



In the High Court of South Africa
(Western Cape Division, Cape Town)

In the matter between:

High Court Ref: 186/2023
Magistrate Ref: 414/2022

THE STATE

And

THOMAS JANSEN

ACCUSED

JUDGMENT

RALARALA, AJ

INTRODUCTION

[1] This matter was placed before this Court by way of special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (“the CPA”), following the accused’s plea of guilty on contravening the provisions of section 17 (a) of the Domestic Violence Act 116 of 1998 (“the Act”), dealt with in terms of section 112(2) of the CPA on 24 October 2022. Pursuant thereto, the

accused was convicted, and a Probation Officer's report was acquired prior to the imposition of sentence. Upon consideration of the Probation Officer's report, the court postponed the passing of sentence in terms of section 297(1)(a) of the CPA.

[2] The passing of sentence was postponed for three years on condition that the accused submit himself for treatment and monitoring by a social worker in the service of the Department of Social Development, Picketberg. The accused was also ordered to appear before the Magistrate Court if called upon during the period of postponement.

[3] Thereafter, in terms of section 297(9)(a)(ii) of the CPA, the prosecution applied for a suspended sentence imposed in a previous case against the accused to be put into operation. At this stage, it was brought to the attention of the court that the accused may be suffering from a mental illness. This prompted the referral of the accused to the local hospital for provisional assessment. Upon examination of the accused, Dr Young, recommended a psychiatric evaluation of the accused.

FACTUAL BACKGROUND

[4] The state alleged that a protection order was issued by the Magistrate of Picketberg on 20 May 2022 in terms of which the accused was prohibited and ordered to not assault, threaten to assault, or swear at the complainant. It was further alleged that the protection order was served on the accused. Pursuant

thereto, the state alleged that on or about 23 September 2022 at Wittewater Clinic in the District of West Coast, the accused unlawfully and intentionally contravened the provisions of the protection order by swearing and threatening the complainant. The accused who was legally represented, pleaded guilty to the charge and a statement in terms of section 112 of the CPA was handed in as an exhibit.

[5] The facts gleaned from his statements in terms of section 112(2) of the CPA were that the accused admitted that on 22 May 2022 a protection order was granted against the accused in favour of the complainant. The protection order prohibited the accused from assaulting; threatening to assault or swearing at the complainant. The accused admitted that the protection order was still valid and admitted the contents thereof as described in the charge. The accused admitted that on the aforementioned day, while the complainant, the accused sister was visiting the local clinic, the accused confronted her in relation to money that she owed him. Amid the aforementioned confrontation, an argument ensued. The relevant part of the section 112(2) statement reads:

“On the aforementioned day my sister, the complainant was at the Clinic. I went there to confront her about the money she owed me. I was also angry because my sister keeps saying things that hurt me and treating me badly. On the day she also told me she is going to tell the ambulance to take me away. I got angry and swore at her saying to her jou poes and also said “vir jou donner ek.”

[6] The accused admitted that he unlawfully and intentionally contravened the conditions of the protection order.

RELEVANT LEGAL PRINCIPLES AND ANALYSIS

[7] It is apparent from the record of proceedings that the accused had previously been convicted on a similar charge and the court had accordingly imposed a suspended sentence. Prior to the plea proceedings, in August 2022, the accused was referred for mental observation in terms of section 77 read with section 79 of the CPA. Subsequent to an examination conducted by Professor S.Kalisky, a forensic psychiatrist in Valkenberg Psychiatric Hospital, a report was compiled and presented before the Magistrate Court.

[8] The report was based solely on information obtained from the accused. It was noted that there were no symptoms of mental illness at the time of the report, even though the accused had experienced voices and persecutory ideas in the past. The report stated that the accused appeared to have low average intelligence. Professor Kalisky ultimately concluded that the accused is not mentally ill and therefore cannot be certified under the Mental Health Care Act 17 of 2002.

