

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

Review No.: 943/2006

In the review between:

THE STATE

and

JACOBUS HENDRIK LUYKE

CORAM: RAMPAL, J *et* VAN ZYL, J

JUDGEMENT: RAMPAL, J

DELIVERED ON: 31 AUGUST 2006

[1] The matter came to this court by way of a special review.

On the 17th July 2006 the accused appeared in the Virginia Regional Court where he was accused of two counts of indecent assault. Before he was required to plead, the

defence and the prosecution bargained and reached a plea agreement and sentenced on the same day, the 17th July 2006 in accordance with the negotiated sentence agreement.

[2] In her referral to the registrar dated the 25th July 2006 the trial magistrate wrote in paragraph 5:

“... it appears to be irregular for the court to impose both suspended and unsuspended imprisonment terms on the accused in terms of section 276(1)(i), Act no. 51/1977.”

[3] The first charge was that the accused indecently assaulted a minor child, T.d.T. at S... in Virginia over a period of time from the year 2001 to year 2005. The state alleged that the victim was 4 years old when the accused began assaulting her indecently by inserting his fingers into her female sex organ.

[4] The second charge was that the accused indecently assaulted a minor child, B.H. at S... in Virginia during the year 2002. Here, as in the first case, the state also alleged that the accused indecently assaulted the 8 year old victim by inserting his fingers into her female sex organ.

[5] The first relevant portion of the sentence agreement in terms of section 105A stipulated that the accused be sentenced to five

years imprisonment during which he may be placed under correctional supervision by the commissioner and that after his release the accused had to undergo specified therapeutic programmes. Vide paragraph 1, Annexure J4.

[6] The second relevant portion of the sentence agreement in terms of section 105A stipulated in paragraph 3 thereof as follows:

“... And a further six (6) years imprisonment suspended for a period of five (5) years on the following conditions.”

The second sentence was imposed in addition to the first sentence described above.

[7] The sentence agreed upon as set out in paragraph 1 of the sentence agreement was a type of sentence as envisaged in section 276(1)(i). But the agreed sentence as set out in paragraph 3 of the sentence agreement was not. It is a pure species of the sentence as envisaged in section 276(1)(b). A suspended sentence has no recognised statutory orbit of its own. This is so because it is really an off-shoot of section 276(1)(b).

[8] The two sentences are quite dissimilar. For instance paragraph 3 effectively obviates the immediate jailing of the offender whereas paragraph 1 demands the immediate jailing of the offender. Put differently the former conditionally suspends the immediate imprisonment but the latter conditionally requires the immediate imprisonment of the offender. A wholly suspended

sentence is an adapted form of section 276(1)(b), which provides for punishment by way of imprisonment. So too is a correctional supervision sentence. Because correctional sentence entails a compulsory component of imprisonment, it is also an adapted form of punishment by way of imprisonment as provided for in section 276(1)(b). This is a fundamental similarity.

- [9] Since the two sentences contained in the sentencing agreement are essentially hybrids of the same punishment creature termed imprisonment, they have to be collectively and not disjointly taken into account if punishment is to be properly and permissibly imposed in terms of section 276(1)(i). So considered the composite sentence imposed in the instant case becomes 11 years imprisonment. Such a sentence is irregular because it offends the statutory provisions of section 276A(2) which underpins section 276(1)(i). This section limits the maximum punishment under section 276(1)(i) in a significant way. Where the customary hybrid of imprisonment, in other words a suspended sentence in terms of section 276(1)(b), is imposed in conjunction with the special hybrid of imprisonment in terms of section 276(1)(i) the composite jail term should not exceed the five year statutory limit. Vide Terblanche: **The Guide to Sentencing in South Africa**, 1999 edition, page 288 paragraph 9.2. Therefore the subsequent realisation of the magistrate that the sentence she imposed appeared to be irregular was indeed

correct.

[10] Section 276A(2), Act No. 51/1977 provides as follows:

- °(2) Punishment shall only be imposed under section 276(1)
- (i) –
- (a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and
- (b) for a fixed period not exceeding five years.”

