



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

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	YES

High Court case no: **R67/2024**

Magistrate's serial no: **11/2024**

Case no: **387/2023**

In the matter between:

THE STATE

and

NOMATHEMBA MARIA SANI

Accused

Coram: JP DAFFUE et I VAN RHYN JJ

Judgment by: DAFFUE, J

Delivered on: 12 DECEMBER 2024

Summary: In a special review in terms of section 304 of the Criminal Procedure Act 51 of 1977 the High Court reviewed and set aside a conviction due to a materially defective charge sheet, notwithstanding the accused's guilty plea. *Ex abundanti cautela* the court referred to the imposed sentence and explained that the suspension condition was impermissibly vague and would have to be amended if the conviction was in order.

ORDER

1. The conviction and sentence are reviewed and set aside.
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**SPECIAL REVIEW IN TERMS OF SECTION 304 (4) OF THE CRIMINAL
PROCEDURE ACT 51 OF 1977**

Daffue J (Van Rhyn J concurring)

[1] This is a special review in terms of s 304 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] Upon her plea of guilty of contravention of the Domestic Violence Act 116 of 1998 (the Domestic Violence Act) the accused was convicted in the Magistrates' Court for the Lejweleputswa district held at Winnie Mandela. She was sentenced to 12 (twelve) months' imprisonment wholly suspended for three years on condition that she is not convicted of 'contravening a protection order' committed during the period of suspension. After some correspondence between the learned acting senior magistrate Cummings and the presiding magistrate, the matter was sent on special review to the High Court. The learned magistrate admitted that he erred in passing the sentence as he did.

[3] The letter of senior magistrate Cummings dated 29 November 2024 reads as follows:

'1. ...

2. ...

3. I am of the view that the conviction should be set aside due to the lack of averment that the protection order was served on the accused prior to committing the offence in question.

4. I am of the view that the sentence is not in accordance with justice as the suspensive condition does not disclose an offence.

5. I thus request that the sentence be set aside and remitted to the Magistrate for sentencing afresh.

6. Alternatively, the Reviewing Judge should use its discretion and impose a suitable sentence.'

The request in respect of sentence is strange. If the conviction is set aside, the same shall apply to the sentence.

[4] It appears from the correspondence between the two magistrates that the presiding magistrate was merely informed that his sentence was not in order. Nothing was said about the conviction. Upon perusal of the documents provided to me, the following observations are recorded:

4.1 The charge sheet, which is clearly a standard document, is incorrect. The Domestic Violence Act does not contain a s 17(a) quoted in the charge sheet and relied upon by the prosecution. I accept that the prosecution sought to rely on s 17(1)(a) which stipulates that any person that 'contravenes any prohibition, condition, obligation or order imposed in terms of section 7... is guilty of an offence' and liable on conviction to be punished. Prosecutors shall ensure that the correct statutory provisions are relied upon in their charge sheets in order to prevent possible future technical defences.

4.2 The prosecution apparently relied upon the contravention of a final protection order. The reference to s 5 (pertaining to interim orders) is irrelevant as only ss 6 and 7, pertaining to the issuing of a final protection order and the prohibitions placed upon the accused in respect of such protection order respectively, are relied upon.

4.3 I accept that neither the interim, nor the final protection order was placed before the court *a quo* as these documents are not contained in the file forwarded to the High Court. It is not clear whether an interim or final order was granted on 26 May 2022. The charge sheet is confusing, not only in this regard, but the wording does not make sense. No allegation is made as to what the accused was prohibited from doing and the relevant case number is not quoted. It is alleged in the charge sheet that the order (interim or final) was served on 23 June 2022. I shall return to this aspect when I deal with the s 112(2) statement of the accused.

4.4 Whoever drafted the charge sheet did not apply their mind. It is wholly deficient and non-sensical. Apparently, unlike as averred, the protection order was never served as provided for in s 6(5)(a) of the Domestic Violence Act, read with s 6(7) and s 13(1) in particular.

