

Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

JUDGMENT

CASE NUMBER: REF 37/2013

SERIAL NO: 1/2014

PATRICK WILLIAMS SASS

AND

THE STATE

Date of the judgment: 22 August 2014

Coram: Phatshoane J and Mamosebo AJ

Phatshoane J.

1. This matter comes before us by way of special review in terms of s 304(4) of the Criminal Procedure Act, 51 of 1977, (the CPA). It follows after the accused was convicted of contravening s 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992, in that he had transported 8,175 Kg of cannabis on the Calvinia/Williston Road on 04 October 2012. He was sentenced to nine years imprisonment in terms of s 276(1)(i) of the CPA by Mr E.S. Morolong, a Magistrate for the District Court of Calvinia.

2. We were not provided with the record of the proceedings. The Court Manager and the Quality Assurance Officer of the Magistrates' Court of Calvinia informed

us that, for reasons unknown, the proceedings were not digitally recorded. I therefore directed that the record be reconstructed and that the presiding Magistrate forward to us his reasons for his decision. What is disconcerting and apparent from the explanation is that following my directive the file was lost in the system at the Registrar office, which resulted in further unjustified delay.

3. The reconstructed record signed by the accused, his legal representative, the presiding Magistrate and the State reads in part as follows:

“Ter uitvoering van u opdrag om die rekord te rekonstrueer, het die betrokke partye op 12 Mei 2014 te Calvinia byeengekom.
Beskuldigde was weereens verteenwoordig deur Mnr Symington, ‘n privaat prokureur.

Rekonstruksie:

Nadat die aanklagte gestel was, het die beskuldigde skuldig gepleit op die aanklag hom ten laste gelê.

Volgens die verdediging, sowel as die Staat, het die verdediging in hul Artikel 112(2) pleit verduideliking aangevoer dat daar handel gedryf was deurdat die dagga soos in die aanklag vermeld na Calvinia vervoer was deur die beskuldigde. Geen afskrif van die pleitverduideliking is beskikbaar nie. Die beskuldigde was toe skuldig bevind soos aangekla. Die Staat het vorige veroordeling bewys. ‘n Voorvonnisverslag waarin korrektiewe toesig aanbeveel was, was tydens vonnisverrigtinge toegelaat. Hierdie verslag het gehandel oor die beskuldigde se persoonlike omstandighede en moontlikheid op rehabilitasie. Na aanleiding van hierdie verslag en die Staat wat daarmee saam gestem het, was gevangenisstraf ingevolge Artikel 276(1)(i) opgelê.

Angesien ek het geen notas en/of ‘n onafhanklike geheue oor die meriete voor vonnis het nie, kan ek nie verdere redes vir vonnis verskaf nie.

Geteken te Calvinia op 12 Mei 2014.”

4. The presiding Magistrate explained that, through an error on his part, he imposed a sentenced in excess of five years imprisonment which runs counter to the provisions of s 276 (1)(i) of the CPA. For this reason he requested that the sentence be set aside and the matter be remitted to the Magistrate Court, Calvinia, for sentencing *de novo*.
5. Upon receipt of the reconstructed record I requested the office of the Director of Public Prosecutions to give their input on the matter. I am grateful to Senior State Adv C.G. Jansen for her assistance on this score.

6. What one gathers from the record is that, without demur, the accused admitted, on more than one occasion, that he dealt in dagga. Therefore, this is not a case where the conviction should be upset. There can be no prejudice.
7. Insofar as the sentence is concerned the Magistrate intimates that he cannot recall the merits of the case before he passed sentence on the accused and cannot provide reasons for the sentence he imposed. It is as well to remember that s 17(e) of the Drugs and Drug Trafficking Act, 140 of 1994, provides that:

“Any person who is convicted of an offence under this Act shall be liable- in the case of an offence referred to in section 13 (f) [contravention of s 5(b)], to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.”

8. Nevertheless, on a plain reading of s 276(3)(b), correctional supervision is a sentencing option that may be imposed, irrespective of anything else provided for in any other law, except where such other law calls for the mandatory minimum sentence in terms of s 51(1) or (2) of the Criminal Law Amendment Act 105 of 1997. See also *S v Nel* 2013 (1) SACR 155 (GSJ) at 157c para 8.
9. A sentence in excess of five years imprisonment, as in this case, would not be competent to impose under s 276(1)(i) of the CPA because it may undermine the exercise of the discretion by the Commissioner of Correctional Services. For this reason alone it stands to be set aside. In *S v Cassiem* 2001 (1) SACR 489 (SCA) at 494c-e para 11 the Court made the following pronouncement:

“The effect of this was the appellant was, in effect, sentenced to a total of seven years' imprisonment. This the magistrate was not empowered to do under s 276(1)(i). This Court in *S v Stanley* 1996 (2) SACR 570 (A) has already decided that the suspended period of imprisonment forms an integral part of the total period of imprisonment. It was held that to render the sentence under s 276(1)(i) competent the total period of imprisonment should not exceed five years, because such excess may interfere with the exercise of the discretion by the Commissioner of Correctional Services under the section. In my view, the sentence imposed by the magistrate offended against the provisions of s 276(A)(2)(b) which forbids the imposition of a sentence in excess of five years under s 276(1)(i).”

See also *S v Howells* 1999(1) SACR 675 (C) at 682j-683a; *S v Bangiso* 2013 (1) SACR 558 (GNP) at 563b-d para 23.

- 10.** We are not at liberty to alter the sentence or to impose a sentence which we believe the Magistrate ought to have imposed anent the requirement of s 276(1)(i) of the CPA in the absence of material facts and reasons by the Magistrate for imposing the sentence of nine years imprisonment. Therefore, it follows that the matter ought to be remitted to the Magistrates' Court for sentencing afresh by the trial Magistrate.

In the result:

ORDER:

- 1. The conviction of the accused is confirmed.**
- 2. The sentence is set aside.**
- 3. The matter is remitted to the Magistrate Court, Calvinia for sentencing *de novo* by the trial Magistrate, Mr E.S Morolong.**

MV PHATSHOANE J

I agree

MC MAMOSEBO AJ