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G.P.A. 4 448

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

DORAH MEAVISIDE

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Webster & Nevadigath
Prokureur van Appellant

Respondent's Attorney (A.G.(Umtata)
Prokureur van Respondent

Appellant's Advocate
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op

(T. H. C.) [illegible] JJA et [illegible] JJA
[illegible] 1000 17

The Court allows the said appeal against the sentence of five years imprisonment imposed by the Court of first instance. The sentence is set aside. The matter is [illegible] to that Court to enable

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

DORAH HEAVYSIDE..... Appellant

and

THE STATE..... Respondent

Coram: Wessels, Rabie, JJ.A., et Galgut, A.J.A.

Heard: 14 November 1975

Delivered: 25 November 1975

J U D G M E N T

WESSELS, J.A.:

The appellant was convicted in the Mount Frere magistrate's court on two counts, namely (1) a contravention of section 78 of Transkei Act No. 7 of 1967 (selling liquor without a licence) and (2) a contravention of section 2(a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, No. 41 of 1971 (dealing in dagga - a prohibited dependence-producing drug).

A sentence.....2/

A sentence of a fine of R100 or 50 days imprisonment was imposed on appellant in respect of the first count. In respect of the second count the magistrate held that, having regard to the provisions of section 2A of Act No. 41 of 1971 (inserted by section 3 of Act No. 80 of 1973), he was required to impose the minimum mandatory sentence of 5 years imprisonment on appellant provided for by sub-paragraph (i) of section 2 thereof. Appellant's appeal to the Transkeian High Court against the convictions and sentences was dismissed. She was, however, granted leave by that Court to appeal to this Court against the sentence of five years imprisonment imposed upon her in respect of the second of the abovementioned two counts.

The substantial issue of law which arises for determination by this Court, concerns the question whether, or not, the abovementioned Act No. 80 of 1973, which came into operation on 6 July 1973, applied in the Transkei self-governing territory, being the Territory described

in section 2 of the Transkei Constitution Act, No. 48 of 1963 (hereinafter called the Constitution Act). The Constitution Act came into operation on 30 May 1963. It is common cause that the district of Mount Frere forms part of the Transkei in terms of section 2(b) of the Constitution Act.

Before considering the arguments of counsel before this Court, it is necessary to refer to certain relevant statutory provisions.

Section 23 of the Constitution Act (as amended by section 1 of Act No. 101 of 1967) provides for the establishment of a Legislative Assembly for the Transkei. Section 37(1)(a) thereof provides as follows:

> "Subject to the provisions of this Act the Legislative Assembly shall have the power -
> (a) to make laws not inconsistent with this Act in relation to all matters appearing in part B of the First Schedule to this Act;"

Section 37(3) of the Constitution Act provides as follows:

> "No law made after the commencement of this Act (including any Act of Parliament or Ordinance of a Provincial Council, but excluding a law made by the Legislative Assembly or any such Act or Ordinance as is referred to in sub-paragraph (ii) or (iii) of paragraph (a) of sub-section (1) of section fifty-two) which relates to any matter referred to in sub-section (1) shall apply in the Transkei or in relation to any citizen of the Transkei in respect of which the Legislative Assembly is empowered to make laws in so far as that matter is concerned."

Part B of the First Schedule to the Constitution Act originally provided for 24 matters in respect of which the Legislative Assembly had legislative power in terms of section 37 of the Constitution Act. Subsequently, in terms of the provisions of section 38 thereof, the legislative power of the Assembly was extended by the addition of further matters to Part B of the First Schedule. One of those matters (item 26) reads as follows:

"All health.....5/

> "All health matters inclusive of hospitalization of citizens of the Transkei in any district mentioned in Section 2 of this Act but not within any area in the district of Matatiele or Port St. Johns which is not a Bantu area."

The item in question was added by Proclamation R259 of 1972, which came into effect on 1 April 1973, i.e., some three months prior to the coming into operation of Act No. 80 of 1973 which, as I have already indicated, by section 3 thereof, amended the aforesaid Act No. 41 of 1971 by the insertion therein of section 2A, which reads as follows:

> "2A. (1) Notwithstanding anything to the contrary in any law contained, no person shall on conviction for a contravention of a provision of section 2(a) or (c) be dealt with under section 352 of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), or the corresponding provision of the Criminal Procedure Ordinance, 1963 (Ordinance No. 34 of 1963), of the territory, if such person was at the time of the commission of that contravention eighteen years of age or older.

(2) The provisions.....6/

> (2) The provisions of subsection (1) shall apply in respect of any person who is convicted of a contravention of a provision referred to in subsection (1) on or after the date of commencement of the Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act, 1973, irrespective of whether or not the contravention in question was committed before such date."

According to its long title, Act No. 80 of 1973 (the Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act) was introduced to amend Act No. 41 of 1971, inter alia, "so as to prohibit the suspension or postponement of a sentence, or a discharge with a caution or reprimand, in certain cases....."

