IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REVIEW 34/25

In the matter between

THE STATE

V

MOEGAMAT ASHRAAF RAILOUN

Date of Judgment: 12 February 2025 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is a review as envisaged in section 302(1)(a)(i) of the *Criminal Procedures Act*, 1977 (Act No. 51 of 1977) (the CPA). The sentence imposed by the magistrate's court was imprisonment which exceeded a period of six months, imposed by a magistrate who held that substantive rank for a period of seven years or longer. The accused initially had legal representation but terminated the mandate of Legal Aid South Africa

before his plea. He was unrepresented during plea, conviction and sentence. The accused was convicted of two counts and sentenced to three years imprisonment. The first count related to an alleged contravention of a protection order, during which the second count arose, which was malicious damage to property wherein the accused damaged a latch and lock of the door of the room in which he ordinarily slept.

[2] One of the primary functional requirements of prosecuting on behalf of the State, as well as the responsibility to speak on behalf of the Judicia Authority of the Republic of South Africa, is to read and write with understanding. The introductory part of count 1 against the accused read as follows:

> *"The State v Moegamaat Railoun (hereinafter referred to as the accused)*
>
> *VIOLATION OF A PROTECTION ORDER*
>
> *That the accused is guilty of contravening Section 17(a) of the Act on Family Violence 116 of 1998 read with sections 1, 5, 6 and 7 of the said Act*
>
> *In that an interim protection order/protection order was granted on 18 February 2019 and at Strand whereby …"*
>
> South Africa had an Act called *Prevention of Family Violence Act,* 1993 (Act No. 133 of 1993). This Act only had 9 sections and came into operation on 1 December 1993. It did not have section 17. The substantive provisions of that Act were repealed by the *Domestic Violence Act,* 1998 (Act No. 116 of 1998) which came into operation on 15 December 1999 and has 22 sections. There is no legislation called Act on Family Violence and therefore there is no section 17(a) of the Act on Family Violence 116 of 1998 in our law. The accused could not be competently issued with a protection order, arraigned for and plead guilty to non-existent legislation. The conviction on count 1 was not in accordance with justice. Whilst technology advanced the smart way of working, including the availability of

> ‘cut and paste’ to alleviate a retyping of the same information, the professional expertise of legal experts cannot be deferred to computers, especially in the criminal justice system where like in this case, there are serious implications to the liberty of those accused of alleged criminal conduct. The old-fashioned way of those within the hierarchy of the National Prosecuting Authority in a district to consider the legal soundness of charge sheets, must remain a noble practice which stood the test of time. An inductive reading with understanding, of a charge sheet is a “MUST” for a judicial officer before whom an accused appears and pleads.

[3] The accused was a 44-year-old male who lived with his parents, a wife to whom he was married for 15 years and his 3 children. He was a qualified mechanical engineer who could not obtain and sustain employment primarily because of addiction to drugs and alcohol. He was troublesome at home when he was under the influence of drugs or alcohol. The family’s attempts to have him institutionalized for rehabilitation did not help. He came back from the institutions and fell back into drug and alcohol abuse. This led to the parents obtaining a protection order against him, simply to stop him from coming home whilst under the influence of drugs or alcohol. Otherwise, he stayed at home when he was clean of drugs and sober. Count 1 emanated from him coming home whilst under the influence of drugs or alcohol. He found the door to his room locked. He broke the latch and lock to enter the bedroom to sleep, which found count 2 of malicious damage to property, to which he pleaded guilty. He was convicted after section 112(1)(b) of the Criminal {Procedure Act, 1977 (Act No. 51 of 1977) questioning, and sentenced. In my view, the conviction on count 2 was in accordance with justice.

[4] The magistrate did not indicate that the counts were taken together for purposes of sentence and simply imposed one sentence. It is not wrong to accept that the sentence imposed was for both counts. The accused was obviously a source of heartache and physical discomfort to those whose love for him could not be doubted, to wit, parents, wife and children. Moreover, there were two previous convictions for the same offence, in September 2022 and March 2023. If regard is had to the dates that those offences

were committed and the dates of his conviction and sentence, the inescapable impression was that he also pleaded guilty in those matters. In the first he was fined R5000 or 3 months imprisonment which was wholly suspended for 5 years on condition that he was not convicted of contravention of the terms of the protection order committed during the period of suspension. In the second previous conviction he was sentenced to 6 months imprisonment wholly suspended for 5 years on condition that he was not convicted of contravention of the terms of the protection order committed during the period of suspension. The second previous conviction was committed during the period of suspension of the first. The threat of a fine or imprisonment did not deter the accused. The accused did odd jobs as a service manager at a car wash and earned about R1000 a week. He expressed remorse and indicated that at the time of his sentencing, it was his 56th day of being clean, in a long time, but that is for the period he was in custody before the plea. He made an apology to the court and to his family, especially his parents. He was prepared to continue seeking help with Netcare 24 with the object of rehabilitation.

