

SOUTH AFRICA / JUDGMENT

S v Nkomo (SH26/2018) [2024] ZANWHC 69; 2024 (2) SACR 109 (NWM) (11 March 2024) [2024] ZANWHC 69

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen, A Reddy

CASE / FILE NUMBER

SH26/2018

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

HIGH COURT SERIAL NO: 01/2024

CASE NO.: SH26/2018

MAGISTRATE'S SERIAL NO.: 1/2024

Reportable

Circulate to judges

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THE STATE

versus

MESHACK NKOMO

ACCUSED

CORAM: PETERSEN J & REDDY AJ

DATE RECEIVED: 28 FEBRUARY 2024

DATE OF JUDGMENT: 11 MARCH 2024

ORDER

- (i) The sentence imposed on 31 August 2021 is reviewed and corrected by the replacement of the offence of murder with culpable homicide as part of the condition of suspension, to read:

“Ten (10) years imprisonment of which three (3) years imprisonment is suspended for a period of five (5) years on condition that the accused is not convicted of culpable homicide which offence is committed during the period of suspension.”

- (ii) The sentence remains extant from the date of imposition on 31 August 2021.

REVIEW JUDGMENT

REDDY AJ

- [1] This matter comes before this Court by way of a request by Regional Magistrate Wessels for special review of the proceedings in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (“the CPA”).
- [2] The accused was charged with murder read with section 51 of the Criminal Law Amendment Act 105 of 1997. From the original charge sheet, an entry on 09 February 2021 indicates that the proceedings were digitally recorded. There is however no transcript of such proceedings. What can be extracted from different fragments of the record is that the accused was duly represented by Miss Pheto, a legal practitioner (attorney) from Legal Aid South Africa. The record reflects that the accused pleaded not guilty to the charge of murder on 09 February 2021. He, however, tendered a plea of guilty to the competent verdict of culpable homicide (See: Section 258 of the CPA). The prosecution represented by Mr. Mataboge accepted the plea of guilty to the lesser charge of culpable homicide.
- [3] A statement was prepared in terms of section 112(2) of the CPA, duly signed by the accused and Miss Pheto and read into the record. The facts as elucidated in these admissions were accepted by Mr. Mataboge as being in accordance with facts that formed the case for the prosecution. On 09 February 2021, the accused was duly convicted of culpable homicide, on his plea to the lesser charge. The matter was postponed to 13 April 2021 for the securing of a pre-sentence report, and addresses in terms of section 274 of the CPA. The pre-sentence report only became available on 07 July 2021.
- [4] The sentence proceedings were duly concluded on 31 August 2021, when the accused was sentenced as follows:

“The court sentences the accused to ten (10) years imprisonment on the count of murder of which 3 (three) years imprisonment is suspended for a period of 5 (five) years on condition that the accused not be found guilty of murder committed during the period of suspension.”

The following ancillary orders are made:

1. No order is made in terms of section 103(1) of the Firearms Control Act, 60 of 2000, as the accused is automatically unfit to possess a firearm.

2. In terms of section 103(4) of the Firearms Control Act (supra) the court orders for the immediate search and seizure of all competency certificates, licences authorizations and permits issued to the offender and all firearms and all ammunition in his possession.
3. The Clerk of the court is to inform the Registrar of the court order with immediate effect.
4. The knife is found to be dangerous weapon in terms of Act on Dangerous Weapons 15 of 2013 and is forfeited to the State in terms of section 34(1) Act 51 of 1977.”

(emphasis added)

- [5] On 1 September 2021, the court as constituted the previous day before, was reconvened, but for the accused who was absent, for obvious reasons. The record reads as follows in this regard:

“These proceedings are in the absence of the accused. It came to my knowledge yesterday after we postponed or finalized the matter and after the court roll was done and it was confirmed this morning that there is a spelling mistake on the sentence in annexure. The court is going to amend the sentence annexure in terms of section 298 of the Criminal Procedure Act 51 of 1977 to read as follows:

“Is suspended for a period of five years on condition that the accused not be found guilty of culpable homicide committed during the period of suspension.”

The court is of the opinion that there is no prejudice for the accused and I am going to ask the clerk of the court Mr Rampoloane to make out a new SAP 69 with the new sentence on attach it to the. Ja get a copy of the new sentence Annexure A and B and then get me copies as well where the orderly have signed for receipt thereof.

