

REPUBLIC OF SOUTH AFRICA



A421/15

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

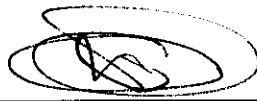
25/6/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

22/05/2015
DATE


SIGNATURE

High Court Ref.: 236/2015

Springs Magistrate Court Serial No.: 16/2015

Date: 20/05/2015

THE STATE

v

TEDDY SIMON KODISANG

ACCUSED

REVIEW JUDGMENT

THOBANE AJ,

[1] This matter was referred for special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977. It appears as if the Acting Senior Magistrate Mrs. Mosaka, identified a sentencing discrepancy and referred the matter to the magistrate that dealt with the matter, Ms. Ngubeni, for her comments.

BACKGROUND

[2] The accused appeared in the Springs Magistrate Court held at KwaThema on a charge of fraud. He enjoyed legal representation at the trial. He pleaded guilt to the charge of fraud and was accordingly found guilty.

[3] The magistrate considered evidence in mitigation as well as aggravation and in the end sentenced the accused to 36 months imprisonment. The magistrate further made the following orders;

1. In terms of Section 103 (1) Act 60/2000, the accused is declared unfit to possess a firearm,
2. In terms of section 276 (B)(1) the Court orders that the accused shall not be placed on parole for the 36 months period.

[4] Reasons for the special review as articulated by the Acting Senior Magistrate, are encapsulated in the following statement"

" It is clear from the mentioned section that the Presiding Officer erred by making an order that the accused not be placed on parole for the duration of his imprisonment in contravention of section 271B (1)(b) of Act 51 of 1977"

[5] The trial Magistrate conceded that her condition with regard to parole was incompetent. Her comments in this regard were as follows;

"The (sic) was an error in the court order regarding the non-parole sentence condition imposed, in that there was an omission of the following words "for the two thirds of the 36 months imprisonment" that is the period within which the accused should not be placed on parole; as reflected now it is for the duration of the entire sentence.

That was an omission on my part - which renders that condition incompetent

The above mentioned court order made on 18/10/2013-

Kindly have same rectified - I did not realize that until the matter was brought to my attention by your office. This will not happen in future."

THE LAW

[6] The Magistrate purported to act in terms of section 276 (B) (1) of the Criminal Procedure Act 51 of 1977, which provides as follows;

"276B Fixing of non-parole-period

(1) (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."

ISSUES

[7] In my view two issues arise from this review. The first being the omission by the Magistrate and secondly, whether the order in terms of section 276 (B)(1) was correctly made.

PROCEDURE

[8] According to the record of proceedings, after the parties had addressed the Magistrate in both mitigation and aggravation, she proceeded with the imposition of sentence. She dealt with the element of retribution and mentioned prejudice real as well as potential, which could have befallen the employee, the store as well as the card owner, had the fraud succeeded. The Magistrate further considered the element of deterrence. In this regard the Magistrate was of the view that a wholly suspended sentence was inappropriate as it would not rehabilitate the accused. She further considered the SAP69 and observed that the accused had used different names on three different occasion. She concluded that imposition of a wholly suspended sentence would not be appropriate. The Magistrate explained that she had looked at section 276 as an option, without explaining which subsection thereof she had considered, but she was of the view that in light of the fact that the accused had a conviction which appeared, according to the SAP69, to have been committed while

he was out on "parole supervision", accused needed to be treated differently. This offense the Magistrate found, was a contravention of a protection order. The court then found that the accused would neither abide by parole conditions nor conditions imposed in respect of a suspended sentence.

[9] The Magistrate thereafter proceeded to impose a sentence of 36 months imprisonment. The Magistrate after imposing the sentence called on the parties to address her as to why she should not fix in respect of the accused, in terms of section 276(B)(1), a non-parole condition. On behalf of the accused it was submitted that he suffers from tuberculosis for which he was taking medication. On behalf of the state it was submitted that the accused would have access to medical personnel wherever he was kept. It was further submitted that the state was within its rights to approach court and argue that the suspended sentences be put into operation. The magistrate then proceeded to impose the following order;

"....that in terms of section 276(B)(1) the court orders that the accused shall not be places (sic) on parole for the 36 months period".