[9] It was during the consideration of putting into operation the latter sentence that the question of the accused's mental status resurfaced. The magistrate referred the accused for mental observation, on the strength of Dr Young's remarks and recommendation of 12 December 2022, to the effect:

“Above mentioned patient has been assessed multiple times at Radie Kotze. This is a complex case and specialist review, in my opinion, is needed at tertiary level (e.g Valkenberg). “

[10] Pursuant to the referral in terms of section 77 of the CPA, on 22 March 2023, the accused was examined by two Psychiatrists, namely Drs S Lintnaar and C De Clercq, on 17 April 2023. A unanimous report was compiled and presented to the presiding magistrate. The report was based on the information obtained from the accused during the interviews conducted with him, as well as the observations of ward psychiatric nursing staff. As far as the mental state of the accused is concerned, it was noted that the accused needed prompting to perform tasks including personal hygiene and dressing. He took longer to execute simple instructions.

[11] According to the assessment, the accused stopped taking his psychiatric treatment. As a result, he relapsed, and the clinical diagnosis is Schizoaffective Disorder, Bipolar type. Ultimately, the Psychiatrists unanimously concluded that the accused was not able to appreciate the wrongfulness of the alleged offence or able to act accordingly. They recommended that he be admitted as an involuntary patient at Stikland Hospital under Chapter v of the Mental Health Care Act.

[12] The report was not challenged by the Defence and the Prosecution. On the strength of the Psychiatrists' report, the process that needs to be followed is as envisaged by section 78 of the CPA. Section 78 (1) reads:

“(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers a mental illness or intellectual disability which makes him or her incapable —

(a) Of appreciating the wrongfulness of his or her act or omission; or

(b) Of acting in accordance with an appreciation of the wrongfulness of his or her act or omission shall not be criminally responsible for such act or omission.”

[13] In this matter, the accused has been convicted and sentenced prior to his referral for psychiatric assessment, meaning that the determination of non-appreciation of the wrongfulness of his actions or acting in accordance with an appreciation of such wrongfulness was not made by the court post-conviction as envisaged in Section 78(6) of the CPA which reads:

“(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—

(a) The court shall find the accused not guilty; or

(b) If the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or intellectual disability, as the case may be, and direct—

(i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—

(aa) detained in psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental care health[sic] user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc). . .

(dd) released subject to such conditions as the court considers appropriate; or

(ee) released unconditionally;

(ii). . .”

[14] From the record of the court proceedings, it is apparent that the magistrate after the conviction of the accused, invoked the provisions of section 297(1)(a) of the CPA, in terms of which the passing of sentence was postponed for a period of three years and certain conditions were attached as aforementioned. It is only after postponing the passing of sentence subject to certain relevant conditions that the court became aware that at the time of the commission of the offence, the accused by reason of mental illness or intellectual disability was not responsible for his actions.

[15] In such cases, section 78(6) (b) of the CPA permits the court after conviction, but before sentence is passed, to set aside the conviction. The magistrate in his submissions was unconvinced that the invocation of section 297(1)(a) amounted to sentencing hence, he/she sought guidance from this court.

[16] This case essentially warrants a statutory interpretation exercise. Section 297 (1) of the CPA is a sentencing provision. Section 297 (1) (a) of the CPA reads:

“297 Conditional or unconditional postponement or suspension of sentence, and caution and reprimand

(1) 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—

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned—

(i) on one or more conditions,’ whether as to—

(aa) compensation;

(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;

(ee) submission to the supervision or control (including control over earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act 116 of 1991);

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

- (hh) any other matter, and order such person to appear before the court at the expiration of the relevant period; or
- (ii) unconditionally, and order such person to appear before the expiration of the relevant period; or
- (b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order; or
- (c) discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(1A).....

(2) Where a court has under paragraph (a) (i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.”

[17] The starting point in the exercise of statutory interpretation is Section 39(2) of the Constitution which sets out the approach to be adopted in interpretation of statutes by our courts. Section 39(2) reads as follows:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

[18] In a number of cases the Constitutional Court has confirmed that the interpretation of the provisions of the statute must be in conformity with the founding values of the Constitution. Ngcobo J, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 72, recognised the position that the interpretation of the provisions of the Act should properly align with the provisions of section 39(2) of the Constitution. The learned justice observed:

“ The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court “must promote the spirit, purport and objects of the Bill of Rights” when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights is a cornerstone of [our constitutional] democracy. It affirms the democratic values of human dignity, equality and freedom.” (footnotes omitted)

[19] In *Liesching and Others v S and Another* 2017 (4) BCLR 454 (CC) para 30, the court affirmed the position that compliance with the Constitution has to be considered when interpreting the provisions of an Act. The court observed as follows:

“ ... All statutes must be interpreted through the prism of the Bill of Rights in order to give effect to its fundamental values. This is so because section 39(2) of the Constitution requires courts to do so”.