Section 38 of the Constitution Act provides that the "legislative power in respect of all matters not appearing in the First Schedule to this Act shall remain vested in the Parliament of the Republic.....". It was common cause between counsel that Act No. 41 of 1971 was an enactment primarily intended to promote the health of the citizens of the Republic. In my opinion, this

conclusion as to its main object permits of no doubt whatsoever. If so, it follows that prior to the addition of item 26 to the First Schedule to the Constitution Act, the legislative power in respect of any matter affecting health remained vested in the Parliament of the Republic, and Act No. 41 of 1971 therefore applied in the Transkei. Upon the addition of item 26 to the First Schedule, however, the Legislative Assembly of the Transkei became empowered to make laws in relation to any matter affecting health and, thereafter, no law made by the Parliament of the Republic in relation to any such matter was of application in the Transkei.

It was contended by counsel on appellant's behalf that inasmuch as Act No. 41 of 1971 was an enactment in respect of a matter appearing in item 26 of the abovementioned First Schedule to the Constitution Act, it followed that the amending legislation in question (Act No. 80

of 1973).....8/

of 1973) must likewise be regarded as being an enactment in respect of a matter appearing in the First Schedule.

The Court a quo assumed for the purposes of its judgment that Act No. 41 of 1971 was "a legislative enactment affecting health". I have already indicated above that it undoubtedly is such an enactment. The further question, namely, whether Act No. 80 of 1973 was such an enactment, was answered in the negative by the Court a quo. The reasoning which led to this conclusion appears from the following passage in the judgment of the Court a quo:

> " The provisions of Sec. 3 of Act 80 of 1973 amounted in effect to an amendment of the Criminal Procedure Act No. 56 of 1955 in that there was added to the list of prescribed sentences which the courts could not suspend even partially, sentences imposed in terms of Sec. 2(i) and (ii) of Act 41 of 1971. It is not disputed that the Criminal Procedure Act from which the courts derive their power to suspend sentences

> in certain circumstances is in force in the Transkei, nor is it contended that any provisions of the Transkei Constitution Act gives the Transkeian Legislative Assembly the power to enact legislation in respect of criminal procedure. In this connection I do not construe Item 4 of Part B of Schedule 1 as giving the Transkei Parliament such powers nor was such construction contended for by Mr. Rogers."

It was contended on behalf of the State that the power of a court in the Transkei to order suspension of a part of a prescribed compulsory sentence is derived from the provisions of section 352 of Act No. 56 of 1955, an enactment of the Parliament of the Republic which, in terms of section 65(1) of the Constitution Act, was to continue in force in the Transkei "until repealed or amended by the competent authority". It was further contended, rightly so in my opinion, that up to the present time the Parliament of the Republic was the "competent authority" with exclusive power to repeal or amend Act No. 56 of 1955. It would follow that

legislation passed by the Parliament of the Republic amending the aforesaid Act would be of application in the Transkei. In developing his argument on this aspect of the appeal, counsel for the State contended that section 2A of Act No. 41 of 1971 (inserted by Act No. 80 of 1973) extended the ambit of matters which could not be dealt with in terms of section 352(2)(a) of Act No. 56 of 1955. In effect, therefore, section 2A served to amend the aforesaid section 352(2)(a).

The alternative argument was that, in sentencing convicted persons, courts in the Transkei were bound to follow the procedure prescribed in regard thereto in enactments of the Parliament of the Republic. Inasmuch as section 2A did not have the effect of amending the prescribed sentences referred to in section 2 of Act No. 41 of 1971, but merely prescribed the procedure to be followed by the sentencing authority in sentencing a

convicted person, it would follow that the court is bound to follow the prescribed procedural directions provided for by section 352(2)(a).

A final alternative submission was that, notwithstanding the main object of Act No. 41 of 1971 (i.e., to legislate with reference to a matter affecting health) the provisions of sections 2 and 2A thereof did not relate to any matter appearing in the above-quoted item 26 in the First Schedule to the Constitution Act. It was submitted that the power of the Transkei Legislative Assembly to make a law which, inter alia, contains provisions imposing punishment for the purpose of enforcing such law, derives from the provisions of item 23 of the First Schedule, which reads as follows:

> "The imposition of punishment for enforcing any law of the Legislative Assembly made in relation to any matter coming within any of the classes of subjects enumerated in this Schedule." (My underlining).

If I understood counsel correctly, it would follow that the Legislative Assembly's power to legislate in respect of punishment for the purpose of law enforcement is restricted to laws made by that Assembly. It would follow then that any enactment of the Parliament of the Republic which continued in force in the Transkei by reason of the provisions of section 65 of the Constitution Act, and which related to a matter appearing in the First Schedule could be amended by the Assembly, provided that such amending legislation did not relate to any provisions in the enactment in question imposing punishment for the purpose of enforcing that law. In this regard counsel referred to the fact that Act No. 41 of 1971 did not relate exclusively to matters affecting health. According to its long title it was an act to provide, inter alia, for "the amendment of.....the Criminal Procedure Act, 1955". Section 62 thereof amended Act No. 56 of 1955 by substituting a new section for the then existing section 341.

