

SOUTH AFRICA / JUDGMENT

S v Sibiya (CA & 47/2021) [2021] ZANCHC 57 (22 October 2021)

[2021] ZANCHC 57

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Lever

CASE / FILE NUMBER

CA & 47/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Special

Review No: CA & 47/2021

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In

the matter between:

THE

STATE

APPLICANT

and

ERNEST

SAM

SIBIYA

ACCUSED

Coram:

Mamosebo J et Lever J

JUDGMENT

ON SPECIAL REVIEW

MAMOSEBO J

- [1] This matter was placed before me on special review by the Acting Magistrate, Mr T Ngwenya, with a request for correction to the sentence imposed.
- [2] The accused was charged with 3 counts of Housebreaking with intent to steal and theft and appeared in court at Delportshoop in the district of Frances Baard. He was legally represented. The State withdrew the charges against the accused in count 2. He pleaded guilty on counts 1 and 3. His legal representative submitted a statement in terms of s 112(2) of the Criminal Procedure Act[1] (the CPA) in which he admitted all the elements of the offences proffered against him.
- [3] The Magistrate explains that the reason for submitting this case on special review is that while he found the accused guilty on both counts one and three on 7 July 2021, he omitted to include the phrase which appears at page 12 line 11 of the record of the sentencing proceedings that he will take count 1 and 3 together for the purpose of sentence, on the J15, where he documented the following sentence on 24 August 2021:
- “In terms of Section 78 of the Child Justice Act 25 of 2008 read with Section 276 (1)(c) of the Criminal Procedure Act 51/1977 12 (twelve) months imprisonment wholly suspended for a period of five years on condition that the accused [is not] found guilty of housebreaking with intent to steal and theft committed during the suspension period of which a sentence of direct imprisonment is imposed without an option of a fine. Accused is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.”*
- [4] The J15 is clearly marked “reviewable” with the disposal directions of D7, which means the record can only be disposed after 7 years.
- [5] This review is in terms of s 302(1) of the CPA because the Magistrate has imposed a sentence of 12 months imprisonment, which is wholly suspended for a period of five years on specified conditions. This sentence exceeds a period of three months whereas the Magistrate has not held the substantive rank of Magistrate for a period of seven years.
- [6] Section 303 of the CPA deals with the transmission of the record but more importantly, is for the Magistrate to bear in mind that the record must reach the High Court within a period of one week and this is peremptory. See *S v Mekula*[2]. This review was only referred after an expiry of a period of two months. Any delays in the submission of the record must be avoided at all costs. Eksteen J’s remarks in *Mekula*[3] are necessary:

“[13] It follows that any failure to comply with the provisions of s 303 of the Act calls for a cogent explanation. In the circumstances, in every instance where the delay in forwarding the record exceeds the prescribed time limit, the record must be accompanied by a proper explanation setting out the reasons for the delay and the inability to comply with the time periods as set out in the section.”

- [7] The learned trial Magistrate has in this instance given a full and detailed explanation which we accept. The Magistrate should, however, note the time period set out in s 303 of the CPA.
- [8] Having read the record of proceedings, I have no doubts that the proceedings were in accordance with justice and that the accused was afforded a fair trial. Taking cue from the pronouncements by Majiedt AJA, then, in *S v Olivier*[4] we are of the view that the trial court recognised factors favourable to the accused by wholly suspending the sentence of imprisonment and ameliorated the cumulative effect of the sentence by taking the two counts together for purposes of sentence. There are no grounds for the review Court to interfere with the sentence except to add the qualifying omitted phrase preceding the sentence as will appear in the first order.

- [9] In the result, the following order is made:

“1. The two counts, count 1 and 3, are taken together for purposes of sentence.

2. In terms of section 78 of the Child Justice Act, 75 of 2008, read with section 276(1)(c) of the Criminal Procedure Act, 51 of 1977, the accused is sentenced to 12 (twelve) months imprisonment wholly suspended for a period of 5 years on condition that the accused is not found guilty of the offence of housebreaking with the intent to steal and theft committed during the period of suspension of which a sentence of direct imprisonment is imposed without an option of a fine.
3. The accused is declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.”

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I concur

L LEVER

[1] 51 of 1977

[2] 2012

(2) SACR 521 (ECG) at para 13

[3] At 525 para 13

[4] 2010

(2) SACR 178 (SCA) at 187 a-b

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