REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO. 286/97 In the matter between

ILZE CORLIA SLABBERT

APPELLANT

AND

THE STATE

RESPONDENT

BEFORE: VAN HEERDEN, NIENABER and SCHUTZ JJA

HEARD: 26 FEBRUARY 1998

DELIVERED: 3 MARCH 1998

SCHUTZ JA

JUDGMENT

SCHUTZJA:

Upon a plea of guilty the appellant was convicted of the theft of R 101 537-71 from her employer. The learned regional magistrate presiding sentenced her to five years imprisonment, to which s 276 (1) (i) of the Criminal Procedure Act 51 of 1977 ("the Act") would apply. This means that the Commissioner for Correctional Services ("the Commissioner") has a discretion to release her from gaol and to place her under correctional supervision. In addition to the five years, the magistrate sentenced her to two years imprisonment, conditionally suspended for five years.

The additional sentence has led to this appeal, because, after an

unsuccessful appeal to the Cape Provincial Division, a petition to the Chief Justice led to leave being granted, but only on the question whether the composite sentence imposed is a competent one.

The provisions of the Act that are relevant are the following. S 276, which is headed "Nature of punishments", reads in part:

"(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely -

(1) ...

(2) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286 B(l);

(3) periodical imprisonment;

(h) correctional supervision;

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

(4) ...

(5) Notwithstanding anything to the contrary in any law

contained, the provisions of subsection (1) shall not be construed as prohibiting the court -

(6) from imposing imprisonment together with correctional supervision; or

(7) from imposing the punishment referred to in subsection (1) (h) or (i) in respect of any offence."

S 276 A (2) provides:

"(2) Punishment shall only be imposed under section 276 (1)

(i)-

(8) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(9) for a fixed period not exceeding five years."

The concluding words quoted from (a) and (b) appear to be both clear and peremptory. Punishment (meaning imprisonment) under the subsection shall not exceed five years. For this reason Kriek JP held in S v Randell 1995 (1) SACK 403 (NC) that a sentence of six years imprisonment plus four years imprisonment subject to s 276 (1) (i) was

incompetent. The objectionability was not the adding together of the two forms of imprisonment, but the total often years. I agree with the decision.

The difference in the case before us is that the two years added to the five is wholly suspended. Does that make a difference? It has been emphasized repeatedly, in a variety of contexts, that a suspended sentence of imprisonment is, nonetheless, a sentence of imprisonment. In Jaga v Donges NO and Another: Bhana v Donges NO and Another 1950 (4) SA 653 (A) the Minister of the Interior was entitled to deem as an undesirable inhabitant of the Union one who "has been sentenced to imprisonment."

The sentences of the appellants had been wholly suspended and it was argued that what the legislation contemplated was "actual and not merely potential imprisonment" (at 657 E - F). This argument was rejected, Centlivres JA saying (at 657 if - 658 A):

"… a sentence of imprisonment, the whole of which is

> suspended on a specified condition, is as much a sentence of imprisonment as a sentence of imprisonment none of which is suspended. It is true that the sentence cannot be enforced unless the condition is breached but it remains in force and can be carried into execution if during the period of its suspension the accused breaches the condition."

In a different context it has been held that a suspended sentence is not something "tacked on" to an unsuspended sentence. The suspended part is not to be viewed as if it will not be served. It is part of the whole sentence and it is the whole that should be appropriate, before consideration is given to suspension of a part. See particularly S v Setnoboko 1981 (3) SA 553 (O) at 556 E - F and S v Labuschagne and 19 Other Cases 1990 (1) SACK 313 (E) at 315 f - g.

The result is that the additional two years is also imprisonment, which means that the sentence is one of seven years. If the magistrate was of the mind that only five years "counted" in deciding whether he should

act in terms of s 276 (A) (2) (a), then he misdirected himself. In any event he erred in imposing a sentence of seven years for one offence whilst purporting to act under s 276 (1) (i) - contrary to the express terms of s 276 A (2) (b). Therefore the entire sentence must be set aside.

The matter should be remitted to the magistrate for him to consider sentence afresh. I understand what the magistrate was trying to do - to sentence the appellant to the full five years permissible under s 276 A (2) with its prospect of amelioration by the Commissioner, whilst having a further two years without a direct prospect of amelioration hang over her head as a warning. All I need say is that the legislation does not permit such a course.

We were requested by the appellant's counsel to order the provision of a report such as is envisaged by s 276 A (1) (a), with a view to the possible application of s 276 (1) (h) (correctional supervision). I do not

agree that this is an appropriate case for our so ordering, as we do not in

any way wish to seem to prescribe what the magistrate should now do. He

will have to exercise his discretion afresh.

The appeal is allowed. The order of the Court a quo dismissing the appeal from the regional court against

sentence is set aside and there is substituted in its place the following order:

Die appel slaag, die vonnis word tersyde gestel en die saak word na

die streekhof terugverwys om vonnis opnuut te oorweeg nadat aan beide

die Staat en die verdediging die geleentheid gebied was om getuienis en/of

vertoe voor te le.

W P SCHUTZ JUDGE
OF APPEAL

CONCUR
VAN HEERDEN JA
NIENABER JA