

# CASES DECIDED

IN THE

## TRANSVAAL PROVINCIAL DIVISION.

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S.A. LAW REPORTS (1914).

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**T.P.D. PART IV.**

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REX v. FREDERICKS AND OTHERS.

1914: October 6. MASON, BRISTOWE and CURLEWIS, JJ.

*Criminal Law.—Procedure.—Minimum penalty prescribed for offence.—Imposition of fine.—Act 40 of 1914, secs. 3 and 8.—Payment by instalments.—Proportionate reduction of imprisonment.*

Where a statute prescribes a minimum period of imprisonment for an offence falling within the provisions of sec. 3 of Act 40 of 1914, the Court may by virtue of secs. 3 and 8 of that Act impose a fine or in default of payment imprisonment, but such imprisonment cannot be for a lesser period than the minimum prescribed by such statute for the offence. If the Court so imposing sentence provides by virtue of sec 3 (c) of Act 40 of 1914 for the payment of the fine in instalments, it may provide for a proportionate reduction of the sentence of imprisonment if some of the instalments are paid.

**Argument on review.**

The three accused, Fredericks, Carpenter and Cnago were convicted by the assistant resident magistrate, Johannesburg, of contravening sec. 46 of Ord. 32 of 1902 of supplying liquor to natives. The only penalty provided for a contravention of that section is one of six months' imprisonment. The magistrate, by virtue of sec. 3 of Act 40 of 1914 imposed the following penalties: Fredericks to a fine of £60 or four months' imprisonment, fine to be paid in monthly instalments of £20; failing the payment of any instalment

the accused to undergo the proportionate period of imprisonment. Carpenter received the same sentence as Fredericks, except that the instalments were made £2 10s. per week. Cnago was sentenced to a fine of £50 or six months' imprisonment.

*E. V. Adams*, for the accused (at the request of the Court): The sentences of the magistrate are wrong in law. If a portion of the fine be paid, the accused ought to undergo not the full period of imprisonment but a lesser period. The fine should be proportionate to the period of imprisonment.

*I. P. van Heerden*, for the Crown: Where a statute imposes a minimum penalty, the magistrate must impose that penalty and not a lesser one; he can however impose a fine under sec. 3 of Act 40 of 1914, but must then as an alternative impose the minimum imprisonment.

*Adams*, in reply: As to payment of a fine by instalments see Maxwell, *Interpretation of Statutes*, 3rd ed., p. 172. The fine imposed must be within the means of the accused; see also *R. v. Belling* (1911, T.P.D. 554).

MASON, J.: Three cases were sent to the Court for review, all of them being convictions under sec. 46 of Ordinance 32 of 1902. The first with which I propose to deal is that of *Rex v. Cnago*. There the magistrate imposed a sentence of £50 fine, or six months' imprisonment with hard labour. The question raised is whether the magistrate has jurisdiction to impose a fine in respect of convictions for contravention of sec. 46 of the Liquor Ordinance. We think it is quite clear that he has that authority, by virtue of secs. 3 and 8 of Act 40 of 1914. But in the other two cases, of convictions under the same section of the Liquor Ordinance, a sentence has been imposed of a fine, or in default of payment four months' imprisonment with hard labour; there is also a provision that the fine may be paid by instalments. The question we have to decide is whether, where the law fixes a minimum period of imprisonment, the magistrate can impose a less sentence of imprisonment on failure to pay the fine. Section 3, which is the one governing these two cases, provides that wherever a person is convicted before any superior or inferior Court of any offence the Court may, with certain exceptions, postpone for a period not exceeding six months the passing of sentence; or pass a sentence of imprisonment, but order its operation to be suspended; or pass sentence of a fine or in default of payment imprisonment, and

suspend the issue of a warrant committing the offender to prison in default of payment. Now, can the magistrate impose, on failure to pay a fine, less imprisonment than the minimum authorised by the law which punishes the offence? I have come to the conclusion that he has not that authority. Section 3 is coupled with sec. 8, and the latter section says that the provisions of every other law—that is, laws imposing penalties “shall be regarded as modified by this Act to the extent to which provision is made in this Act.” Now, under sec. 3, when it is provided that the magistrate may postpone for a period not exceeding six months the passing of sentence, that means, I think, the sentence authorised in respect of the particular offence of which the prisoner is convicted; and under sub-sec. (b), where the magistrate is authorised to pass sentence but to order the operation of the sentence to be suspended for a period not exceeding three years, that means the sentence authorised in respect of that particular offence. Is there any reason, then, why the same construction should not be given to sub-sec. (c)? That authorises the magistrate to pass sentence of a fine, or, in default of payment, imprisonment, but to suspend the issue of a warrant during the payment of instalments. Now I think, *prima facie*, “imprisonment” means the imprisonment authorised in respect of the particular offence of which the prisoner is convicted. If it means the imprisonment which a magistrate, or a superior Court, has jurisdiction to pass, the result might be, in certain cases, to increase the amount of punishment, in the way of imprisonment, which could be inflicted, both by an inferior and by a superior Court. That could never have been the intention. The only intention, I think, was, while not interfering generally with the powers of punishment provided by statutes in respect of particular offences, to give the magistrate jurisdiction to allow the offender the option of paying a fine—not in lieu of some other punishment, but only in lieu of the punishment provided by the statute. Under these circumstances, it seems to me that the magistrate, where he imposes a fine, and provides for imprisonment in default of payment, can only provide for that imprisonment which is authorised in respect of the particular offence. Therefore these two sentences, which provide for imprisonment for four months, are incorrect.

