

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: CA & R 29/25

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

Circulate to Magistrates: YES / **NO**

In the matter between:

THE STATE

and

ALDRICH VAN ZYL

ACCUSED

Coram: Phatshoane DJP *et* Mamosebo J

Heard: In chambers.

Delivered: 22/08/2025.

Summary: *Special Review: Section 304(4) of the Criminal Procedure Act, 51 of 1977 (CPA) – Accused pleaded guilty to assault common in terms of s 112(1)(a) of the CPA – Accused subsequently charged with a contravention of a protection order and assault common emanating from the same conduct – Plead guilty in terms of s 112(2) of the CPA – Convicted and sentenced – Not duplication of convictions but double jeopardy – Globular sentence imposed – It was in the interests of justice to set aside the second conviction on assault and antedate the sentence.*

ORDER

1. The conviction and sentence in Case Number L43/2022 in respect of assault common is set aside.
 2. The accused is sentenced to a period of six months imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, 51 of 1977 for the conviction of contravening a protection order.
 3. The sentence in (2) above is antedated to 14 September 2022. This sentence has, itself, superannuated.
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JUDGMENT ON SPECIAL REVIEW

MAMOSEBO J (PHATSHOANE DJP CONCURRING)

- [1] On 29 April 2025 Mr JC Byleveld, a Magistrate in Calvinia, submitted this matter for review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (CPA), with the request that the conviction and sentence on the second count of assault common be set aside as it constitutes a duplication of the exact same charge that the accused was already convicted of and sentenced for under a different Case Number, L40/2022.
- [2] The background is necessary. The State had issued summons in a criminal case (J175) which was served by a member of the South African Police Service (SAPS) on 14 June 2022 on the accused notifying him to appear at a Periodical Court in Loeriesfontein, Calvinia, on 22 June 2022 on a charge of assault common said to have been committed on 02 April 2022. The State alleged that he

assaulted L[...] v[...] Z[...], his sister, by throwing a cup against her head, which caused an incised wound.

- [3] The accused's first appearance in Court was on 22 June 2022 under Case Number L40/2022. It appears that an Admission of Guilt (AOG) fine was fixed at R300.00, and the case was postponed to 13 July 2022 to afford him an opportunity to pay the fine. On 13 July 2022, the AOG fine was still unpaid, and the matter was postponed to 02 August 2022.

- [4] On 02 August 2022, the composition of the Court was the following: The magistrate was Mr Byleveld, the prosecutor Ms Jannetjies and for the defence, Mr Makaza. The accused pleaded guilty in terms of s 112(1)(a) of the CPA. He was sentenced to a fine of R500 or one month imprisonment, which was suspended for a period of three years on specified conditions.

- [5] On 14 September 2022, the accused appeared in the same courtroom in respect of a different Case Number, L43/2022. The composition of the court was the same as on 02 August 2022. In this instance, he was charged with the contravention of a protection order in terms of s 17(1)(a) read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act, 116 of 1998; and assault common which stems from the same incident for which he was already convicted under Case Number L40/2022. He pleaded guilty to both those counts in terms of s 112(2) of the CPA and was convicted. The Magistrate took both counts together for purposes of sentence and imposed six months imprisonment in terms of s 276(1)(i) of the CPA read with s 84F(1) (*sic*) of the Correctional Services Act, 111 of 1998. He was further sentenced to an additional six months imprisonment, conditionally suspended for a period of five years.

- [6] According to the Magistrate, it was only when the State applied to the Court seeking that the suspended sentences imposed on 02 August

2022 and on 14 September 2022 be put into operation that he realised the erroneous duplication in cases L40/2022 and L43/2022 in respect of the assault common charge. Hence the request for the review.

[7] Section 304(4) of the CPA provides:

‘If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.’

[8] It is unfortunate that the prosecutor, in drawing up the charge sheet, and the accused’s attorney, during consultation, did not pick up the duplication. There was a plea available to the accused –of *autrefois convict*, which means that he has already been convicted of the offence with which he is charged and proceeding with the same charge would amount to double jeopardy.

[9] Adv JJD Rosenberg of the Office of the Director of Public Prosecutions has provided us with a most helpful opinion in this regard, for which we thank him. Navsa JA *et Van Heerden JA in S v Whitehead and Others*¹ wrote:

‘Du Toit *et al Commentary on the Criminal Procedure Act* (service 38, 2007) at 14- 5 summarises the effect of s 83 in the following manner:

¹ 2008 (1) SACR 431 (SCA) para 33.

Section 83 authorises the inclusion in the charge-sheet of all the charges that could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of convictions. An accused may thus not object, at the beginning of the trial, to the charge-sheet or indictment on the basis that it contains a duplication of charges. Such a duplication will occur where more than one charge is supported by the same culpable fact. In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges.'

The *Whitehead* case is therefore on point.

