

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG**

DR 242/2014

REPORTABLE

In the matter of -

THE STATE

Versus

JULIE GOVENDER

REVIEW JUDGMENT

Delivered on 4 November 2014

NDLOVU J

- [1] This matter served before me as a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA). It was submitted by the Senior Magistrate and Head of Office of the Scottburgh Magistrate's Court, KwaZulu-Natal, after detecting an apparent technical irregularity in the sentence imposed on the accused by the Additional Magistrate.¹
- [2] The accused, a 38 year old woman from Umthwalume area on the south coast of KwaZulu-Natal, appeared before the Magistrate's Court on two charges involving a contravention of section 58(1)(b) of the Marine Living

¹ The technical irregularity was detected when the senior magistrate conducted an internal administrative quality control assessment of the criminal court section, under the powers vested in him by section 12(1)(c) of the Magistrates' Courts Act 32 of 1944.

Resources Act, 1998², read with regulations 22(1)(d) and 27(1)(a), in that she unlawfully possessed 67 shad; and further that she unlawfully sold the said fish without being the holder of a prescribed permit.

[3] Upon arraignment the accused pleaded guilty to both counts and the prosecutor accepted the pleas in terms of section 112(1)(a) of the CPA. The accused was, without further ado, summarily convicted as charged. On 14 August 2014 she was sentenced to undergo six months' correctional supervision, in terms of section 276(1)(h) of the CPA, with certain specified conditions, including house arrest.

[4] The issue for consideration is whether the sentence of correctional supervision, which includes house arrest, is a competent sentence where an accused is convicted on a guilty plea in terms of section 112(1)(a) of the CPA.

[5] Section 112 (1)(a) provides:

“Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea –

“(a) The presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and –

(i) Impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in

² Act 18 of 1998

the *Gazette*; or deal with the accused otherwise in accordance with law.” (Emphasis added).

- [6] House arrest, in the context of judicial punishment, is clearly and logically a “form of detention without the option of a fine” as envisaged in section 112(1)(a) of the CPA. Thus, *a fortiori*, any type of sentence that includes house arrest may not competently be imposed following upon a conviction under section 112(1)(a).
- [7] In *S v Cedars* 2010 (1) SACR 75 (GNP) a similar scenario, as in the present case, was encountered. The accused, in that case, pleaded guilty to theft of toothbrushes valued at R130, from Checkers. The prosecutor consented to the matter being dealt with in terms of section 112(1)(a) and the accused was convicted accordingly. At that stage it transpired that the accused had two previous convictions for theft – both committed within a year prior to the commission of the current offence. In mitigation of sentence the accused revealed, amongst other things, that he had a drug problem and he requested to be subjected to a rehabilitation programme. After considering the submissions presented on sentence, including pre-sentence reports compiled by the social worker and the correctional supervision official, the Magistrate acceded to the accused’s request and sentenced him to twelve months’ correctional supervision with certain conditions, including house arrest. On review, the Court found that the sentence of correctional supervision, including house arrest, was incompetent where an accused was dealt with under section 112(1)(a). However, after referring with approval to earlier

decisions in *R v Harmer*³ and *S v Zulu*⁴, the Court concluded that “the circumstances of this case do not dictate that the sentence imposed [should] be set aside” notwithstanding the “technical irregularity”, on the basis that the Court was “satisfied that the sentence was in accordance with real and substantial justice.” Accordingly, both the conviction and sentence were confirmed.

- [8] Indeed, it is clear from the wording of section 304(1) of the CPA that, for certification by a Judge, the review proceedings under sections 302(1) and 304(4), need not strictly be in accordance with law, but they need, more importantly, to be in accordance with justice. Section 304(1) reads:

“If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate’s court in question, it appears to the judge that the proceedings are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate’s court in question.”
(Emphasised).

- [9] Whether the proceedings in question are in accordance with justice, is a matter that will depend on the facts and circumstances of a particular case. In my view, the facts and circumstances of this case are distinguishable from those in *Cedars*, above. In the present instance the accused had no previous convictions proved against her. In other words, she was treated as a first offender. She did not have any drug or alcohol problem. She did not request

³ *R v Harmer* 1906 TS 50 at 52.

⁴ *S v Zulu* 1967 (4) 499 (T) at 502D

to undergo any rehabilitation programme for whatever reason. It only appeared in the social worker's report that the accused suffered from a physically disabled condition known as *genu valgum* or commonly referred to as 'knock knees'. As a result of this condition the accused was reported to be unable to walk for a fairly long distance without support. On the basis thereof she was approved to receive a monthly State disability grant of R1320,00. In terms of the correctional supervision report, it was only certified that the accused had a fixed abode and was, therefore, 'monitorable' for the purpose of a sentence of correctional supervision, in the event of the court determining the same to be an appropriate sentence. The report did not in any way purport to recommend to the court that such sentence be imposed.

[10] In light of the above, it is unclear to me on what legal or moral basis a sentence involving house arrest was considered to be suitable and appropriate in the circumstances of this case. I further note that one of the other conditions of the sentence was that "*the accused refrains from using intoxicating substances except on medical prescription*". I am perplexed as to what purpose this particular condition sought to achieve, since the social worker's report, for instance, specifically noted that the accused did not take any alcoholic drinks. Nor was it ever suggested by anyone that the accused had any drug problem.

[11] In my view, the sentence imposed on the accused was not an appropriate sentence in the circumstances of this case and, therefore, it cannot stand. On 11 September 2014 I issued the following order, which was transmitted to the Magistrate: "*The operation of the sentence imposed on the accused is*

suspended pending review in terms of section 304(4) of Act 51 of 1977. The accused must accordingly be released from house arrest forthwith.”

[12] In the circumstances, it seems to me appropriate that the matter be remitted to the Magistrate in order for him/her to consider the question of sentence afresh, in light of this judgment. If deemed necessary, further evidence and/or submissions on sentence may be presented before the Magistrate. As it appears to have been the Magistrate's intention to impose a non-custodial sentence, there is indeed a range of suitable options in that regard, including correctional supervision, without house arrest.

[13] Accordingly, I make the following order:

1. The conviction is confirmed.
2. The sentence is set aside and the matter is remitted to the Magistrate to consider the question of sentence afresh, in light of this judgment; and, if deemed necessary, further evidence and/or submissions on sentence may be presented before the Magistrate.
3. The Magistrate shall take into account the period of house arrest already served by the accused; and the new sentence shall be antedated to 14 August 2014.

I agree: _____

NTSHANGASE J