



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

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

Special Review No.: R05/2017

In the review between:

ALFRED KOTSOANE

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* NICHOLSON, AJ

JUDGMENT BY:

REINDERS, J

DELIVERED ON:

7 FEBRUARY 2017

**SPECIAL REVIEW IN TERMS OF SECTION 304(4)
OF THE CRIMINAL PROCEDURE ACT, 51/1977**

- [1] This matter has been sent on special review in terms of Section 304(4) of the Criminal Procedure Act, 51 of 1977 (the “Act”) from the Phuthaditjaba Magistrate’s Court.

[2] Mr HB Breyl, Judicial Head (Phuthaditjaba) in a letter attached to the special review, set out the following summary of the relevant circumstances and facts:

- “2. The accused was convicted and sentenced on 8 November 2016 at Fouriesburg. The magistrate from Fouriesburg brought the matter to my attention and asked for guidance.
- i) The accused was charged with assault to do grievous bodily harm and contravening s 3(1) Act 15 of 2013: possession of a dangerous weapon. Accused was represented by legal aid and pleaded guilty to both and the magistrate proceeded in terms of section 112 (1)(a) of Act 51 of 1977 and convicted him on both counts.
- ii) He was then sentenced to a fine of R 1 500 or 3 months imprisonment and a fine of R 300 or 30 days imprisonment respectively on the two counts. The magistrate also ordered that the sentences must run concurrently in terms of s 280 Act 51 of 1977.”

[3] On 14 November 2016 Mr Breyl addressed a letter to the learned magistrate, Ms L Mhlambo, indicating that sec 280(2) of the Act refers expressly only to imprisonment and that he is of the opinion that she could not have made such an order. Mr Breyl furthermore indicated that he intended sending the matter on special review and requested her comments. Ms Mlambo gave her views on the correctness of the order made by her in terms of s 280(2) of the Act in a letter dated 12 December 2015, referring to applicable case law. She conceded that the order issued by her might not have been correct. The learned magistrate furthermore indicated that she contacted Bethlehem Correctional Services and was advised

that the accused was released after paying the fine imposed on him in terms of count 1 (assault with the intention to do grievous bodily harm).

- [4] The bone of contention is sec 280(2) of the Act which reads as follow:

“Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently”

- [5] In the said letter attached to the special review, Mr Breyll referred to the wording of sec 280 of the Act and applicable case law, concluding that he is of the opinion that the magistrate could not have ordered that the sentences should run concurrently. Mr Breyll made reference of **S v Jeffries 2011 (2) SACR 580 (FB)**. In the said decision of this bench the question whether a court, where it imposes a fine with alternative imprisonment, can order a sentence to run concurrently with another sentence, was dealt with extensively. The majority of the full bench (Musi, J ,as he then was, dissenting) per Kruger, J held in par [12] that the 1993 amendment of sec 280(2) of the Act made it clear that, where imprisonment was imposed as an alternative to a fine, an order that sentences were to run concurrently, could not be made. Concurrent running under sec 280(2) could only be ordered where there were sentences of imprisonment.

Alternative imprisonment was not a sentence of imprisonment and could never stand alone. Therefore the learned magistrate *in casu* was bound by this decision and had to follow it.

- [6] From the sentences imposed it appears that the magistrate did not intend that the accused should pay more than R1 500,00 and thus ordered that the sentences should run concurrently. As noted in the comment by the magistrate on her enquiries about the accused, it appears that the fine of R 1 500,00 was paid by accused with the Department of Correctional Services, where after he was released. The Department most probably did so by virtue of the order in terms of sec 280. I therefore cannot merely order that the order of concurrent running be deleted. If I only delete that, it would mean that the accused be re-arrested to pay the fine of R 300,00 on count 2 or undergo the alternative imprisonment of 30 days.
- [7] Having read the record of the transcriptions together with the supporting documents thereto and in view of what has been stated above, I am in agreement with Mr Breyll's view that an impermissible sentence was imposed by the learned magistrate Ms Mlambo.
- [8] In the circumstances I would make the following order:

8.1 The sentences imposed on counts 1 and 2 as well as the order in terms of sec 280 of the Criminal Procedure Act 51 of 1977 is set aside and replaced with the following:

“1. The convictions on counts 1 and 2 are confirmed.

2. Counts 1 and 2 are taken together for purposes of sentence and the accused is sentenced to pay a fine of R1 500-00 or 3 months imprisonment.”

C. REINDERS, J

I concur.

C. NICHOLSON, AJ

It is so ordered.