[20] Equally, courts have long recognised that the contextual and purposive approach must be applied to statutory interpretation, which entails the consideration of the context in which the provision appears and its apparent purpose. *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012(4) SA 593 (SCA); *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC).

[21] Fundamentally, section 297 forms part of chapter 28 of the CPA which governs sentencing in criminal proceedings. It follows that section 297 (1) (a) has to be considered and construed within the context of Chapter 28. The heading of Chapter 28 is 'Sentence'. Importantly, the context to which one refers in the process of interpretation must be inclusive of the chapter headings. *Bato Star Fishing (supra)* para 90. Intelligibly, the provision is enacted for the purposes of sentencing within the context of the CPA.

[22] Properly construed, and in congruence with the principles espoused above, section 297 envisages two separate instances. First, Section 297(1)(b) envisages a case where the sentence is imposed but the execution of the whole or portion thereof is suspended in terms of paragraph (b) thereof. Secondly 297(1)(a) envisages a case where the sentence is postponed for a period not exceeding five years either subject to condition or unconditionally. A court may postpone a sentence in terms of section 297(1)(a) for all offences save those for which the legislature prescribes a minimum sentence.

[23] Crucially, in terms of section 297(1)(a)(hh), the court may order an accused person whose sentence was postponed to appear before court at the expiration of the relevant period to determine if the accused complied with the conditions set by the court. Where the court is satisfied on such appearance that the conditions of the postponement were met, in terms of section 297(2), the court must discharge the accused without passing sentence. In terms of section 297(2), the discharge has the effect of an acquittal, except that the conviction will be recorded as a previous conviction.

[24] Thus, the postponement of a sentence in terms of section 297 of the CPA does not amount to an imposition of a sentence. Notwithstanding that a sentence has been postponed, the court remains endowed with the discretion to impose an alternative sentence if the accused concerned does not comply or observe the conditions the court imposed. If he complied with those conditions, the court must discharge him without passing sentence.

[25] In my opinion, section 297 aims to deter or prevent future criminal conduct rather than to punish offenders who have been convicted of committing serious crimes. See *S v Mokasi and Others* 2002 (2) SACR 609 (T). In all instances where immediate execution of a sentence will not achieve the three main objectives of punishment, the postponement of sentence should be considered. See *S v S* 1977 (3) SA 830 (A).

[26] It is also important to bear in mind that in this instance, only after the court has convicted the accused person in criminal proceedings, is it permissible for the court to invoke the provisions of section 78(6) of the CPA. I am conscious that this case

deviates from the norm, as the invocation of section 297 should not have followed after conviction, had the magistrate at that stage been aware of the findings made by the Psychiatrists.

[27] In summary, an order in terms of section 297 of the CPA permits the court to postpone the passing of sentence, conditionally or unconditionally, and confers the court with discretion to attach conditions to the postponement of the passing of sentence that the convicted person must comply with. Further, the section makes provision for the procedure to be followed in the case of breach of the conditions, so attached. Discernibly, in the case of breach of the conditions, the court may then impose any competent sentence. Conceivably the court may make orders to be complied with by the convicted person, as envisaged in section 297(1) (a) of the CPA as is the case in this instance.

[28] In my view to the extent that the passing of sentence was postponed subject to conditions, this does not detract from the fact that the court did not impose a sentence as envisaged in the CPA. The court would have passed the sentence if the accused breached the conditions imposed by the court. I am of the view that this case falls squarely within the purview of section 78(6(b) of the CPA.

[29] Considering the determination by the Psychiatrists, it was incumbent upon the magistrate to set aside the conviction and found the accused not guilty by reason of his mental illness.

ORDER

[30] In the result, I would propose the following order:

[30.1] The matter be remitted to the magistrate to properly comply with the provisions of section 78(6) (b) of the CPA.

RALARALA NE

ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered.

LEKHULENI JD

JUDGE OF THE HIGH COURT