

SOUTH AFRICA / JUDGMENT

S v Mduli, S v Thage; S v Hlongwane (69/00906/2006, 69/936/2006, 69/01562/2006) [2006] ZAGPHC 239 (14 September 2006) [2006] ZAGPHC 239

COURT

High Courts - Gauteng

BEFORE

D S S Moshidi, M W Msimeki

CASE / FILE NUMBER

69/00906/2006, 69/936/2006, 69/01562/2006

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

High Court Ref No: 497/06

Magistrate's Serial No: 179/06

Special Review Case No: 69/00906/2006

THE STATE v MDLULI, BONGANI

High Court Ref No: 498/06

Magistrate's Serial No: 180/06

Special Review Case No: 69/936/2006

THE STATE v THAGE, DANIEL

High Court Ref No: 499/06

Magistrate's Serial No: 181/06

Special Review Case No: 69/01562/2006

THE STATE v HLONGWANE, ALFRED CHRISTOPHER

Magistrate

JOHANNESBURG

SPECIAL REVIEW

JUDGMENT

MOSHIDI, J:

INTRODUCTION

- [1] The three matters discussed below came to me on special review.
- [2] These matters all involve a common problem on review. In all three matters, the trial magistrate seeks the guidance of this Court concerning the appropriateness of the conditions of suspension of the various sentences imposed by him. I deal with the matters ad seriatim:
- [3] AD CASE NO. 69/906/2006 – THE STATE v BONGANI MDLULI – MAGISTRATE’S SERIAL NO. 179/2006

In this matter, the accused was charged with corruption in contravention of section 1(1)(a) read with section 3 of the Corruption Act, No. 94 of 1992. It was alleged that the accused offered the complainant, a South African Police Constable, an amount of R40,00 (Forty Rand) as a bribe, to secure the release of another person from lawful custody in the police cells. The accused, who was legally represented, pleaded guilty to the charge and was convicted. The accused was sentenced to a fine of R500,00 (Five Hundred Rand) or 2 (two) months’ imprisonment as well as a further R2 500,00 (Two Thousand Five Hundred Rand), or 10 (ten) months’ imprisonment which was wholly suspended for 5 (five) years on condition the accused was not convicted of corruption, fraud or theft committed during the period of suspension. The sentence was imposed on 15 May 2006.

Both the conviction and sentence appear to be in accordance with justice and call for confirmation. However, the trial magistrate, in retrospect, is of the view that the conditions of suspension are too wide in ambit to the prejudice of the accused.

The essential issue to be determined is whether the condition of suspension was proper. The discretionary powers of a judicial officer to suspend sentences is regulated by section 297(1) of the Criminal Procedure Act, No. 51 of 1997, which 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 –

postpone for a period not exceeding 5 years the passing of sentence and release the person concerned –

on one or more conditions, whether as to –

...

any other matter, and order such person to appear before the court at the expiration of the relevant period; or

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 ...”

In *S v Van den Berg* 1976 (2) SA 232, (TPD), and 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. The accused should know exactly what conduct may result in the obligation to serve the sentence. In *S v Goeieman* 1992 (1) SASV 296 (NK), where the accused was convicted of theft and was sentenced to 12 (twelve) months’ imprisonment which was suspended for 5 (five) years on condition that he was not again convicted of a crime in involving dishonesty, the condition of suspension was set aside, on the basis of vagueness and replaced with a condition that he not again be convicted of theft or attempted theft committed during the period of suspension.

[4] In casu, the condition of suspension relates to three separate offences, namely corruption, fraud and theft which is clearly too wide and

prejudicial to the accused. In *S v Herold* 1992 (2) SACR 195 (W), Cloete J states as follows:

“The purpose of a suspended sentence has been succinctly stated in a number of decisions. In S v Burger 1975

(4) SA 877 (A) Holmes JA stated at 881A:

‘Balancing all the relevant considerations, I come to the conclusion that an appropriate sentence would be one of imprisonment for 4 years, with 2 years thereof suspended. The latter Damoclean warning is calculated to induce the appellant to watch his steps in treading life’s pathway – to the benefit of society.’ ...”

In the instant matter, the trial magistrate has proposed that the condition of suspension be amended to exclude the offences of fraud and theft, and retain the offence of corruption only, a view shared by his senior magistrates as well. There is, in my view, merit in the suggestion.

