

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN**

REPORTABLE

**CA&R: 98/2014
Review Number: 20140032
Date delivered: 15.4.2014**

In the matter between:

THE STATE

VS

FEZIWE MASETI

REVIEW JUDGMENT

TSHIKI J:

[1] The accused herein pleaded guilty to and was convicted of assault with intent to cause grievous bodily harm. She had assaulted the complainant one Miner Ncedo by stabbing her with a knife. She was sentenced as follows:

“To undergo eighteen (18) months imprisonment which is wholly suspended for five years on condition that accused is not convicted of assault with intent to do grievous bodily harm or murder or culpable homicide where violence is involved, committed during the period of suspension. Not to run concurrently with any sentence imposed.”

[2] It is the last portion of the sentence that has caused some controversy. On receiving the review judgment the initial reviewing Judge sought opinion from the Director of Public Prosecutions on whether the trial Court had powers to prescribe the manner in which the future suspended sentence should be implemented. Mr

Henning of the office of the Director of Public Prosecutions submitted a memorandum in his response and I am indebted to him for his helpful memorandum.

[3] The relevant portion of section 297 of the Criminal Procedure Act 51 of 1977 provides:

- “(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:
- (a) ...
 - (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; or
 - (c) ...”

[4] The question to decide herein is whether in this case it was appropriate for the magistrate to make an additional order that the suspended sentence imposed on the accused shall, if brought in operation, not be ordered to run concurrently with any sentence imposed upon the accused in the future.

[5] The wording of the entire section 297 of the CPA does not empower the Court that imposed the suspended sentence to give directions and/or conditions on how in future the suspended sentence is brought into operation. That to me would make sense in that the suspended sentence may be brought into operation by the Court which proves it against the accused which may not be the Court that had imposed it on the accused person. It is the Court which proves the existence of the previous conviction that has the competence to consider whether or not the suspended sentence should be brought into operation and if so on what conditions. In terms of section 297(6)(b)(i) of the CPA a Court which has suspended a sentence under

subsection (a) of section 297 of the CPA, whether differently constituted, may further suspend the operation of the sentence on any existing or additional conditions which the Court may deem expedient. It is also that Court which has the power to bring about its operation should the circumstances allow and the discretion of that Court should not, in my view, be fettered by the restrictions imposed by the Court which imposed the suspended sentence.

[6] In considering whether to apply the conditions of the suspended sentence or not, the Court is called upon to exercise its discretion in a judicial manner, after hearing argument and considering all the aspects of the case as they affect the accused and as they affect the community. (*Callaghan v Klackers, N.O. and Another* 1975 (2) SA 258 (E)). It follows that whether or not to put a suspended sentence into operation and conditions attendant thereof is a matter of discretion which must be exercised judiciously. If, therefore, a Court would be bound by the order of the sentencing Court that imposed the conditions upon which the suspended sentence should operate would amount to defeating the purpose of exercising the discretion. (*S v Gantsha* 1990 (2) SACR 104 (CK); *S v Olyn* 1982 (3) SA 31 (B)).

[7] For the above reasons I am in agreement with the Director of Public Prosecutions' suggestion that the sentence imposed by the magistrate should be amended by striking out the last sentence.

[8] In the circumstances, there is no justification for the magistrate to impose an order that the suspended sentence in this case should in future not run concurrently with any sentences imposed on the accused, should that be the case.

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

[9.1] The conviction and sentence are hereby confirmed but the last portion of the magistrate's sentence that reads "not to run concurrently with any sentence imposed" is hereby deleted.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

I agree.

M.J. LOWE
JUDGE OF THE HIGH COURT