[11] In **S v SLABBERT** 1998 (1) SACR 646 SCA at 647h to 648e, Schultz JA authoritatively outlined the correct legal position of section 276A(2) read with section 276(1)(i). He said:

°The concluding words quoted from (a) and (b) appear to be both clear and peremptory. Punishment (meaning imprisonment) under the subsection shall not exceed five years. For this reason Kriek JP held in *S v Randell* 1995 (1) SACR 403 (NC) that a sentence of six years’ imprisonment plus four years’ imprisonment subject to s 276(1)(i) was incompetent. The objection was not the adding together of the two forms of imprisonment, but the total of 10 years. I agree with the decision.

The difference in the case before us is that the two years added to the five is wholly suspended. Does that make a difference? It has been emphasised repeatedly, in a variety of contexts, that a suspended sentence of imprisonment is, nonetheless, a sentence of imprisonment. In *Fega v Dönges*

NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) the Minister of the Interior was entitled to deem as an undesirable inhabitant of the Union one who 'has been sentenced to imprisonment'. The sentences of the appellants had been wholly suspended and it was argued that what the legislation contemplated was 'actual and not merely potential imprisonment' (at 657E-F). This argument was rejected, Centlivres JA saying (at 657H-658A):

... a sentence of imprisonment, the whole of which is suspended on a specified condition, is as much a sentence of imprisonment as a sentence of imprisonment none of which is suspended. It is true that the sentence cannot be enforced unless the condition is breached but it remains in force and can be carried into execution if during the period of its suspension the *accused* breaches the condition.'

In a different context it has been held that a suspended sentence is not something 'tacked on' to an unsuspended sentence. The suspended part is not to be viewed as if it will not be served. It is part of the whole sentence and it is the whole that should be appropriate, before consideration is given to suspension of a part. See particularly *S v Setnoboko* 1981 (3) SA 553 (O) at 556E-F and *S v Labuschagne* and 19 *Other Cases* 1990 (1) SACR 313 (E) at 315f-g.

The result is that the additional two years is also imprisonment, which means that the sentence is one or (should be of) seven years. If the magistrate was on the mind that only five years 'counted' in deciding whether he should act in terms of s 276A(2)(a), then he misdirected himself. In any

event he erred in imposing a sentence of seven years for one offence whilst purporting to act under s 276(1)(i) – contrary to the express terms of s 276A(2)(b). Therefore the entire sentence must be set aside.”

[12] Although the accused face two counts of indecent assault in the instant case, it was agreed *inter partes* that the two counts should be taken together for the purposes of sentence. It was probably the number of the charges which prompted the state to insist on the additional but suspended sentence of six years. It was probably felt by all concerned that the first sentence alone as set out in paragraph 1 of the sentence agreement was disproportionate to the gravity of the two charges. The court was then asked to take the two charges together for the purpose of sentence. In retrospect this appears to have been the cause of the present dilemma. In the end the court erred in imposing a composite sentence of 11 years imprisonment for “one offence” whilst porting to act in terms of section 276(1)(i). In doing so the express provisions of section 276A(2) were violated.

[13] In the light of the foregoing irregularity I am not satisfied that the proceedings in the court below were indeed in accordance with justice. Therefore the entire sentence and indeed the conviction itself have to be set aside and the matter remitted to the regional court.

[14] Considering that the plea of guilty and the agreed sentence contained in such an agreement are interrelated to one another, it can and probably will cause an injustice to the accused should only the sentences be set aside and the convictions be allowed to stand. Should the prosecutor and the accused not be able to agree on a new sentence, the accused will still be bound by the plea of guilty. This will obviously cause an injustice to the accused. I therefore consider it necessary and appropriate that both the conviction and the sentences be set aside and that the matter be referred back to the regional court to be heard *de novo*.

[15] I may add that I am of the view that the prohibition against entering into a new plea and sentence agreement as contained in section 105A(10)(b) will not be applicable when this matter is heard *de novo*, because in this instance the parties have not withdrawn from the agreement as provided for in section 105A(9)(d).

[16] As I near the end, I find it appropriate to conclude with the following passage per Schutz JA in **S v SLABBERT** *supra* at 648 f – g.

i°I understand what the magistrate was trying to do – to sentence the appellant to the full five years permissible under

s 276A(2) with its prospect of amelioration by the Commissioner, whilst having a further two years without a direct prospect of amelioration hang over her head as a warning. All I need say is that the legislation does not permit such a course.”

[17] Accordingly I make the following order:

- 17.1 The convictions and the sentences are set aside.
- 17.2 The case is remitted to the regional court to be heard *de novo*.

M.H. RAMPAL, J

I concur.

C. VAN ZYL, J

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