[5] It seems to me that this is a matter where the magistrate ought to have sought the probation officer's report before sentencing. In the light of the accused's admitted abuse of drugs and alcohol, a psycho-social expert opinion would have been helpful. The damage to the latch and lock of the door may sound trivial, but the impact of the conduct of the accused on his elderly parents, wife and children surely is the source of emotional, psychological and social trauma. The harm is immeasurable even in the absence of visible bleeding, a wound or a scar to show. The magistrate did not explore these avenues. I am unable to find that the magistrate was wrong in considering direct imprisonment as a sentencing option under the circumstances. I however hold the view that this is a matter where the magistrate had to do more than just imprison. The accused and his family needed help. Section 276(1)(i) of the CPA reads as follows:

"276 Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

In *Roman v Williams NO* 1998 (1) SA 270 (CPD) at 282F-283D it was said:

"In the first instance, the Appellate Division has emphasized that correctional supervision is not intended and must not be regarded as a light sentence or 'soft option' as compared with imprisonment.

Correctional supervision is intended to provide an alternative sentencing option whereby a wrongdoer who is regarded by a court or the Commissioner to be a suitable candidate for supervision and rehabilitation may serve his punishment outside prison walls and within the community.

Like "probation' as a comparable system is referred to in the United States of America, it is a community-based punishment based on a probationary programme designed to assess and exploit the rehabilitation potential of a probationer.

However, it has been emphasized that punishment and retribution must remain firmly in place amongst its main objectives.

The essential penal elements of this correctional discipline are house arrest during specific hours each day, rehabilitational, educational or psychotherapeutic programmes, regular community service in various forms, abstinence from criminal or improper conduct and from use or abuse of alcohol and drugs.

> Lastly, of course, constant monitoring is essential for effectiveness. It stands to reason, for instance, that house arrest and monitoring will only be possible of a probationer has a fixed address and is able to keep regular hours.
>
> The success of any probationary programme aimed at rehabilitation will obviously depend on strict adherence to the supervisional conditions, which may be amended from time to time.
>
> In order to preserve its crucial penal character and, what is equally important, to retain public respect as an effective punishment and deterrent, correctional supervision must obviously be strictly administered and constantly monitored, particularly in respect of house arrest and community service programmes.
>
> The discipline understandably makes heavy demands on the probationer and placed an even heavier burden on the Commissioner's staff."

Direct imprisonment is not like some hot oven at a fast-food outlet where you simply put in something raw, and in no time something well-cooked comes out ready for consumption. In a case like this, the Commissioner for Correctional Services must be allowed to have the space to assess the accused and design a programme within and where possible even outside institutionalization and with the assistance of the community and other experts, to correct the accused. The magistrate must be the first to kick that ball towards a responsive criminal justice system, especially where a distressed family needed that response with a son, husband and father who needs serious attention. Other experts must be allowed into the sentencing to help a judicial officer, for judicial officers hold no magic wand. Where necessary, the sentence itself should also speak to continued expert intervention.

The accused was convicted and sentenced on 27 June 2024. It needs to be reiterated that it is preferable for one, especially in explaining rights, to have a copy of the applicable legislation and to read from it to guide the explanation. To drive the point

home, it is perhaps necessary to repeat the last three sentences of the presiding magistrate as they appear on the transcribed record to understand why reading the applicable provisions of the Act would have helped:

> "The court has heard submissions in your mitigation of sentence, also the aggravating submissions by the State. The court has come to the conclusion that it is an applicable sentence to three years imprisonment. If you are unhappy about the sentence, you may, within 14 days appeal to the clerk of the court. You may step down."

The magistrate did not read the rights of an accused person as set out in the law, and did not explain them to the accused as they should have been. It was a misdirection which must be understood to have contributed to the delay in the matter. The fact that the record now showed that the accused took steps to appeal the sentence, is an indicator that the accused may have pursued his rights on review within 7 days of the sentence. The matter was discovered during quality assurance by another magistrate, that it ought to have been submitted for review, and was immediately submitted on 30 January 2025. This explained why the matter only found its way to a Judge in early February 2025.

[6] The accused has been in custody for over 7 months. Remitting the matter back to the magistrate, in my view, would expose the accused to more prejudice especially as regards an expeditious finality. The period of imprisonment imposed is not long, and the sentencing as indicated, may require comprehensive and well- researched reports in order to individualise the sentence to the person of the accused before the court. Whilst I do so with some reluctance, I deem it proper to determine what an appropriate sentence should be. The general approach, which I ordinarily favour, is to remit the issue of sentence to be resolved by the trial court. For these reasons I would make the following order:

1. The conviction and sentence on count 1 is set aside.

2. The conviction on count 2 is confirmed. The sentence on count 2 is set aside and replaced with the following:

The accused is sentenced to 3 years imprisonment in terms of section 276(1)(i) of the CPA. The sentence is antedated to 27 June 2024.

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DM THULARE
JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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ED WILLE
JUDGE OF THE HIGH COURT