But that is not the only question which arises on these sentences. The next question which we have to determine is whether the magistrate, even where there is a minimum sentence, can provide for a proportionate reduction of the sentence if some of the instal-

ments of the fine are paid. Now there is no doubt that the object of sub-sec. (c) was to provide that a prisoner might serve his punishment by paying a fine, in lieu of imprisonment. If he were to serve the whole period of imprisonment, whatever proportion of the fine he paid, the object of the section would in a great measure be defeated. Where the section provides that a prisoner may pay a fine in lieu of imprisonment, and then provides that he may pay the fine in instalments, I certainly think the intention was that on the payment of instalments he might, if the sentencing authority thought proper, be discharged from imprisonment in respect of those portions of the fine which he had paid. The result of this view of the case is that we must set aside the sentence in *Fredericks' case* and *Carpenter's case*, and remit the cases to the magistrate to pass fresh sentence. But we shall instruct him that the minimum sentence of imprisonment provided by Ordinance 32 of 1902 must be imposed on failure to pay the fine, but such imprisonment may be reduced in proportion to the amount of the fine paid. If, for instance, a man pays three-fourths of a fine under the instalment system, he should be considered to have served three-fourths of the imprisonment to which he is liable. We think that principle applies both to minimum sentences, as well as to other sentences, if the magistrate, or superior Court, as the case may be, chooses to apply the principle in those particular instances. These remarks I think deal with the three cases which have been brought before us, and will enable magistrates to know with some certainty what the view of the Supreme Court is on this particular statute.

BRISTOWE, J.: I agree. This is a new and important statute, and it was certainly desirable that these points should be brought before the Court for consideration. As regards the first point, whether the period of the minimum term of imprisonment prescribed by a special statute can be reduced under the authority of sub-sec. (c) of sec. 3 of this statute, there may be other reasons for holding that the minimum period cannot be reduced; but the one which commends itself to me, and which I think is sufficient to enable me to decide the case, is afforded by reading that sub-section in connection with sec. 8, which says that "The provisions of every other law shall be regarded as modified by this Act to the extent to which provision is made by this Act," showing that the intention was that no other law should be regarded as modified or repealed:

except to the extent to which the language of this statute repeals or modifies it. If we apply sec. 8 to sub-sec. (c) of sec. 3, there is nothing to warrant the conclusion that the minimum sentence was intended to be reduced. For that reason, I think the minimum sentence under sec. 46 of the Liquor Ordinance has not been reduced. That undoubtedly, as pointed out in the course of the argument, leads to a result which may seem rather surprising—viz., that the fine may vary according to what the magistrate thinks right, but the sentence of imprisonment which is to take effect in lieu of the fine cannot be varied. That is somewhat modified by the view expressed by my brother MASON, with which I agree, that the fine imposed under sub-sec. (c) is to be regarded as compensating, to the extent to which it is paid, the term of imprisonment. Clearly if the whole fine is paid, the whole term of imprisonment is compensated. Therefore, similarly, if the fine is paid to a certain extent, the term of imprisonment ought to be reduced to a corresponding extent. Although that may not be the literal meaning of the section, I think it was the intention of the legislature, and I think we ought to hold that the term of imprisonment is reducible according to the amount of the instalments of the fine which may be paid before failure occurs to pay a particular instalment.

CURLEWIS, J.: I concur.

[G. v. P.]

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LEWIS AND SON v. THE LIQUOR LICENSING COURT OF  
LOUIS TRICHARDT AND SUTHERLAND.

1914. October 8. MASON, J.

*Liquor laws.—Licence in respect of premises opening on to public thoroughfare.—Room opening on to passage.—Sec. 34 (1) Ordinance 32 of 1902.*

Sec. 34 (1) of Ord. 32 of 1902 provided that no certificate for a general retail liquor licence or bottle liquor licence should be granted by the Licensing Court in respect of any premises . . . otherwise than in premises having the bar entrance opening in or towards a public street or thoroughfare. *Held*, that the words "public thoroughfare" included passages or lanes to which the public ordinarily resorted and had been accustomed to resort.

*L* was granted a liquor licence in respect of a room opening into a passage-way used as a public thoroughfare to certain buildings, *Held* that the room opened towards a public thoroughfare.