

,

THE STATE v TERMOS NVULA

THE STATE v ALFRED ALBERT OLIVIER

CASE NO. CR 162/2001 CASE

NO. CR 143/2001

2001/12/14 Silungwe, J., Maritz, J. *et*

Levy, AJ.

CRIMINAL PROCEDURE

Criminal procedure - s.297(l)(b) of CPA - competency of suspended sentences of imprisonment imposed in addition to fine with alternative of imprisonment - competent if substantive sentence is composite sentence of fine and imprisonment - not competent if substantive sentence is only fine and suspended period of imprisonment is "added" to substantive sentences - line of recent review judgments to contrary not followed.

Criminal procedure - s.297(l)(b) of CPA -purpose of s.297(l)(b) discussed - amelioration, not increase of sentence passed intended - use of term "plus further .." not introducing suspension clause in cases of compound sentences - not adding anything to such sentence.

TERMOS NVULA

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THE STATE

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ALFRED ALBERT

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OLIVIER

CASE

NO.

1550/20

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CORA

M:

SILUN

GWE,

J.,

MARI

TZ, J.

et

LEVY,

J.

Heard on:

2001-11-26

Delivered on:

2001-12-14

JUDGMENT

MARITZ, J.: Only one issue falls to be decided in these two reviews: the competency of a

court to
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accuse
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fine (or
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period and such conditions as are contemplated in s.297 (1) of the Criminal Procedure Act, 1977.

The accused in the Nvula-case was convicted of the crime of indecent assault and sentenced to N\$3 000.00 or 15 months imprisonment plus a further 15 months imprisonment which were suspended in whole on condition that the accused is not convicted of indecent assault

committed during the period of suspension. The matter came before my sister, Judge Gibson, on automatic review. In response to her query about the severity of the

sentence, the magistrate furnished reasons why the sentence was appropriate in the circumstances but, in view of a number of recent review judgments dealing with the competency of courts to impose sentences in that form, requested that the 15-month suspended sentence be set aside.

The sentence imposed in the Olivier-review for having stayed in

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beyond
the
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period
endorse
d in his
passpor
t in
contrav
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of s.
29(5) of
the
Immigr
ation
Control
Act,
1993, is
similar
in form:
"N\$2
500.00
fine of
12

months
imprisonment,
plus a further 12
months
imprisonment
suspended for 2
years on
condition that
the accused is
not convicted of
a contravention
of s.29(5) of Act
71 of 1993
committed
during the
period of
suspension."
When queried
about the
competency of
the sentence,
the magistrate
agreed on the
same basis as
the one in the
Nvula-review
that the 12

month
suspens
ded
sentenc
e
should
be set
aside.

In both
instanc
es, the
trial
magistr
ates
conced
ed their
"error"
on
account
of the
ratio in a
number
of
recent
review
judgme

nts handed down by this Court. In those judgments it was held that the imposition of a suspended sentence of imprisonment in addition to the imposition of a fine, conflicted with the provisions of s.297(l)(b) of the Criminal Code.

The reviewing Judges in the two reviews under consideration, found themselves in respectful disagreement with that line of

thought and, with leave of the acting Judge President, caused the issue to be heard by the full Court. The full Court requested counsel's arguments on the competent

ency of the sentences in the reviews under consideration but also invited argument on the following illustrative examples of sentences to stimulate both thought and debate on the issue:

"(a)

12 months imprisonment plus a further 6 months

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b) N\$

nt wholly suspended for a period of ...

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	imprisonment plus a further N\$ 600-00 or 6 months imprisonment wholly suspended for a period of ...		ent plus a further N\$ 600-00 or 6 months imprisonment wholly suspended for a period of ...
c)	N\$ 1000-00 fine or, in default of payment, 1-year imprisonment plus a further 6 months imprisonment.		ent plus a further 6 months imprisonment.
d)	N\$ 1000-00 fine or, in default of payment, 1 year imprisonment plus a further 6 months imprisonment the whole of which imprisonment	e)	N\$ 1000-00 or, in default of

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payment,
1 year
imprisonm
ent plus a
further 6
months
imprisonm
ent, 3
months of
which
imprisonm
ent are
suspended
for a
period of...

The Court is
grateful for the
submissions
made by Ms
Lategan (for the
State) and Mr
Maritz (who
appeared *amicus
curiae*). They
submitted that
the sentences in
examples (a)
and (b) are not
competent

under
s.297(l)
(b) of
the
Crimina
l
Procedu
re Act,
1977,
and, in
our
view,
for
good
reason.

The
relevan
t
provisio
ns of
section
297
reads
as
follows:

"(1)

Where a
court
convicts a
person of
any
offence,
other than
an offence
in respect
of which
any law
prescribes
a
minimum
punishme
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court may
in its
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(b) pass
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The section
empowers the
court to suspend
the whole or any
part of a
"sentence
passed". On a
careful reading
of the

subject
ion, it is
clear
that
what
the
Legislat
ure
intende
d, was
an
amelior
ation of
a
sentenc
e
passed
by
authori
sing the
suspens
ion of
the
whole
or any
part
thereof.

