

SOUTH AFRICA / JUDGMENT

S v Nquma and Another (CA&R187/2018) [2018] ZAECHC 58 (31 July 2018)

[2018] ZAECHC 58

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N.P. Jaji, P.T. Mageza

CASE / FILE NUMBER

CA&R 187/2018

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 187/2018

Review No: 20180080

Date Delivered: 31 July 2018

In the matter between:

THE STATE

and

MXOLISI ALFRED NQUMA

LUYANDA LURWAYI

REVIEW JUDGMENT

JAJI J:

- [1] Both accused in this case were convicted of two different counts, i.e. housebreaking with intent to steal and theft (common law offence) and contravening the provisions of section 66(2) read with section 89(1) of the National Road Traffic Act, 93 of 1996, using a motor vehicle without consent (statutory offence). I am of the view that the convictions are in order.

- [2] The magistrate took both counts as one for purposes of sentence and both accused sentenced to twelve (12) months correctional supervision in terms of section 276(1)(h) and further eighteen (18) months each which the latter term of imprisonment wholly suspended for a period of five (5) years.
- [3] The magistrate subsequently submitted the proceedings on special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977, indicating that she was of the view that the sentence imposed was incompetent. This view was premised pursuant to the advices of the senior magistrate which were correctly heeded by the magistrate.
- [4] As pointed out by the senior magistrate's advices to the magistrate which I agree:
- 4.1 The penalty clause in section 89(6) of the Road Traffic Act 93/96 provides for sentence of a fine or imprisonment for a period not exceeding one year. Accordingly, as the senior magistrate advised, the sentence of eighteen (18) months imposed is incompetent. The magistrate correctly referred to section 280 of Act 51 of 1977 which provides that "it is not permissible to impose a sentence which is competent in regard to one offence and incompetent in regard to the other in respect of both offences." Regard was to *S v S* 1981 (3) SA 377 (A), therefore discouraging the practice of taking together different offences for purposes of sentence, especially if they are not the same or not closely related in respect of common law offences.
- [5] The practice of taking more than one count together for the purpose of sentence, is neither expressly authorised, nor prohibited in the Criminal Procedure Act[1]. This should, however, be done in exceptional cases only according to the learned authors. See in this regard *inter alia* Director of Public Prosecutions, *Transvaal v Phillips*[2] and *S v Ganga*[3].
- [6] This case is a good example of the situation referred to in the *Ganga* judgment, where the two offences which the Magistrate took together for sentence, are subject to different sentencing regimes. Theft, being a common law crime, is not subject to a statutory prescribed maximum sentence (subject to the limits of the Court's sentencing jurisdiction). Using a motor vehicle without consent, on the other hand, as a statutory offence, carries a prescribed maximum sentence as set out in paragraph 4 above.
- [7] The sentence of eighteen months imposed by the Magistrate quite evidently exceeds the maximum of one year imprisonment prescribed in section 89(6) of the Road Traffic Act 93 of 1996, and as such is an incompetent sentence on the count of using a motor vehicle without consent. According to *Du Toit*[4], where charges are taken together for sentence and a court to impose a sentence which is competent on one charge but incompetent on the other, such a sentence is a nullity. See also *S v Hayman*[5].
- [8] If the learned Magistrate intended to ameliorate the effect of two separate sentences, she ought to have ordered that such sentences be served concurrently, either in whole or in part. Such an order would be competent and is provided for in terms of section 280(2) of the CPA.
- [9] In the circumstances, the following order issues:

The matter should be remitted to the Magistrate to reconsider the imposition of sentence on both counts.

N.P. JAJI

JUDGE OF THE HIGH COURT

MAGEZA AJ:

I agree.

P.T. MAGEZA

JUDGE OF THE HIGH COURT (ACTING)

- [1] See Du Toit, Commentary on the Criminal Procedure Act, page 28-20J-5 under the sub-heading “Counts taken together for the purposes of sentence.”
- [2] 2013 (1) SACR 107 (SCA) at para 27
- [3] 2016 (1) SACR 600(WCC) at [56]
- [4] Commentary on the Criminal Procedure Act, page 28-20J-6
- [5] 1988 (1) SA 831 (NC)

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