I propose to deal first with counsel's second alternative argument, which I have summarised in the immediately preceding paragraph. Counsel's argument derives a measure of support from what was stated by Cloete, J., in S. v. Ndewanana, 1966(3) S.A. 312(E) at p. 315A - E. In my opinion, however, regard must be had to the very wide legislative power granted to the Transkei Legislative Assembly by section 37(1) of the Constitution Act. In terms thereof power is granted

not only "to make laws.....in relation to all matters appearing in Part B of the First Schedule",

but also "to provide in any such law for the amendment or repeal of any law, including any Act of Parliament, in so far as it relates to any such matter and applies in the Transkei....." (Section 37(1)(b)).

There is, in my opinion, no warrant whatsoever for holding that the power, e.g., to amend an Act of the Parliament of the Republic which applies in the Transkei, does not include the power to amend a provision thereof which

imposes.....14/

imposes a punishment for the purpose of enforcing that law. When any Act of the Parliament of the Republic applying in the Transkei relates to a matter appearing in Part B of the First Schedule, the competent authority to amend that Act is the Transkei Legislative Assembly, and it alone would have the power to amend, e.g., provisions relating to the imposition of punishment for the purpose of enforcing that law. This power would clearly not be derived from the provisions of item 23 of the First Schedule, but from the provisions of section 37(1)(b) of the Constitution Act. A power to legislate in respect of any matter appearing in the First Schedule would, in my opinion, necessarily include the power to provide for the imposition of punishment for the purpose of enforcing the law in question. I am in respectful agreement with the opinion ventured by Van den Heever, J., in S. v. Moagaesi en 'n Ander, 1974(1) S.A. 137 (N.C.) at p. 141D, that a corresponding provision contained in the

Act.....15/

Act which established the self-governing territory of Bophuthatswana was included ex abundante cautela. It could never have been the intention of the Legislature that the Transkei Legislative Assembly should not have power to amend penal provisions in an Act of the Parliament of the Republic which applies in the Transkei and which relates to a matter in respect of which it alone has the power to legislate. I conclude, therefore, that at the time Act No. 80 of 1973 was promulgated, the Transkei Legislative Assembly had exclusive power to repeal or amend the provisions of Act No. 41 of 1971. It is not necessary to deal in this judgment with counsel's submission that part of the last-mentioned Act (viz. section 62 thereof) effects an amendment of the Criminal Procedure Act, No. 56 of 1955. It may well be so that, if an Act of Parliament of the Republic, which applies in the Transkei, deals in part with a matter appearing in

the First Schedule to the Constitution Act, and in part with a matter not appearing therein, the power of the Transkei Legislative Assembly to repeal or amend the first-mentioned Act would be restricted to that part of it which deals with a matter appearing in the First Schedule. As to the remainder of the Act, the Parliament of the Republic may well retain its legislative power. It would seem to follow, in my opinion, that the Transkei Legislative Assembly would have legislative competence in respect of any provisions in any Act of the Parliament of the Republic which applies in the Transkei if such provision deals with a matter appearing in the First Schedule, notwithstanding the fact that the remainder of the Act deals with a matter not appearing therein.

I next deal with the submission made by counsel appearing on behalf of the State that section 2A of Act No. 80 of 1973, though purporting to be an amendment of

Act No. 41 of 1971, in effect amended section 352 of the Criminal Procedure Act, 1955 (Act No. 56 of 1955). It was submitted that section 2A did not have the effect of amending the provisions of section 2 of Act No. 41 of 1971, but merely prescribed the procedure to be followed by the sentencing authority in imposing the punishment provided for therein. In my opinion, however, section 2A was neither intended to amend section 352 of the Criminal Procedure Act, nor did it in effect result in any amendment thereof. If there were to have been any doubt as to the Legislature's intention in enacting section 2A, reference to the long title of Act No. 80 of 1973 reveals that an amendment of the Criminal Procedure Act was not contemplated. (cf. the long title of Act No. 41 of 1971). The effect of section 2A is, in my opinion, to qualify the powers of the sentencing authority to impose a sentence in terms of section 2 of Act No. 41 of 1971. As I have already indicated above, at the time Act

No. 80 of 1973 was promulgated, the Transkei Legislative Assembly had exclusive power to amend section 2 of Act No. 41 of 1971. Such a power would in my opinion, include the power to prescribe directions to the sentencing officer bearing upon the imposition of punishment. It follows that section 2A of Act No. 80 of 1973 did not apply in the Transkei.

In my opinion, the appellant's appeal against the sentence of five years imprisonment imposed by the court of first instance succeeds. The sentence is, accordingly, set aside. The matter is remitted to that court to enable the magistrate to ascertain such information as will enable him to determine an appropriate punishment and thereafter to impose a sentence on the appellant.

Rabie, J.A. }
Galgut, A.J.A. } concur