It did not authorise the sentencing officer to increase the severity of the sentence passed by tacking on a further sentence and to suspend the latter wholly or in part. We are glad to note that it is also the view of Mullins, J in *Sy Labuschagne and 19 Others*, 1990 (1) SACR 313 (E) at 315/-g:

"To revert to the provisions of s 297(1) (b) of the Criminal Procedure Act, there is also

judicial authority for the affirmation of the sentence issued in view of that the sentence is suspended

ended
portion of
a sentence
is not an
additional
sentence
tacked on
to a
substantiv
e
sentence,
but that it
must be
'part of
such
substantiv
e
sentence.
In other
words, the
sentence
passed for
a
particular
offence
consists of
both the
unsuspend
ed and the
suspended
portions
thereof,
and such
total
sentence
must not

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the
offence for
which the
offender is
being
punished."

We also agree
with the
approach to
sentencing
proposed by him
when the court
contemplates a
suspension of a
sentence under
section 297(l)
(b):

"The
proper
approach
of a
judicial
officer
faced with
the
determinat
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appropriat
e sentence
is firstly to
consider

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cide
whether
the
offence
calls for a
fine alone
(with the
alternative
of
imprisonm
ent), or
imprisonm
ent alone,
or both
fine and
imprisonm
ent. S v
Juta, 1988
(4) SA 926
(T) at
927H.
Having
decided on
the form
of
punishme
nt, the
magnitude
of the fine
or the
length of
imprisonm
ent, or
both, must
be
decided. I

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at the alternative period of imprisonment is the sanction which the Court regards as appropriate in the event of non-payment of the fine.

Having determined both the appropriate form of sentence, and the magnitude thereof, the magistrate may decide to suspend part of the sentence. It would in my view, however, be

improper to increase a sentence which appears appropriate at sentence and to

suspend
such
increase
merely in
order to
deter the
offender
from
repeating
his
offence."
(At 316 d-
yj

The same view,
although
differently
expressed was
echoed by
Schutz, JA *in Sv*
Slabbert, 1998 (1)
SACR 646 (SCA)
at 648d:

"In a
different
context it
has been
held that a
suspended
sentence
is not
something
'tacked on'

to
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is not to
be viewed
as if it will
not be
served. It
is part of
the whole
sentence
and it is
the whole
that
should be
appropriat
e, before
considerati
on is given
to
suspensio
n of a
part."
(Emphasis
added)

A sentence
formulated
along the lines
of the example
in paragraph (a)
supra is not
competent for
two reasons: It is
contrary to
section 297(l)(a)

because
it
aggrav
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the
substan
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sentenc
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passed
by
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adding
on a
further
sentenc
e -
albeit
suspens
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(Compa
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addition
to the
authorit
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already cited: *S v Z en Vier Ander Sake*, 1999 (1) SACR 427 (E) at 4341, *S v Oosthuizen en 'n Ander*, 1995 (1) SACR 371 (T) at 374C, *S v Allart*, 1984 (2) SA 731 (T) at 734A, *S v Olyn en Andere*, 1990(2) SA 73 (NC), *S v Setnoboko*, 1981(3) SA 553 (O) at 556E-F, *S v Nangolo*, 1995 NR 208 (HC) and the unreported judgments of this Court in *Sy Simon Teister*, CR 124/2000 dated 29 November 2000 and *S v Petrus Tjoboa and Mathias Kadumwa*, CR 18/2000 dated 13 February 2001). It also amounts to an impermissible fragmentation of the same type of sentence for the purported attainment of differing sentences

ing objectives.
This reason is
perhaps best
illustrated by the
words of
Fieldsend, CJ in *S*
v Wakiri, 1981(2)
SA 527 (ZAD) at
529F:

"I do not regard
it as the right
approach to
decide what
effective
imprisonment an
accused should
undergo and
then to add a
suspended
sentence with a
view to
dissuading him
from further
crime. The result
of this latter
course might be,
if the dissuasion
is not effective,
that an accused
will have to
serve a longer
sentence for his

offence
than it
really
deserve
s
becaus
e he
has
again
fallen
from
grace."

It is for
the
same
reasons
that the
sentenc
e in
exampl
e (b) is
also
impermiss
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(See
the
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ed
judgme

nt of this Court
in *Sy Gideon*
Xoagub, Case No.
CR 92/2001
dated 23 May
2001).

Turning to the
sentence in
example (c): It
does not contain
any suspensive
provision but
contemplates a
compound
sentence by
combining of
two types of
punishment: a
fine and a period
of imprisonment
without the
option of a fine
(see: s.276(l)
(b)and (f) of the
Criminal
Procedure Act,

1977).
There is
no
doubt
that a
sentenc
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officer
may
use
both
those
sentenc
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tools to
tailor
an
appropri
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sentenc
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of the case. Virtually every penal provision in our statutes allows for the imposition of a fine or imprisonment "or both such fine and imprisonment". Moreover, the imposition of such a composite sentence is expressly contemplated in s. 287(1) of the Criminal Code: "Whenever a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative

punishment), it may, in imposing a fine upon such person, impose, as a punishment alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction: Provided that, subject to the provisions of subject

ion (3), the
period of such
alternative
sentence of
imprisonment
shall not, either
alone or
together with
any period of
imprisonment
imposed as a
direct
punishment,
exceed the
longest period of
imprisonment
prescribed by
any law as a
punishment
(whether direct
or alternative)
for such
offence."

