

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 454/2008

In the special review between:

THE STATE

and

JOHANNES MPHULANYANE

CORAM: WRIGHT, J *et* RAMPAL, J

JUDGEMENT: RAMPAL, J

DELIVERED ON: 14 AUGUST 2008

[1] The matter came to this court by way of a special review. It originates from the Bloemfontein Regional Court where the accused was convicted on a charge of indecent assault which he committed at Brandfort on the 2nd March 2007 against X, a three year old minor girl child. He was convicted on his plea on 27 February 2008.

[2] On the 28th May 2008 Ms R. M. Sepato, the acting regional court magistrate sentenced the accused as follows:

“And further, that you shall **perform community service** at Tshepong Community Centre, located at the National Hospital, Bloemfontein.

This Tshepong Centre is where you will find victims of sexual abuse and other forms of assault. This is where you will be paying back to the community of Bloemfontein, of Free State, of South Africa, the larger mankind.

The type of community service that you shall be performing there shall be; cleaning services and any such related duties as shall be assigned to you by a person in charge of the centre. **This community service you shall be executing for a period of one year**, that is, for twelve months from today.

And all this shall be monitored by the correctional supervision officer or any such person as shall be delegated by the commissioner of correctional services. The said community service of twelve months shall be carried out in, at the least, **four hours of duty per day which shall commence from eight until twelve noon** on the days that shall be determined by the correctional officer or any such person delegated by the commissioner of correctional services.

Further, you shall **take part in any program** that shall be prescribed to you as it may be necessary by the said correctional officer or a delegate of the commissioner of correctional services.

And further, that you shall observe any other condition or order of the correctional officer or a delegate of the commissioner of correctional services.”

- [3] Two days later on 30 May 2008 the accused once again appeared before the trial court. As before he was legally represented by a certain Advocate Mazibukwana. The court *a quo mero motu* then proceeded to amend the sentence as follows:

“The sentence reads that the accused be sentenced to two years of correctional supervision with full house detention. Further, that he shall perform community services at Tshepong Victim Support Centre at the National Hospital, Bloemfontein, doing cleaning services and any such related duties as shall be assigned to him by the officer in charge there for twelve months from the 28th of May. Same shall be monitored by the correctional supervising officer or any other person delegated by the commissioner of correctional services. The said community service shall be at **four hours per day between eight and twelve noon for two days in the week only.**”

[4] The practical effect of the amendment was that the original sentence of 4 hours by 7 days per week community service for a period of 1 year as from the 28 May 2008 was drastically reduced to the performance of community service of 4 hours by 2 days per week for a period of 1 year retrospectively from the 28th May 2008.

[5] In a letter dated the 10th July 2008 addressed to the registrar, Mr K. M. Lalbahadur, the regional court president wrote:

“The Acting Regional Court Magistrate at Bloemfontein, Ms R M Sepato convicted the above Accused on 27th February 2008. The matter was then postponed to 28th May 2008 for sentence. The Accused was duly sentenced on the said day. However on 30th May 2008 the Accused was recalled to court and re-sentenced on the same matter.

Mr. M I Menong who is Ms Sepato’s mentor is of the view that this procedure is indeed flawed and as such after the Accused was sentenced the Presiding Officer was *functus officio* and as such the sentence imposed on the 30th May 2008 is not a competent one. I attach hereto Mr Mernong’s memo to Ms Sepato and her reply thereto.

Under the circumstances kindly have the matter placed before a reviewing Judge to have the sentence set aside and the matter referred back to the said Magistrate to sentence the Accused properly.”

- [6] In paragraph 3 of the memorandum he addressed to Ms Sepato on the 24th June 2008, Mr Menong, the regional court magistrate, expressed the view that the adjustment which the trial magistrate effected on the 30 May 2008 went beyond the powers which the court has in terms of section 298, Criminal Procedure Act No. 51 of 1977 to correct errors.
- [7] In paragraph 3 of the memorandum she wrote on the 9th July 2008 in response to Mr Menong’s memorandum, Ms Sepato explained that she acted in terms of section 298 to correct the sentence. What transpired in the court *a quo* on the 30th May 2008 is recorded as “sentence amendment”. This heading, in my view, does not correctly reflect the substantive nature of what really happened on the day in question. The trial magistrate purported to correct the sentence it previously imposed on the accused.

