,

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.

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THE STATE

versus

ALFRED ALBERT

OLIVIER

CASE NO. 1550/2001

CORAM: SILUNGWE, J., MARITZ, 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 sentence a convicted accused to payment of a fine (or in default, imprisonment) plus a further period of imprisonment wholly or partially suspended for such

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 Namibia beyond the permissible period endorsed in his passport in contravention of s. 29(5) of the Immigration 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 suspended sentence should be set aside.

In both instances, the trial magistrates conceded 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 counsels' arguments on the compet

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 imprisonment wholly suspended for a period of ...

b) N$ 1000-00 fine or, in default of payment, 1 year imprisonment

mprisonment 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.

d) 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 ...

e) N$ 1000-00 fine or, in default

ault of payment, 1 year imprisonment plus a further 6 months imprisonment, 3 months of which imprisonment 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 Criminal Procedure Act, 1977, and, in our view, for good reason.

The relevant provisions 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 punishment, the court may in its discretion-

la)-

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five

years on any condition referred to in paragraph (a)(i) which the court may specify in the order; ..."

The section empowers the court to suspend the whole or any part of a "sentence passed". On a careful reading of the subsection, it is clear that what the Legislature intended, was an amelioration of a sentence passed by authorising the suspension 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 aforementioned view that the suspe

nded portion of a sentence is not an additional sentence tacked on to a substantive sentence, but that it must be 'part of such substantive sentence. In other words, the sentence passed for a particular offence consists of both the unsuspended and the suspended portions thereof, and such total sentence must not only be a component sentence, but must be appropriate for

> 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 determination of an appropriate sentence is firstly to consider the nature of the punishment imposed. In casu, he must decide

cide whether the offence calls for a fine alone (with the alternative of imprisonment), or imprisonment alone, or both fine and imprisonment. S *v Juta*, 1988 (4) SA 926 (T) at 927H. Having decided on the form of punishment, the magnitude of the fine or the length of imprisonment, or both, must be decided. I agree with the view of Van Reenen CJ in *Juta's case supra* at

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

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> 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 a nunsuspended sentence. The suspended part

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 appropriate, before consideration is given to suspension 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 aggravates the substantive sentence passed by impermissibly adding on a further sentence - albeit suspended (Compare, in addition to the authorities

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 18/2001 dated 13 February 2001). It also amounts to an impermissible fragmentation of the same type of sentence for the purported attainment of differing sentenc

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 deserves because he has again fallen from grace."

It is for the same reasons that the sentence in example (b) is also impermissible (See the unreported 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 sentencing officer may use both those sentencing tools to tailor an appropriate sentence suitable for an offender in the circumstances

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 subsect

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 "economical offence" (e.g. dealing in rough and uncut diamonds) and the court deems in appropriate that he or she should be punished in a 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$l 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 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 imprisonment) of which the period of imprisonment is wholly or partly suspended may read exactly the same as a substantive sentence of a 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 impermissible one, may have been the cause of some confusion. What is not readily recognised is 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 therefore be determined in the circumstances of each case, bearing in mind what the sentencing officer intended as a suitable substantive sentence for the offender. What 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 founde

d on an incorrect understanding of the *Labuschagne-ca.se*: 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 Criminal Procedure Act, 1977.

It is apparent to us that the form of the substantive sentence which the magistrates deemed appropriate in the circumstances

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.