I have invited the comments of Adv J R Davidowitz of the Director of Public Prosecutions, on all three these reviews. He concurred that the conditions of suspension were too wide and inappropriate.

THE MATTER OF S v DANIEL THAGE – CASE NO. 69/936/2006 (180/2006)

[5] Mr Daniel Thage (the accused), was charged with negligently losing his licensed firearm in contravention of the provisions of the Firearms Control Act, Act No. 60 of 2000. The accused, who was legally represented, pleaded guilty and was convicted as charged. The accused was sentenced to a fine of R3 000,00 (Three Thousand Rand) or 8 (eight) months’ imprisonment which was wholly suspended for 5 (five) years on condition he was not convicted of any crime of which negligence was an element, committed during the period of suspension.

Once more, the trial magistrate, in submitting this matter for review, was of the view that the condition of suspension was formulated too wide, such that it could have future unwarranted and indeed unfair implications for the accused. For example, if the accused, later, is convicted of negligent driving or culpable homicide, the suspended sentence would come into operation. The trial magistrate has suggested that the condition of suspension be on condition that the accused was not convicted of any crime of which negligence was an element under the Firearms Control Act, No. 60 of

2000. Applying the legal principles as set out in the previous matter of *S v Bongani Mdluli* (case number 69/906/2006), I agree with the suggestion of the trial magistrate. Otherwise, the conviction and the sentence proper, without the condition of suspension, were in accordance with justice and ought to be confirmed.

THE CASE OF THE STATE v ALFRED CHRISTOPHER HLONGWANE – CASE NO. 69/1562/2006
(MAGISTRATE'S SERIAL NO. 181/06)

[6] Similarly, the accused was charged with negligently losing his licensed firearm in contravention of the relevant provisions of the Firearms Control Act, No. 60 of 2000. The accused was legally represented, he pleaded guilty to the charge. He was duly convicted as charged. The conviction was in accordance with justice and ought to be confirmed. The accused was sentenced to a fine of R4 000,00 (Four Thousand Rand) or 12 (twelve) months' imprisonment which was wholly suspended for 5 (five) years, on condition the accused was not convicted of any crime of which negligence was an element, committed during the period of suspension. As in the previous two matters, the trial magistrate was of the view that the condition of suspension was formulated too widely, to the prejudice of the accused. If the accused was subsequently convicted of a crime such as negligent driving or culpable homicide, the suspended sentence would come into operation. The legal principles set out above in the case of *S v Bongani Mdluli* (case number 69/906/2006), justifies the amendment of the condition of suspension as it clearly is too wide and prejudicial to the accused.

[7] Accordingly, I make the following order:

7.1 In the case of *S v Bongani Mdluli* (case number 69/906/2006 -magistrate's serial number 179/2006), the conviction is confirmed. However, the sentence imposed is hereby set aside and replaced with the following sentence:

"The accused is sentenced to a fine of R500,00 (Five Hundred Rand) or 2 (two) months' imprisonment. In addition, the accused is sentenced to a fine of R2 500,00 (Two Thousand Five Hundred Rand), or 10 (ten) months' imprisonment which is wholly suspended for 5 (five) years (from 15 May 2006) on condition the accused is not convicted of the crime of corruption, committed during the period of suspension."

7.2 In the case of *S v Daniel Thage* (case number 69/936/2006 – magistrate's serial number 180/2006), the conviction is confirmed. However, the sentence imposed by the trial magistrate is hereby set aside and replaced with the following sentence:

“The accused is sentenced to a fine of R3 000,00 (Three Thousand Rand) or 8 (eight) months’ imprisonment which is wholly suspended for 5 (five) years (from the date of conviction), on condition the accused is not convicted of any crime of which negligence was an element under the Firearms Control Act, No. 60 of 2000.”

7.3 In the case of S v Alfred Christopher Hlongwane (case number 69/1562/2006 – magistrate’s serial no. 181/2006), the conviction is hereby confirmed. However, the sentence imposed by the trial magistrate is hereby set aside and replaced with the following sentence:

“The accused is sentenced to a fine of R4 000,00 (Four Thousand Rand) or 12 (twelve) months’ imprisonment which is wholly suspended for 5 (five) years (from the date of conviction), on condition that the accused is not convicted of any crime of which negligence was an element under the Firearms Control Act, No. 60 of 2000.”

D S S MOSHIDI

JUDGE OF THE HIGH COURT

I agree:

M W MSIMEKI

ACTING JUDGE OF THE HIGH COURT

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