated in such a way that it will not be possible for a minor contravention to activate the operation of the substantial suspended sentence imposed by the trial court. In my view, where a suspended sentence of imprisonment has been imposed, the suspensive condition should be such that it refers only to a condition for which imprisonment is imposed without the option of a fine in order to limit the type of crime that may breach the conditions to fairly serious crimes – See *S v Standaard* 1997

(2) SACR (C) 668 at 670cd; *S v Tsanshana* 1996 (2) SACR 157 (E) at 160a.

[19] Consequently, the sentence imposed by the trial court has to be corrected to reflect the correct period of suspension and to include the rider at the end of the sentence: “for which he is sentenced to unsuspended imprisonment without the option of a fine.” This will ensure that petty offences of theft or attempted theft do not trigger the operation of the suspended sentence.

ORDER

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

20.1 “The accused is sentenced to a fine of four thousand rand (R4000) or four (4) months imprisonment which is wholly suspended for a period of five years on condition that the accused is not found guilty of Theft, Attempted theft, contravening section 36 or 37 of Act 62 of 1955 committed during the period of suspension for which he is sentenced to unsuspended imprisonment without the option of a fine.”

LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered:

DOLAMO J

JUDGE OF THE HIGH COURT

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