FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 343/2010

In the matter between:

THE STATE

and

STEVEN BRAND

CORAM: RAMPAI, J *et* JORDAAN, J

JUDGEMENT: RAMPAI J

DELIVERED ON: 29 JULY 2010

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[1] The matter came to this court by way of a special review in terms of section 304(4) of the Criminal Procedure Act no 51 of 1977. It originated from the Boshoff district court.

[2] The historical background of the matter consists of three specific events. The accused, a 14-year old teenager, was arrested at Boshoff on the 17th April 2008. He stood trial with three co-accused. He was accused number 3 in the case. He was on trial in connection with five counts of burglary with intention to steal and theft.

[3] The particulars of the 4th charge were that they burglared the building known as Municipal Park situated in Fontein Street at Boshoff between the 15th to the 17th April 2008 and that they stole from Tokoloho Municipality, apparently the owner of the building, goods worth R6800,00. The relevant case number was 169/2008.

[4] The accused pleaded guilty to the aforegoing charge but not guilty to the remaining four. On 28 August 2008 he was convicted on his plea. In respect of the rest, he was acquitted. Therefore, I shall say no more about them.

[5] On the 7th November 2008 he was sentenced to 9 months jail term which was wholly suspended for five years on condition that he was not again found guilty of burglary with intention to commit a crime or theft or robbery or an attempt to commit such crimes during the period of suspension. The suspension period was supposed to expire on the 6th November 2013. He was sentenced by Mr I H J Gresse.

[6] Just over three months later, on 13 February 2009 to be precise, the teenager was once again arrested. On this occasion he was accused number 1 under case number 76/2009. His co-accused was a 16-year old teenager. He, Paul Jansen, was accused number 2. They faced a charge of burglary with intent to steal and theft.

[7] The particulars of the charge was that they broke into the house of a certain Mr Piet Morerni at Soet en Suur in the Boshoff district on 4 February 2009 where they allegedly stole certain goods as itemised on the annexure to the charge sheet. The annexure in question was not before me in these proceedings. Therefore the value of such stolen goods does not appear.

[8] Subsequent to his arrest, the accused finally appeared before Mr I H J Gresse in the Boshoff district court on the 12 March 2009. Again, he was convicted on his plea on the same day. The case was then remanded for sentence.

[9] About two months later, on the 7th May 2009, the accused was sentenced to two years imprisonment in terms of

section 276(1)(b) which he was directed to serve at the youth section of the Kimberley Correctional Facility.

[10] Approximately eight months after his second conviction, the prosecutor requisitioned him to appear in court on the 30th October 2009. On that day the accused appeared before Mr M Malangeni. The prosecutor then applied in terms of section 297(9)(a)(ii) of the Criminal Procedure Act, No. 51 of 1977 for the 9 months suspended sentence of imprisonment under case number 169/2008 to be enforced. He proved that the accused had breached the condition of suspension on the 12th March 2009, long before the period of suspension expired, through his subsequent conviction under case number 76/09. The matter was apparently remanded.

[11] On the 9th November 2009, just over 6 months after the imposition of the 2 year sentence of imprisonment, Mr Malangeni put the suspended sentence into operation but also directed that such suspended jail term of 9 months should run concurrently with the 2 year jail term which the accused was already serving.

[12] The direction of Mr Malangeni was irregular and therefore incompetent. In her letter to the deputy director of public prosecutions dated the 30th November 2009 Ms Hayes, the prosecutor concerned, alluded to this error as did Mr Mokhobo, the control magistrate in Bloemfontein, in his letter to the registrar of this division dated the 12th July 2010.

[13] The legal position is that when a subsequent sentence (2 years imprisonment) has already been imposed in respect of the conviction which constitutes a breach of a previously suspended sentence – a court which puts such previously suspended sentence into operation cannot direct that it must be served concurrently with the already imposed unsuspended sentence. Only a court which subsequently imposes the unsuspended sentence can competently direct that its sentence of direct imprisonment be concurrently served with a previously imposed but conditionally suspended sentence – **S v CHABLALA** 1998 (1) SACR 203 (OPD) at par 205a – per Ghimwala AJ, **S v MOTHIBI** 1982 (4) SA 49 at 51B – E (NCD) per Steenkamp, R and **S v BREYTENBACH** 1988 (4) SA 486 (T) at 292E – 293B per

Stafford, R. By virtue of this principle I am inclined to intervene by way of special review.

[14] Perhaps the principle sounds like Newton's law of relativity. Well some procedural rules may be extrapolated from the principle in order to elucidate it.

- In the first place there must be a previous conviction (28 August 2008) and a subsequent conviction (12 March 2009) to constitute breach of a suspensive condition. In the instant case, the second conviction, just like the first, was for burglary, so there was substantive connection between the two.
- In the second place the prosecution must apply in terms of section 297(9)(a)(ii) of the Criminal Procedure Act, No 51 of 1977 only after the subsequent conviction (12 March 2009) for an order to put into operation the suspended sentence previously imposed (28 August 2008) on the accused.
- In the third place the suspended sentence must then be put into operation on or before (but ideally before) the second sentence (for argument sake say 6th May 2009) is imposed on the accused for the second conviction (12

March 2009) which kick-started section 297(9)(a)(ii) application.

- In the fourth place the court sentencing (7 May 2009) the accused in connection with the second conviction must be appraised of the order in terms of section 297(9)(a)(ii) whereby the suspended sentence was put into operation (say on the 6th May 2009). In sentencing the accused such a court will then be entitled to take into account the fact that the previously suspended sentence imposed on the accused has now been put into operation.

[15] In the instant case no such order in terms of section 297(9)(a)(ii) existed as on the 7th May 2009 when the second sentence was imposed on the accused. The principle is that the court imposing the second sentence, that and only that court, is competent to direct that its own sentence (7 May 2009) should be served concurrently with the first sentence (28 August 2008) which was previously imposed on the accused but conditionally suspended.

[17] Where, as in the this instance, the provisions of section 297(9)(a)(ii) were invoked (9 November 2009) after the second sentence (7 May 2009) has already been imposed, the court putting such a suspended sentence into operation is not competent to direct that such sentence should be served concurrently with the second sentence the accused is already serving.

[18] By law the power to make such a direction is the absolute prerogative of the court imposing the second sentence (7 May 2009). The power of the court granting an enforcement order in terms of section 297(9)(a)(ii) is strictly confined to making such an order and nothing more.

[19] The practical effect of the principle is that, on the facts, the suspended sentence in the instant case was supposed to run separately on its own after the expiry of the current unsuspended sentence. These then are some procedural guidelines. Using the phrase in a rather loose sense, one may say the two must run consecutively should the suspended sentence be put into operation. That they can no longer run concurrently is now an accomplished fact.

[20] Accordingly, I make the following order:

20.1 The suspended sentence enforcement order of the 9th November 2009 made by the district court magistrate and the related direction that such previously imposed suspended sentence of the 28th August 2008 must run concurrently with the unsuspended sentence already imposed on the 7th May 2009 are hereby set aside.

20.2 The matter is remitted to the district magistrate court to reconsider afresh the enforcement application in terms of section 297(9)(a)(ii) of the Criminal Procedure Act, No. 51 of 1977 in accordance with the guidelines set out herein should the prosecution still pursue such an application.

M. H. RAMPAI, J

I concur.

A.F. JORDAAN, J

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