IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable	Yes/No
Of Interest to other Judges	Yes/No
Circulate to Magistrates:	Yes/No

Review No. : 01/2022

In the matter between:

THE STATE

versus

MOHAU MAKUTOANE

MOTLATSI RAMAOTO

LERATO MAKUTOANE

TELLO MAKUTOANE

CORAM: I VAN RHYN, J *et* N. SNELLENBURG, AJ

JUDGMENT BY: N SNELLENBURG AJ

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 1 July 2022 at 14:00.

[1] This matter was sent for special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977, as amended ("the Act"), by the Senior Magistrate for the district of Welkom.

[2] The 4 accused persons were charged with the following offences:

2.1 Count 1: Contravening Section 4(3) (read with Section 1 and 20(1)(a)) of the Precious Metals Act, Act 37 of 2005 in that upon or about 22 September 2021 at or near Welkom in the district of Welkom the accused did unlawfully and intentionally possess an unwrought precious metal to wit 0,0015 grams of fine gold to the value of R309,50 without him being authorized thereto in terms of the provisions of the abovementioned Act; and-

2.2 Count 2: Contravening Section 49(1)(a) (read with sections 1, 10, 25 and 26) of the Immigrations Act 13 of 2002 [as amended by sec 24 of Act 13/2011] in that upon or about 22 September 2021 and or near Welkom in the district of Welkom the accused entered or remained in the Republic of South Africa in contravention of the Immigrations Act by remaining in the Republic of South Africa without a valid permit, passport or travel document.

[3] The accused persons were legally represented and pleaded guilty to the aforesaid charges. Statements were prepared and handed in on behalf of each accused person in terms of Section 112(2) of the Act.

[4] The State accepted the guilty pleas, and the accused persons were subsequently convicted and sentenced as follows:

> 'Count 1: Accused 1 - 4 each Fined R 3000 (Three Thousand) or 60 (Sixty) days imprisonment.
> Count 2: Accused 1 - 4 each Fined R 1000 (One Thousand) or 30 (Thirty) days imprisonment. In terms of section 280(2) of the Criminal Procedure Act, Act 51 of 1977 the court orders the sentences imposed in count 1 and 2 shall be served concurrently.
> In terms of section 35 of Act 51 of 1977 gold bearing material is declared forfeited to the State.'

[5] In the referral letter the Senior Magistrate records that it was confirmed that none of the accused persons could pay the fines and they thus served the imprisonment term.

[6] The Senior Magistrate requests consideration on special review by virtue thereof that:

6.1 It was incompetent for the court to order that a sentence consisting of a fine with alternative imprisonment should run concurrently with another sentence.

6.2 The relevant gold bearing material was not seized in terms of the provisions of the Criminal Procedure Act. The order should therefore be made in terms of section 21(1)(b) of the Precious Metals Act 37 of 2005 [The Precious Metals Act].

[7] Section 280(1) and (2) of the Act provides as follows with regards to cumulative or concurrent sentences:

> '(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
> (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.'

[8] With reference to section 280(2) of the Act, Du Plessis J held in *S v Manganyi*[1] that it 'is incompetent for a court to order that a sentence consisting of a fine with alternative imprisonment must run concurrently with another sentence.'.

[9] *Manganyi* was approved by the Full Court in the Division in *S v Jeffries*. In *Jeffries* the accused was convicted on two counts under the National Road Traffic Act 93 of 1996 and sentenced, on each count, to a fine of R1200 or four months' imprisonment. Both sentences were ordered to run concurrently. Kruger J, delivering the majority judgment, held that section 280(2) makes it clear that where imprisonment is imposed as an alternative to a fine, an order that sentences to run concurrently will be incompetent, because concurrent running under s 280(2) can only

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1 *S v Manganyi* 2007 (2) SACR 617 (T) [*Manganyi*].

be ordered where there are sentences of imprisonment.[2] Kruger held that it was no answer to say that the problem was solved by amending the magistrate's sentence, as the full court did in S v Mngadi 1991 (1) SACR 313 (T), to read that concurrent running only applied in respect of the sentences of imprisonment.[3]

[10] The sentences imposed by the sentencing magistrate is therefore not competent and falls foul of the provisions of section 280(2).