[10] In my view the Magistrate misdirected herself in many respects. Whether the imposition of the non-parole order for the entire sentence was a mistake is beside the point. Such an order stands to be set aside.

10.1. The imposition of sentence is entirely in the discretion of the trial court. Interference should be limited to those instances repeated in many a court decision. Vide: ***R V MAPUMULO & OTHERS 1920 AD 56 AT 57 R V***

HOLDER 1979(2) SA 70 (A) AT 77 TO 78, S V RABIE 1975(4) SA 855 (A) AT 857 D-E. The nature and import thereof is aptly encapsulated in this *dictum* in **S V JUTA 1988 (4) SA 962 (TK) at 927 D-F** where the court expressed itself as follows:

".....it is true that the sentence is pre-eminently a matter for the trial court, and it is, within the limits of statutory provisions, in the discretion of the presiding officer. But that discretion is not an ordinary discretion, it is a judicial discretion which means that the discretion cannot be exercised arbitrarily or whimsically. It is a discretion which is bound by judicial precedent and judicial authority.....".

10.2. The fact that the order of non-parole covers the entire term of imprisonment is a misdirection. On this point alone the order stands to be set aside.

10.3. It is clear from the record that the accused's legal representative as well as the prosecutor were taken by surprise when the Magistrate asked them to address her in terms of section 276(B)(1). This is deduced from the fact that they simply repeated portions of what they said in mitigation and aggravation. Their address therefore could not have assisted the court in fact, it was not of any use as the Magistrate had already heard the parties on the points they were raising. Failure to afford the parties a proper opportunity to address the court is a misdirection. See **S v Mthimkulu 2012 (2) SACR 89 (SCA).**

10.4. The Magistrate did not advance any reasons as to why she believed the imposition of a non parole condition was necessary. It was held to be both fair and a salutary practice to advance reasons for an order or condition. See ***S v Immelman 1978 (3) SA 726 (A)***, where Corbett JA had the following to say;

*"It has been decided in this Court, with reference to the verdict of the Court, that, although there is no provision in the Criminal Procedure Code for the delivery of a judgment when a Judge sits alone or with assessors (when these decisions were given the alternative system of trial by jury still obtained), in practice such a judgment is invariably given and that it is clearly in the interests of justice that it should be given (see ***R v Majerero and Others 1948 (3) SA 1032 (A)***; ***R v Van der Walt 1952 (4) SA 382 (A)***). It seems to me that, with regard to the sentence of the Court in cases where the trial Judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serve the interests of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State."*

10.5. The approach to be adopted by the sentencing court that wishes to impose the non-parole period is to make a determination as to whether exceptional circumstances are present. The approach was spelled out in ***S v Stander 2012 (1) SACR 537 (SCA)***, where the following was said by Snyders JA in paragraph 20;

".....It also found, correctly in my view, that exceptional circumstances cannot be spelled out in advance in general terms, but should be determined on the facts of each case. These should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist".

In *casu* the magistrate did not have exceptional circumstances placed before her. It follows therefore that making such an order in the absence of such exceptional circumstances was a misdirection.

[11] The proceedings were in accordance with justice however, in view of the aforementioned incidences of misdirection, the sentence must be revisited and considered afresh. I am satisfied that the sentence of 36 months imprisonment is suitable in the circumstances of this case. The portion imposing the non-parole condition must be set aside.

[12] I therefore make the following order;

12.1. The conviction of the accused is confirmed.

12.2. The sentence imposed is reviewed, set aside and substituted with the following:

The accused is sentenced to thirty six months imprisonment in terms of section 276(1)(b) of Act 51 of 1977.

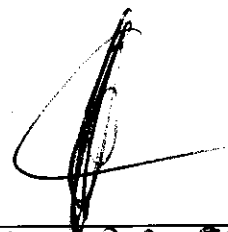
10.3. The sentence is antedated to 18th October 2013.

10.4. In terms of section 103(1) of Act 60 of 2000, the accused is declared unfit to possess a firearm.

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SA THOBANE
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

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LEDWABA DJP.
JUDGE OF THE HIGH COURT