

SOUTH AFRICA / JUDGMENT

S v Nwodo (R41/2023) [2023]

ZAFSHC 407 (20 October 2023)

[2023] ZAFSHC 407

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, Hefer

CASE / FILE NUMBER

R41/2023

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO: R41/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THE STATE

and

KENNETH CHUKWUEBUKA NWODO

ACCUSED

CORAM: OPPERMAN, J et HEFER, AJ

JUDGMENT BY: HEFER, AJ

DELIVERED ON: 20 OCTOBER 2023

- [1] This matter served before us as a special review in terms of Section 304(4) of the Criminal Procedure Act (“the CPA”).[1] The Accused was charged in the Bethlehem Magistrates Court on seven counts of contravening the provisions of Section 5(b) of Act 140 of 1992, the Drugs and Drug Trafficking Act (read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997) – dealing in drugs.

[2] The State and the Accused, who was legally represented, entered into an agreement in terms of Section 105A (1) of Act 51 of 1977 in respect of:

(i) pleads of guilty by the Accused to the seven counts against him; and

(ii) a just sentence to be imposed by the Court.

[3] After pleading the Accused was convicted on all seven counts according to the Section 105 agreement.

[4] The Magistrate sentenced the Accused in accordance with the sentence agreement as follows:

“All seven counts are taken together for purposes of sentencing and the Accused is sentenced to 6 years imprisonment in terms of Section 276(1)(a) of the Criminal Procedure Act 51 of 1977 of which years is wholly suspended for 5 years on the following conditions:

That the Accused is not convicted of contravening Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 with specific reference to Part 3 of Schedule 2 and the second condition, that the Accused must compensate the State to the amount of R50,000.00 of which the first payment of R2000.00, is payable to the Clerk of the Court, Bethlehem Magistrates Act on or before the 30th of June 2023 and thereafter as per page 5 of the agreement consecutively.”

[5] According to a letter from Magistrate H.J.M Bothma from the Bethlehem Magistrates Court dated 19 September 2023, the Presiding Magistrate, in sentencing the Accused, erred in applying Section 276(1)(a) of Act 51 of 1977 in that Section 276(1)(a) of Act 51 of 1977 does not exist whereas it was deleted by Section 34 of Act 105 of 1997. It needs to be mentioned at this stage that this letter from Magistrate Bothma refers to “the State v Tumelo Godfrey Khambule”. The Magistrates Court serial number as well as the case number being “05/2023” and “A295/2022” however, respectively correspond with the documentation placed before me in the review in respect of the Accused K.C Nwodo.

[6] It needs to be pointed out that the plea and sentence agreement dated 27 June 2023 originally made reference to Section 276(1)(b) of the Criminal Procedure Act 51 of 1977 which was apparently amended by hand and initialled accordingly by the respective parties.

[7] From the record of proceedings it is also evident that originally the Presiding Magistrate sentenced the Accused in terms of Section 276(1)(b) of the Criminal Procedure Act 51 of 1977 but the prosecutor then “corrected” the Presiding Magistrate by stating that reference should be made to Section “276(1)(a)” instead.

[8] According to the letter from Magistrate Bothma the error was noticed when the sentence was queried by the Department of Correctional Services. The Presiding Magistrate, the prosecutor as well as the advocate who appeared on behalf of the Accused, conceded that the agreement upon Section 276(1)(a) of Act 51 of 1977 was a bona fide mistake. According to Magistrate Bothma, Adv Maxaka, who appeared on behalf of the Accused, consulted with the Accused in person and they agreed on an amendment of the Section 105A agreement. It

also appears that Frank Botha Attorneys, who instructed Adv Maxaka, as well as the prosecutor, agreed to the amendment of the agreement. A signed agreement also dated 27 June 2023 now referring to Section 276(1)(b) has also been placed before me.

- [9] I found it astounding that both the Presiding Magistrate as well as the prosecutor and to a lesser degree Adv Maxaka who represented the Accused, erred in referring to a subsection of the Criminal Procedure Act which was repealed in 1997 already.
- [10] Be that as it may, whereas the incorrect reference to a repealed section of the Criminal Procedure Act was referred to, because of a bona fide mistake by all parties and representatives involved, the sentence stands to be corrected.

ORDER:

1. The conviction is confirmed.
2. All seven counts are taken together for purposes of sentencing and the Accused is sentenced to six (6) years imprisonment in terms of Section 276(1)(b) of the Criminal Procedure Act 51 of 1977 of which three (3) years is wholly suspended for five
- (5) years on the following conditions:

2.1 That the Accused is not convicted of contravening Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 with specific reference to Part 3 of Schedule 2; and

2.2 That the Accused must compensate the State to the amount of R50,000.00 of which the first payment of R2000.00 is payable to the Clerk of the Court, Bethlehem Magistrates Court on or before the 30th of June 2023 and thereafter as per page 5 of the agreement consecutively.

HEFER, AJ

I concur

OPPERMAN, J

- [1] Act 51 of 1977.

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Prepared on 10 October 2026 · Esheria