Mr Rampoloane a new SAP 69 must be made out a copy of these and then the orderly must sign and I want copies of everything to be attached. I will attach it to the charge sheet myself. Thank you Mr Mataboge you can proceed.”

- [6] The Regional Magistrate purported to act in terms of section 298 of the CPA by correcting the sentence imposed the previous day. In October 2021, the Department of Correctional Services queried the differences in the sentence recorded on the corrected record and that recorded on the SAP 69. In essence, the central issue in this special review, is whether the sentence should be corrected to reflect the true intention of the Regional Magistrate, at the time when the sentence was imposed, and which was impermissibly done in terms of section 298 of the CPA.

- [7] In *S v Moabi* 1979

- (2) SA 648 (B) at 648H-649A, Hiemstra CJ set out the circumstances under which it is permissible to invoke section 298 of the CPA, as follows:

“It is elementary that a magistrate is not entitled to alter either his verdict or his sentence after it has been pronounced. He can, in terms of s 176 of the Criminal Procedure Act 51 of 1977, correct a verdict which has been given in error, but then only “before or immediately after it is recorded”. Section 298

gives him the same power in regard to a wrong sentence. But then it is a sentence or verdict delivered “by mistake” as both these sections provide. That implies a misunderstanding or an inadvertency resulting in an order not intended, or also a wrong calculation. A verdict or sentence, however much open to criticism, cannot be altered if it was deliberately given or imposed. To exceed punitive jurisdiction is probably included under “mistake”. But then the correction must be done immediately, on the same day, preferable before the magistrate leaves the bench. This sentence was neither imposed by mistake nor was it altered immediately. The subsequent proceedings were a complete nullity.”

- [8] Section 298 of the CPA provides that a sentence may be corrected when by mistake a wrong sentence is passed. The court may before or immediately after it is recorded, amend the sentence. Du Toit et al in the Commentary on the Criminal Procedure Act state, with reference to the authorities cited in the Commentary on section 298, that a wrong sentence refers to ‘an incompetent or irregular sentence or a sentence which bears no relation to the merits of the case or which contains a technical mistake’, and also includes ‘a sentence which does not accord with the real intention of the court’ (Revision Service 65, 2020 ch28-p61).
- [9] In this special review ‘...an inadvertency resulting in an order not intended,...’ as alluded to in Moabi is relevant. Section 298 requires the amendment of the sentence to occur before or immediately after it is recorded. This usually entails that the amendment may be made within a reasonable time after the sentence was recorded, given the circumstances of the matter and without delay. (see also S Terblanche A Guide to Sentencing in South Africa Third Edition (2016) 467-8). The amendment must take place in the presence of the accused.
- [10] Simply put, in the present review, the Regional Magistrate could not invoke section 298 for two reasons. First, the Regional Magistrate was functus officio. Section 298 of the CPA must be interpreted restrictively. See: S v Smit 1993 (1) SACR 540 (C) at 542d-f. Once the sentence was handed down and the court had adjourned, the Regional Magistrate was functus officio. Had, the Regional Magistrate returned shortly after the imposition of sentence, in the presence of the accused, his legal representative

and the prosecutor and corrected the sentence, a compelling argument may have been made for the application of section 298 of the CPA. Second, the purported section 298 proceedings were conducted in the absence of the accused. This alone is a fatal irregularity.

- [11] The “technical mistake” which did not accord with the real intention of the Regional Magistrate and which caused an inadvertency resulting in an order not intended, stands to be corrected. The accused was convicted of culpable homicide. The intention of the Regional Magistrate was clearly, that

the suspensive condition relating to the commission of culpable homicide, in the event of such a conviction occurring during the

period of suspension, should be susceptible to the sentence imposed being put into operation.

[12] The Regional Magistrate, in my view, acted correctly by transmitting the matter on special review in terms of section 304(4) of the CPA. The corrective procedural mechanism created by section 298 of the CPA clearly did not avail the Regional Magistrate. In the circumstances, this Court is enjoined in terms of section 304(c)(iii) to correct the proceedings of the magistrate's court.

Order

[13] In the premise, the following order is made:

A REDDY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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