



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **R27/2023**

Magistrate's Ref: **Ash 18/20**

In the matter between:

THE STATE

versus

MAQALENGJOSEPH MAKUBO

ACCUSED

CORAM: NAIDOO, J

REVIEW JUDGMENT BY: NAIDOO, J

DELIVERED ON: 11 April 2023

- [1] This matter was referred to the High Court, on an urgent basis, by the Regional Magistrate, Bethlehem, in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (CPA). As the recess duty judge, it was brought before me for urgent adjudication. The practice in this Division is that such a matter would normally be adjudicated by two judges, but if it is brought on an urgent basis, the duty judge may adjudicate it on his/her own.
- [2] This matter has its genesis in criminal proceedings conducted by an Acting Regional Magistrate, in which he convicted the accused, on 9 October 2020, on a charge of Assault with Intent to do Grievous Bodily Harm, read with the provisions section 51(2)b) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act) The Acting Magistrate sentenced the accused, on 29 October 2020, to six (6) years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA). His acting appointment has since expired and he is no longer acting as a Regional Court Magistrate The matter was brought to the attention of the Regional Magistrate on 24 March 2022 and he immediately referred it to the High Court. He asserted that the sentence imposed on the accused is in excess of the permissible maximum sentence which can be imposed in terms of section 276(1)(i) of the CPA, resulting in a failure of justice. This court was, consequently, requested to review the matter in terms of section 304(4) of the CPA.

- [3] Due to the urgency, the Regional Magistrate did not obtain a transcript of proceedings and merely attached the original charge sheet, with attendant annexures. The charge related to the serious assault on the complainant, an eight year old boy, who was repeatedly kicked in the stomach by the accused. The child suffered a perforated bowel as a result, and had to undergo surgery to repair the damage. The accused was legally represented and pleaded guilty to the charge. A typed statement in terms of section 212(2) of the CPA is attached to the papers and as such proceedings go, it seems very likely that it was read into the record. The statement was signed by the accused.
- [4] In considering sentence, the Acting Regional Magistrate, found that substantial and compelling circumstances existed to justify a departure from imposing the prescribed minimum sentence of ten (10 years' imprisonment. As indicated, the court sentenced the accused to six years' imprisonment in terms of section 276(1)(i) of the CPA, read with section 51 (2)(b) of the Minimum Sentences Act.
- [5] The legal position pertaining to this matter is governed by sections 276(1)(i), read with 276A and 304(4) of the CPA.

Section 276 (1)(i) provides as follows:

Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—

- (i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

Section 276A, which is titled “*Imposition of correctional supervision, and conversion of imprisonment into correctional supervision*” provides in subsection (2) that:

- (1) Punishment shall, subject to the provisions of section 75 of the Child Justice Act, 2008, only be imposed under section 276(1)(i)—
 - (a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and
 - (b) for a fixed period not exceeding five years.

Section 304(4) reads thus:

If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.

[6] Without the benefit of a transcript of the relevant court proceedings, I am unable to say what factors the Acting Regional Magistrate took into account in deciding that a sentence in terms of section 276(1)(i) was appropriate. However, having made that decision, it was not competent for the him to have imposed a sentence of six years' imprisonment, contrary to the provisions of section 276A(2), which stipulates that a sentence in terms of section 276(1)(i) shall be for a fixed period not exceeding five years. It is, therefore, my view that, for the reasons set out above, the court *a quo* misdirected itself in imposing a sentence of six years' imprisonment on the accused, warranting the interference of this court in order to ensure that the interests of justice are served.

[7] In the circumstances, the following order is made:

7.1 The sentence imposed in this matter by the Regional Court, which reads:

"On a charge of assault with intent to do grievous bodily harm, read with the provisions of section 51(2)(b) of Act 105 of 1997 as amended, the accused is sentenced to imprisonment for a period of 6 (Six) years' in terms of the provisions of section 276(1)(i) of Act 51 of 1977", is set aside.

7.2 The following sentence is substituted for that which was imposed by the Regional Court :

"On a charge of assault with intent to do grievous bodily harm, read with the provisions of section 51(2)(b) of Act 105 of 1997 as

amended, the accused is sentenced to imprisonment for a period of Five (5) years' in terms of the provisions of section 276(1)(i) of Act 51 of 1977."

- 7.3 In terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentence referred to in paragraph 6.2 is antedated to 29 October 2020

S NAIDOO J