IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Review Number: 140017
CA&R:
Date delivered: 19/03/2014

In the matter between:

THE STATE

vs

ANATHU STUURMAN

REVIEW JUDGMENT

TSHIKI J:

[1] The accused herein pleaded guilty and was subsequently convicted of two counts which are housebreaking with intent to steal and theft as well as malicious injury to property. The presiding magistrate of Port Elizabeth sentenced the accused as follows:

> "Both counts are taken together as one for purpose [of] *sic* sentence. You are sentenced to four (4) years direct imprisonment to run concurrently with the sentence that you are currently serving. With regard to sect. 103 you are declared unfit to possess a firearm."

[2] After imposing the above sentence the magistrate realised that he had exceeded the jurisdiction of the Magistrate's Court of three years imprisonment by imposing a four year term on the accused. He now requests this Court to set aside the sentence to enable him to impose a fresh competent sentence. Alternatively, that this Court should sentence the accused to three years imprisonment.

[3] I agree that the magistrate by sentencing the accused to four years imprisonment, both counts having been treated as one for the purpose of sentence, had exceeded his penal jurisdictional limit of three years imprisonment which may be imposed by the district court magistrate. This is so in terms of section 92 of the Magistrate's Court Act 32 of 1944, as amended.

[4] The powers of the review Court in terms of section 304(2) (c) (iv) are unusually wide in nature. Apart from the explicit powers of confirmation, amendment or setting aside of the sentences, as well as orders and convictions of magistrates' Courts, the reviewing Court may, where the proceedings were not in accordance with justice, impose the sentence which the magistrate's court should have imposed. (***S v Adaba; S v Ngeme; S v Van Wyk*** 1992(2) SACR 325 (T)).

[5] In this case, it seems to me that the magistrate was not aware of the error that he had committed until some days after he had sentenced the accused. The record shows that the accused was sentenced on the 11th February 2014 and the letter forwarding the record for "special review" is dated the 20th February 2014.

[6] For the reasons that will appear in the paragraphs to follow the magistrate should never have imposed the sentence in excess of his jurisdiction in the first place.

[7] It seems to me that errors such as these have their genesis from the tendency by most magistrates, when sentencing the accused convicted of more than one offence, to impose a globular sentence wherein such offences will be treated as one

for the purposes of sentence. This form of sentencing is not desirable and should be discouraged especially where the accused has been convicted of different offences. In his letter accompanying the record of the proceedings the learned magistrate says: "would you please submit the enclosed records to the Honourable Judge as a special review, due to the fact that I exceeded my penal jurisdiction by sentencing the accused to four years imprisonment instead of three years which was my original intention if the [Court] sic were not taken together two years on each counts."

[8] My view is that the preferred approach is to impose a separate sentence for each count of which the accused has been convicted. Once this approach is considered there can be no errors similar to the one under discussion. In order to ameliorate the cumulative effect of those sentences on the accused which could result in the sentences being excessive, the sentencing Court should order the sentences to run concurrently. In ***S v Chawasira*** 1991(1) SACR 551 (ZHC) at 551 f-g Smith J held that "where an accused is convicted of two or more offences it is preferable that he should be sentenced separately for each offence, especially where, as in this case, the offences were entirely different."

[9] In a vast majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a competent sentence for each offence and then by scaling down the sentences if the cumulative effect renders the total unreasonable.

[10] I have had to digress a little because I frequently receive review records where the sentences for several counts, sometimes unrelated, are always treated as one for the purposes of sentence. The result created by such problem will obviously

be that even when on appeal or review the conviction is set aside on one or some of the offences the Court would not know which sentence has been imposed for the remaining offence(s). Whatever the position is, the practice of taking counts together for the purpose of sentence is undesirable and it should be avoided and can only be resorted to in exceptional cases. (***R v Frankfort Motors (Pty) Ltd*** 1946 (OPD) 255 at 267-8; S ***v Nkosi*** 1965(2) SA 414(C) and ***S v Leshabe***; ***S v Mahlangu***; ***S v Mamele*** 1968(4) SA 576; S ***v Setlhare*** 1973(2) SA 488 (O); S ***v Van Zyl*** 1974(1) SA 313 (T) and ***S v Van der Merwe*** 1974(4) SA 523 (N). In a nutshell even where the offences were created by the same ordinance and broadly speaking, belonged to the same genus, it is preferable to impose separate sentences (***S v Van Zyl*** *supra*).

[11] In the present case, had the magistrate decided to impose a separate sentence for each count of which the accused was convicted, this record would never have been brought to this Court for special review. I do not think that there is a need to remit the record back to the magistrate for the purposes of sentence. I am of the view that doing so would not be in the interests of justice because all the factors that were taken into account by the trial Court form part of the record herein. For that reason, I will impose the sentence which ought to have been imposed by the trial Court.

[12] In the result, I make the following order:

[12.1] The sentence imposed by the magistrate is hereby set aside and is substituted by the following sentence:

[12.1.1] In respect of count one, the accused is sentenced to undergo two years imprisonment.

[12.1.2] In respect of count two, he is sentenced to undergo 12 months' imprisonment.

[12.2] Sentences are ordered to run concurrently and are antedated to the 11th February 2014.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Smith J:

I agree.

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J.E. SMITH
JUDGE OF THE HIGH COURT