[5] Having referred to the obvious problems detected in the charge sheet, I considered the guilty plea and the accused person's statement in terms of s 112(2) of the CPA. The accused was represented by a legal practitioner who made use of a

standard document. I do not have any doubt that the accused intended to and indeed pleaded guilty. However, paragraph 3 of the statement is not only incomprehensible, but also false. According to this statement an interim order was granted on 26 May 2022 and on the same day the final order was confirmed. An interim order can be confirmed, not a final order. It is unthinkable that the interim and final orders were issued on the same day. More uncertainty is caused insofar as the accused confirmed that she was present on the day of the final order, to wit 26 May 2022. When dealing with service of the protection order, she inserted the letters 'N/A' which obviously could only mean 'not applicable'. However, she stated that she had been made aware of the final order and its conditions which had been explained to her in her home language. This aspect is again repeated in paragraph 6 of the statement. The accused created the impression that the presiding magistrate explained the order to her. May this be regarded as sufficient and that service of the documents may be done away with? More about this later herein.

[6] A defect in a charge sheet can be amended before judgment,¹ but once the plea has been accepted and the accused convicted, the court becomes *functus officio*. A defective charge sheet which has not been amended may be cured by evidence at the trial proving that which should have been averred.² It is also possible for an appellate court to amend a charge sheet on appeal or review, provided the court is satisfied that the defence would remain the same and the accused could not possibly be prejudiced by the amendment.³ I might have been prepared to uphold the conviction if the only defect was the reference to a wrong section of the Domestic Violence Act, especially bearing in mind the guilty plea. Unfortunately, this is not the case.

[7] It needs to be considered how and by whom a protection order should be served on a respondent. The answer lies in s 13 of the Domestic Violence Act which stipulates that service shall be effected in the prescribed manner by the clerk of the court, the sheriff or a peace officer.

[8] There is a further defect in the proceedings. The accused did not confirm in her s 112(2) statement that the final protection order was indeed served on her as provided

¹ Section 86 of the Criminal Procedure Act 51 of 1977; *S v Ndlovu* 2017(2) SACR 305 (CC).

² Section 88.

³ *S v Nedzamba* 2013(1) SACR 335 (SCA) para 20.

for in s 13(1). The purpose of service is to inform the addressee of the contents of the documents and the consequences in the event of non-compliance. In order to consider whether this technical defect could possibly be excused and the conviction be confirmed, I was initially inclined to accept that the accused had been duly warned by the magistrate who granted the final order in her presence. Who could have explained it better, I initially thought, than the presiding magistrate who did it in her home language? This may be a trivial issue, but if the conviction is confirmed, a dangerous precedent would be set that might lead to a miscarriage of justice in future. The prosecutor, the defence attorney and the learned magistrate should ensure that the interests of justice are properly served. Both legal practitioners are admonished to prepare sensible and legally sound documents for presentation to a court of law. Mistakes like those made in this case should be avoided.

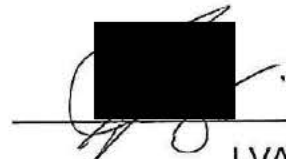
[9] Insofar as the conviction stands to be reviewed and set aside, it is unnecessary to consider the sentence in any detail. However, I would neglect my duty if I do not make some remarks. A sentence of 12 (twelve) months' imprisonment is not only grossly disproportionate with the offence, but the court *a quo* committed a misdirection in imposing an unacceptably vague suspension condition. The suspension condition should have referred to transgression of the relevant statutory offences. If the court *a quo* intended to suspend the sentence as it did, the sentence should have been wholly suspended for a period of 3 (three) years on condition that the accused is not convicted of contravening section 17(1)(a) of the Domestic Violence Act 116 of 1998, read with sections 5, 6 and 7 thereof, committed during the period of suspension.

[10] Therefore, the following order is issued.

1. The conviction and sentence are reviewed and set aside.

I concur


JP DAFFUE J


I VAN RHYN J