

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

Review number: 200/2015

In the matter between:

THE STATE

Applicant

and

ASELO SELAI

Respondent

JUDGMENT BY: HINXA, AJ

DELIVERED ON: 23 MARCH 2016

HINXA AJ:

- [1] This matter served before this court on special review in terms of Section 304 (4) of the Criminal Procedure Act 51 of 1977 (the CPA).
- [2] The following query was raised in the following terms on 12 October 2015,

“The record as was forwarded to the registrar is incomplete as it starts at the tail end of the proceedings. You are hereby requested to reconstruct the record and forward a more comprehensive record to this office”.

- [3] The matter served before me on 28 January 2016. On perusing the record it transpired that it was received by the Clerk of the Court Welkom on 20 October 2015. It is not clear whether the record ever found its way to the Presiding Officer. It suffices to state that it was sent back without any reconstruction highlighted in the query having been heeded. It is equally mysterious as to who actually returned it.
- [4] With a view to expediting disposal hereof, I deemed it discreet to telephonically contact the Cluster Head (Ms Motlekar) and explain what was precisely expected.
- [5] Pursuant thereto, she did not only ensure that the record was urgently fetched from the High Court but also that the query was meticulously and swiftly attended to and the record hastily returned. I am indebted to her for the promptness with which she handled this matter. The Senior Magistrate from her office (Mr. Ferreira) is of the view that the sentence falls to be set aside as the offence was committed after the expiry of the period of suspension.
- [6] At this juncture I consider it apposite to deal with the merits of the case:
- 6.1 The accused, being accused 4 of the seven accused, was convicted on 5 March 2010 in the district court at Welkom on a charge of contravening Section 1(1)(a) of the Trespass Act, Act 6 of 1959 ("the Trespass Act"). He was then sentenced as follows:

“Fined (R2000.00) two thousand rand or (6) six months imprisonment. Further each sentence to (18) eighteen months imprisonment, sentence wholly suspended for a period of (5) five years on condition that accused is not found guilty again of contravention of section 1 (1) of the Trespass Act, Act 6 of 1959 at the mine property committed during the period of suspension”.

- 6.2 The same accused being accused 3 in Case A 2185/15 was again convicted on 16 July 2015 in the district court at Welkom on *inter alia* a charge of contravening section 1 (1)(a) of the Trespass Act. The following sentence was imposed,

“(2) Two years imprisonment sentence is wholly suspended for a period of (5) five years on condition that the accused is not found guilty of contravention of section 1 (1) of the Trespass Act, Act 6 of 1969 at the mine premises or property committed during the period of suspension”.

- 6.3 It bears mentioning that this offence was committed on 25 June 2015. The accused was subsequently brought before the court on 24 July 2015 for the suspended sentence imposed on 5 March 2010 to be put into operation. He was legally represented. The attorney conceded that the suspension conditions were breached and requested that the suspended sentence imposed on 5 March 2010 be further suspended. The presiding magistrate then further suspended the 18 months imprisonment imposed on 5 March 2010 in Case no A 925/10 for another period of 5 years.

[7] Before dealing with the ground for this special review, I deem it apt to first consider yet another ground which would still render the sentence inappropriate:

7.1 It is trite exposition of our law that before the court can grant a further suspension it must be satisfied that: (a) the accused has through the circumstances beyond his/her control been unable to comply with the condition of the suspended sentence imposed. Circumstances beyond control have been described as occurrences or reasons which were not brought about by the accused or have no nexus with his/her conduct or failure to act (**S v Gaika** 1971 (I) SA 231 at 232 A). Of importance, the courts have cautioned against imposing a condition of a suspended sentence of such a nature that the sentence can be brought into operation by an event beyond the accused's control (See **S v Gaika** *supra* at 232 A-B).

Furthermore, the court may also, (b) for some other good or sufficient reason further suspend the sentence. Other good or sufficient grounds are grounds other than circumstances beyond the accused's control such as: where an accused person's sentence of imprisonment is suspended for a period on condition that he pays a sum of, say, R10,000 by way of compensation within a specified time, he may fail to pay the sum and prefer to go to prison because he considers that, although he has the money to pay, he must keep it for the purpose of meeting other obligations. If it should happen that after the period for payment has expired he should suddenly find himself,

whilst serving the suspended sentence of imprisonment which has been duly brought into operation, an unexpected heir to great wealth, it seems distinctly absurd that he should not be able to obtain a further period of suspension, notwithstanding that the sentence has been put into force, to enable him to put his hands upon the wealth to which he has become the unexpected heir and pay the R10,000, which it was all along intended that he should be forced to pay by having hanging over him a sentence of imprisonment. (See **Berg v Regional Magistrate, Southern Transvaal and Another** 1956 (2) SA 676 (T) at 678 D-H).

7.2 The presence of either of the two grounds alluded to at paragraph 7.1 (a-b) above will suffice to justify a further suspension (See **S v Dina** 1962 (2) SA 464 (N) at 466 C-D).

7.3 The onus on a preponderance of probabilities rests on the accused to show that a further suspension is warranted. (See Hiemstra's Criminal Procedure: Chapter 28 page 85).

[8] I revert now to the facts of the matter under review. Having considered the conspectus of the evidence, there is not a shred of evidence pointing even in the remote to any of the two grounds. Accused's legal representative only stated that the accused has two (2) minor children and still executes his fatherly duties. Compounding the matter is the fact that the accused was serving a prison term and it is incomprehensible how he was executing

his fatherly duties to deserve a further suspension. It follows from this that the magistrate did not apply his mind to the questions which the law required him to consider viz. the existence or non-existence of any of the aforestated grounds.

[9] I come next to the ground raised by the Senior Magistrate. It is common cause that the initial suspended sentence was meted out on 5 March 2010; it was suspended for five (5) years; and the accused only committed the subsequent offence on 25 June 2015 i.e. after the expiry of five (5) years. Accordingly, the offence for which the accused was convicted on 16 July 2015 in case no A 2185/15 was committed outside the period of suspension. It follows that the order bringing into operation the suspended sentence is inappropriate and falls to be set aside.

[10] The aforesaid order is accordingly set aside. The sentence imposed on 16 July 2015 appears to be in accordance with justice. It is accordingly confirmed.

M.D HINXA, AJ

I concur

B.C. MOCUMIE, J