[11] In *Jeffries* the majority resolved issue by changing the magistrate's sentence by taking the two counts together for sentencing purposes. The amount of the fine remained the same. The Court ordered that the sentence imposed by the magistrate be deleted and substituted with an order to the effect that both counts are taken jointly for purposes of sentence; a fine of R2400 or four months' imprisonment is imposed and the order regarding deferment of payment of the fine granted by the magistrate remains in place.

[12] Whilst there could be no objection to the order on review in *Jeffries*, namely by taking the counts together for sentencing purposes, by virtue thereof that the accused was convicted on two counts under the National Road Traffic Act 93 of 1996 and sentenced, on each count, to a fine of R1200 or four months' imprisonment, that would unfortunately not be an appropriate order in this matter in light of the nature of the offences of which the accused persons were found guilty.

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2 *S v Jeffries* 2011 (2) SACR 580 (FB) [*Jeffries*] at para 12.
3 *Jeffries* supra para 12.

[13] A Court's powers on automatic review does not include the power to increase a sentence or make orders that are more onerous for the accused where the sentence imposed by the magistrate's court was a competent sentence[4]. Where the sentencing magistrate however imposed an incompetent or unlawful sentence, the Court may on automatic review impose the correct sentence, even if this would result in the sentence being increased or the order being more onerous to the accused.[5]

[14] In terms of section 304 of Act 51 of 1977 a Judge is required to certify that the proceedings are in accordance with justice, not that the proceedings are in accordance with strict law. A Court on automatic review may therefore, in the interests of justice, refuse to interfere with an incompetent judgment. See *R v Harmer* 1906 T.S. 50 at p 52; *S v Zulu* 1967 (4) SA 499 (T) at 502 D-H; *S v Nteleki* 2009 (2) SACR 323 (O) para 7 and *S v Cedars* 2010 (1) SACR 75 (GNP) at A-E. The Court can therefore confirm an incompetent sentence where circumstances does not warrant the setting aside thereof.

[15] This matter bears a striking resemblance to the circumstances that were present in *Nteleki* supra where Van Zyl J (Van der Merwe J, as he then was, concurring) concluded that it would not be in the interests of justice to set aside the incompetent sentence imposed in that matter.

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[4] *S v November and Three Similar Cases* 2006 (1) SACR 213 (C) at 219E; *S v Nteleki* 2009 (2) SACR 323 (O) para 4 [*Nteleki*].

[5] *S v Msindo* 1980 (4) SA 263 (BH) at 265 F-G.

[16] The accused persons are all Lesotho citizens who were inter alia sentenced for contravening Section 49(1)(a) of the Immigrations Act 13 of 2002. The accused persons' addresses do not appear to have been confirmed as the chargesheet in respect of each accused refers to the residential addresses only as being "Lesotho". The accused persons were convicted and sentenced on 17 January 2022 and have already served the imprisonment term. The review was only received by the Registrar on 10 May 2022. The accused persons would have been deported after completing the sentence. For the same reasons as dealt with in *Nteleki* supra, it is conceivable that considerable time, effort, inconvenience and expense to both the State and the accused persons will be involved in bringing the accused persons, as Lesotho citizens, before the court again. What will be required is 'probably cumbersome' procedures which will have to be followed in the State's endeavours to bring the accused persons back to South-Africa whilst their addresses are unknown. As Van Zyl J held in *Nteleki* supra, it is conceivable that the State may not even go to such effort and incur the accompanying expense without being successful in tracing the accused persons. For the same reasons as held in *Nteleki* supra, this can result in the matter not being brought to finality which may bring about results which neither the accused, nor the State desire and will not serve the interests of either party. In addition, whilst it may be appropriate in another matter, I do not consider it to be in the interests of justice to bring the accused back in these circumstances where they have completed the sentence as imposed.

[17] The relevant gold bearing material was not seized in terms of the provisions of the Act. The order should have been made in terms of section 21(1)(b) of the Precious Metals Act. The correction of the order in this respect only, will not affect the accused persons, nor does it result in the failure of justice.

[18] I would make the following order:

1. The convictions are confirmed.

2. The sentence, duly amended to read, "In terms of section 21(1)(b) of Act 37 of 2005 gold bearing material is declared forfeited to the State", is confirmed.

N. SNELLENBURG, AJ

I concur and it is so ordered.

I. VAN RHYN, J