Such a
composite
sentence would,
to mention only
one example, be
appropriate in
cases where an
accused has
committed an

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offence
" (e.g.
dealing
in
rough
and
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the
court
deems
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that he
or she
should
be
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like
manner
and,
given

the seriousness of the offence, also be incarcerated for a period 6 months without the option of a fine.

If a composite sentence is both permissible in law and appropriate in the circumstances of the case, there is no reason in logic or in law why, in applying the approach earlier referred to on p316d-/of the *Labuschagne*-case, is it suddenly impermissible to

suspend the whole (example (d)) or part (example (e)) of the imprisonment contemplated in such a compound sentence in terms of s.297(l) (b). Such a suspension does

not add anything to the substantive composite sentence, it simply ameliorates the harshness thereof. Our law reports abound with examples of sentences imposed in that form.

Of course, when the sentencing officer deems the imposition of a fine (e.g. N\$1 000.00 or, in default of payment, one year imprisonment) as adequate punishment for

the offence, the addition of any further suspended sentence to that substantive sentence will be impermissible - and it matters not whether the sentence is tacked on in

that instance is
a further fine
(example (b)) or
a period of
imprisonment
wholly or partly
suspended. The
tacking on of
such an
additional
sentence to the
substantive
sentence will not
be competent
for the reasons
already
mentioned when
discussing
examples (a)
and (b).

We must
immediately
acknowledge
that a composite
substantive
sentence (of a

fine and
impriso
nment)
of
which
the
period
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impriso
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is
wholly
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substan
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sentenc
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fine

with the
impermissible
addition of a
period of
imprisonment
wholly or partly
suspended: e.g.
"N\$ 1000-00 fine
or, in default of
payment, 1 year
imprisonment
plus a further 6
months
imprisonment,
the whole of
which
imprisonment is
suspended for a
period of
It seems to us
that the
similarity in
formulation of
what is on the
one hand a
permissible
sentence and on

the
other
hand an
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one,
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What is
not
readily
recogni
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that the
use of
the
words
"plus a
further"
or "and
in

addition" in the formulation of a compound sentence connect two different types of sentencing tools in one substantive sentence. They have no reference to and do not introduce the suspended part of the sentence - as they do when a further sentence is impermissibly tacked on to a substantive sentence.

This Court, in a full bench judgment handed down in

the case of *S v Nangolo*,
supra, recognised the difference between the addition of suspended sentences to a substantive sentence (such as in example (a)) and the suspension of part of

a composite sentence when it said (*per* Frank, J at 210F-I):

"Because of the problems that the use of the words such as 'plus' or 'in addition' can cause when they introduce the suspended portion of the sentence, they should be avoided. As pointed out they, *prima facie*, create the impression that a second and different sentence is imposed and where nothing appears from the record to indicate that it was not intended as an additional sentence but was still part of

the one composite sentence, an appeal court will be compelled to interfere herewith.

It must be added in passing that there is a whole array of statutory offences where the enabling legislation authorises such

sentences. The most common sentence that comes to mind is where the statute prescribes a fine or imprisonment or both such fine and imprisonment. In such a case it is clearly in order to impose a fine and in addition to that imprisonment. Here different considerations apply as the sentence would obviously not be *ex facie* problematical." (Our underlining)

Whether a sentence imposed in such a form is competent or not, must

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is clear

though, is that a composite sentence of a fine and imprisonment of which the whole or part of the imprisonment is suspended, is not *per se* impermissible as the unreported review judgments of this Court in *S v Sydney Hendricks* (Case No. CR 85/2001 dated 9 May 2001), *S v Manfred Baby Tjiho* (Case No. CR109/2001 dated 2 July 2001) and others seem to suggest or, at least, are being

understood by the magistrates involved in these two reviews when they conceded their "error". The reasoning in those two unreported review cases appears to be founded

d on an incorrect understanding of the Labuschagne-case: it loses sight of the fact that Mullins, J expressly contemplated (at 316d-/of that judgment) that a sentence in the "appropriate form" that may be suspended in whole or in part, includes a compound sentence of both a fine and imprisonment.

A useful guide that less experienced sentencing officers may apply to ensure

that a suspended sentence is framed and imposed in a competent manner is, firstly to write down the sentence that he or she deems appropriate in the circumstances

of the case and
to assess if that
sentence
(whether
compound or
not) is
authorised
under the
applicable
legislation or in
common law.
Only if he or she
is satisfied that
it is and it is
appropriate to
suspend the
whole or any
part thereof, to
do so (without
adding any
further
sentence) for
the period and
on the
conditions
contemplated in
s.297 (l)(b) of

the
Crimina
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1977.

It is
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was that of a compound sentence of which a part was suspended.

There is no suggestion that they intended to add a further sentence to the substantive composite sentences when they suspended part thereof.

Furthermore, having

considered the reasons advanced by them, we are also satisfied about the adequacy of the sentences.