However, the court did more than just correcting the sentence. It effectively replaced the original sentence with a completely different and a new sentence. This was impermissible. It was indeed incompetent for the court to do so. The substantial reduction of the sentence from 7 days per week to 2 days cannot convincingly be described or regarded as a corrective exercise.

- [8] Such a drastic alteration cannot be seen as a correction purely intended to clarify the duration of the community service as the learned magistrate later explained. The thrust of the whole exercise was to drastically reduce the sentence. The trial court had no powers to reconsider its own decision as it did. The court was *functus officio* and could not proceed the way it did, even if it was prompted to do so by the subsequent realisation that the sentence it imposed on the accused in the first place was too burdensome or cumbersome regard being had to the fact that he lived at Botshabelo but had to perform such community service in Bloemfontein far away from his residence. I am not certain as to why the accused was not ordered to performed community service where he lived. It

is certainly undesirable for an offender to incur an expense by travelling from one town to another town far away for the purpose of serving a sentence.

[9] Where a magistrate is troubled by the pangs of her conscience because after imposing the sentence, she feels the sentence was too onerous, the correct procedure is to refer the case to relevant High Court on special review. The referral must contain reasons why the unwanted order was made in the first place, the reasons why such order is subsequently considered too onerous or disproportionate to the crime and the alternative new order proposed to replace the old order. If the review judges are satisfied with the motivation given by the magistrate then they may nullify the order concerned and substitute it with such order as they may deem appropriate in the circumstances.

[10] Section 298, Act No. 51 of 1977 provides that when a wrong sentence is imposed by mistake, the court may amend the sentence before or immediately after it is recorded. Ideally the amendment has to be done while the court is still on the bench. As to the prerequisite and the

construction of the section, see Du Toit *et al*: Commentary on the Criminal Procedure Act at 28-53/4 and the authorities there cited.

“The section cannot be used by the court to substitute another sentence for the original one, or to set aside the proceedings related to sentence. **R v PHIKE** 1953 (1) SA 591 (O) 592B; **S V ZWANE & ANOTHER** 1967 (2) PH H295 (N); **DU TOIT** 178; see also Du Toit 178 – 179”

[11] In the light of the foregoing I am inclined to set aside the subsequent sentence imposed on the accused on the 20th May 2008 on the grounds that the magistrate was not competent to replace the original sentence she imposed on the accused with the subsequent sentence as she did. As regards the original sentence I am of the view that it too cannot be allowed to stand. I am inclined to set it aside on the grounds that it is financially too burdensome to the accused.

[12] Such a burdensome sentence which obliges the accused to travel a considerable distance at great expense in order to

perform community service in terms of the court order may not be easy to comply with. For instance, the accused might fail to reach the victim centre in Bloemfontein on account of one or other strike by bus drivers or taxi drivers or community boycotts of both the busses and the taxis in protest against increased bus fares or taxi fares. Such community boycotts or strikes by workers are not uncommon in our communities.

[13] In addition to the foregoing, it is not unthinkable that the accused might not be able to travel to the victim centre in Bloemfontein because he might not have the money for the necessary taxi fare or bus fare. In the course of sentencing the accused the magistrate said:

“I am informed, both in the report and by your legal representative, that you are not employed fulltime.”

Now a person who is not permanently employed would surely struggle to afford the travelling expenses. It seems to me that in the circumstances, the accused might find it difficult to comply with the court order and that his failure to

comply will expose him to further prosecution which would lead to his imprisonment, a sentence which the court below considered unsuitable in this case.

[14] In the circumstances I make the following order:

14.1 The subsequent sentence imposed on the accused on the 30th May 2008 is set aside.

14.2 The original sentence imposed on the accused on the accused on the 28th May 2008 is also set aside.

14.3 The case is remitted to the trial magistrate to sentence the accused afresh after investigating the possibility of the accused performing community service in the town where he resides.

M. H. RAMPAL, J

I concur.

G. F. WRIGHT, J

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