[10] The Constitutional Court in *S v Basson*² pronounced:

'2(b) Double jeopardy

Section 35(3)(m) of the Constitution guarantees that:

"Every accused person has a right to a fair trial, which includes the right -

. . .

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."

The plea of double jeopardy, whether in the form of a previous conviction or acquittal, is

"based in English law on the maxim *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa* and this maxim is derived from the Roman law of the *exceptio rei judicatae*. A

² 2004 (1) SACR 285 (CC) paras 61 and 62.

plea of *autrefois acquit* is in fact equivalent to a plea of the *exception rei judicatae* in our law.”

The plea of double jeopardy also forms part of the English common law and was recorded by *Blackstone* as a “universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence”. The constitutional protection against double jeopardy is part of the right to a fair trial. Both the individual and the State have interests in the prevention of double jeopardy. The individual must be protected against abuse by the State and be given the benefit of a final decision in any criminal prosecution. The process of prosecution is disruptive and there must be the prospect of and timely receipt of finality in a prosecution. Moreover, an accused has a right to rely on an acquittal, when he or she has been at risk of conviction, and the accompanying right not to face further prosecutions.

Sections 106(1)(c) and (d) of the Criminal Procedure Act provide for the pleas of *autrefois convict* or *autrefois acquit*. These pleas provide the legal remedy which enables an accused to rely on his or her s 35(3)(m) right and they must accordingly be interpreted in the light of that right. The pleas are based on the common-law principles referred to above.’

- [11] Regard being had to the above principles and authorities, the accused ought not to have been prosecuted, much less convicted and sentenced for assault common under Case Number L43/2022. It follows that the conviction on the assault common under Case Number L43/2022 was not competent and therefore not in accordance with justice and stands to be set aside.
- [12] The trial court imposed a globular sentence under Case Number L43/2022. The Magistrate’s view is that even if the conviction on the assault charge is set aside, the globular sentence imposed would still

fit the crime. The Supreme Court of Appeal in *S v Rantlai*³ confirmed the undesirability of the practice of globular sentences, cautioning:

‘It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See *S v Young* 1977 (1) SA 602 (A) at 610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer, based on the peculiar facts of the case. However, our courts have on various occasions expressed some misgivings about such sentences, particularly where an accused was convicted after having pleaded not guilty, but subsequently having the conviction on some counts set aside on appeal. See *Director of Public Prosecutions, Transvaal v Phillips* 2013 (1) SACR 107 (SCA) [2011] ZASCA 192) para 27 where Petse AJA stated:

“The practice of imposing globular sentences for multiple counts is generally an undesirable one.”

See also *S v Kruger* 2012 (1) SACR 369 (SCA) ([2011] ZASCA 219) para 10.

As it is clear from *Young*, *Kruger* and *Phillips* that there is no absolute bar against imposing globular sentences, there seems to be some unanimity in our courts that, depending on the facts of each case, it can be effectively used in exceptional circumstances. See *S v Nkosi* 1965 (2) SA 414 (C) at 416C. This is because there will be circumstances where, for instance, it can be used to ameliorate the effect of sentences which individually may appear to be shockingly inappropriate. Furthermore, such a sentence may be appropriate where an accused pleaded guilty on multiple offences which are closely connected in terms of time and common facts and in respect whereof the individual sentences may, cumulatively, amount to a

³ 2018 (1) SACR 1 (SCA) paras 9 and 10.

sentence that induces a sense of shock. There may of course be other cases where such a sentence might be appropriate.’

[13] Under the circumstances, the review court is at large to consider the sentence afresh for purposes of the remaining conviction of a contravention of a protection order.⁴ The personal circumstances, the nature of the offence and the interests of the community remain the same. Of significance is the fact that the accused was sentenced on 14 September 2022 to an effective term of six months imprisonment in terms of the provisions of s 276(1)(i) of the CPA and an additional six months imprisonment, which was suspended for a period of five years.

[14] The sentence of six months imprisonment has been rendered redundant due to the effluxion of time. The latest information was sourced from the Department of Correctional Services. A copy of the form G373 of the Department under the head: Warrant for Placement under Correctional Supervision on Parole/ Release upon Expiration of Sentence was placed before us. It is recorded on the form that the accused was released on 13 March 2023 upon the expiration of the sentence. It is accordingly in the interests of justice to substitute the existing sentence of six months imprisonment suspended for five years with the following:

1. The conviction and sentence in Case Number L43/2022 in respect of assault common is set aside.
2. The accused is sentenced to a period of six months imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, 51 of 1977 for the conviction of contravening a protection order.

⁴ See for example *S v Nkomo* [2024] ZANWHC 69; 2024 (2) SACR 109 (NWM) and *S v Mainga* [2019] ZAGPJHC 523; 2020 (1) SACR 666 (GJ).

3. The sentence in (2) above is antedated to 14 September 2022. This sentence has, itself, superannuated.

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY