# THE SUPREME COURT OF APPEAL

# OF SOUTH AFRICA

Reportable

**CASE NO. 042/2004**

**In the matter between**

**LOUIS VAN DYK** **Appellant**

**and**

**THE STATE** **Respondent**

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CORAM: STREICHER, NAVSA, NUGENT JJA
et JAFTA, PATEL AJJA

HEARD: 2 SEPTEMBER 2004

DELIVERED: 29 SEPTEMBER 2004

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Summary: Sentence – offender found in possession of 378 abalone – sentenced to 18 months' imprisonment in terms of s 276 (1)(i) of Act 57 of 1977 – whether correctional supervision could be imposed for a statutory offence if the statute in terms of which the offender was convicted did not provide for such sentence but provided for a fine or imprisonment.

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JUDGMENT

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JAFTA AJA

[1] This appeal concerns the interpretation of s 276 of the Criminal Procedure Act 51 of 1977 ('the Act'). The section provides:

'(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 –

(a) ...

(b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286 B(1);

(c) periodical imprisonment;

(d) declaration as an habitual criminal;

(e) committal to any institution established by law;

(f) a fine;

(g) ...

(h) correctional supervision;

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

(2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed –

(a) as authorising any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or

(b) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.

(3) Notwithstanding anything to the contrary in any law contained, the provisions of subsection (1) shall not be construed as prohibiting the court –

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

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

[2] The appellant, Louis van Dyk, was convicted in the magistrates' court at Hermanus on three charges of possessing and conveying 378 abalone in contravention of Regulations 9, 36 (1) and 38 (3)(b) of the regulations published on 2 September 1998 under Government Notice R1111 ('the regulations') read with s 58 (4) of the Marine Living Resources Act 18 of 1998. Regulation 96 thereof provides:

'Any person who contravenes or fails to comply with any provision of these Regulations shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.'

[3] The appellant was convicted on the basis of his plea of guilty. In his plea explanation he admitted that he was arrested on 14 April 1999 while in possession of 378 abalone which he transported in a motor vehicle. In terms of the regulations it is an offence for one person to possess more than 20 abalone and to transport more than 4 abalone in a motor vehicle.

[4] The appellant's counsel submitted before the magistrate that a sentence of correctional supervision in terms of s 276 (1)(h) was an appropriate sentence. The magistrate, quite correctly, considered himself bound by the interpretation of s 276 of the Act by the Cape High Court in *S v Daniels* 2000 (1) SACR 256 (C). In accordance with that decision correctional supervision could not be imposed for a statutory offence unless the penalty provision of that statute

provided for it as a sentencing option. Consequently the magistrate sentenced the appellant to 18 months' imprisonment in terms of s 276 (1)(i) of the Act.

[5] The appellant appealed to the Cape High Court. It was contended on his behalf that the case of *Daniels* was incorrectly decided and the High Court was urged to depart from it. After considering the decisions in *S v Strydom and another* 1994 (2) SACR 456 (T); *S v Lowis* 1997 (1) SACR 235 (T) and *S v Philander* 1997 (2) SACR 529 (C), the Cape High Court reaffirmed the ratio in the *Daniels* case. It construed s 276 (2)(a) to mean that a trial court is not authorised to impose a sentence other than the sentence prescribed by the penalty provision in a statute. The Cape High Court then dismissed the appeal but granted leave to appeal to this court.

[6] In granting leave to appeal, the court below restricted the appeal to the issue of whether or not a sentence of correctional supervision could be imposed for a statutory offence if the penalty provision of the statute did not provide for correctional supervision. The answer to this question lies in the interpretation of s 276 of the Act. But, a brief analysis of the High Courts' decisions is necessary before construing the section.

[7] In *Daniels* Knoll J (with whom Traverso J concurred) stated at 258 b-f:

'In my view, the original correctional supervision sentence of 36 months was not a competent sentence. The accused was found guilty of a statutory offence. The penal provision contained in s 50 (3) of Act 74 of 1983 reads as follows:

> "Any person convicted of any offence under this section shall be liable to a fine not exceeding R20 000,00 or imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

There is no provision in this section, nor anywhere else in the Child Care Act, for a sentence of correctional supervision in terms of s 276 (1)(h).

In *S v Strydom and Another* 1994 (2) SACR 456 (W) at 462 b-d, Cloete J held that where a statutory provision refers only to imprisonment, a fine or correctional supervision or any other sentence besides imprisonment may not be imposed.

This Court, in an unreported judgment dated 9 April 1999, in the matter of *S v Warren Oscar Abrahams*, followed the decision of *S v Strydom* (supra) *inter alia* and found, at p 8 thereof, that correctional supervision under s 276 (1)(h) of Act 51 of 1977 cannot be imposed for a statutory offence, unless the relevant statute creating the offence provides for such sentence.

Accordingly, the sentence of correctional supervision imposed should not have been imposed and, in my view, in the exercise of this Court's inherent review jurisdiction, should be set aside.'

[7] A similar approach was followed in the *Lowis* and *Philander* cases. In *Lowis* the accused was convicted of contravening s 34 (1)(b) of the South African Reserve Bank Act 90 of 1989 which provided for imprisonment only as punishment for contravening the section. The magistrate had sentenced him to 3 years' imprisonment in terms of s 276 (1)(i) of Act 51 of 1977. On appeal the accused asked for correctional supervision to be imposed. Van Dyk J (with the concurrence of McCreath J) held that where the Legislature had prescribed a sentence of imprisonment without the option of a fine for a specific offence, a

sentence of correctional supervision was not competent because it was not a sentence intended for the offence by the Legislature.

[8] In *Philander*, Conradie J (with whom Traverso J concurred) held that in the light of the decision in *Strydom*, it was doubtful whether correctional supervision could be imposed in cases where a penal provision did not provide for it as a sentencing option.

[9] I shall now deal with s 276 of the Act. The correct interpretation of the section must be determined from the context of s 276 as a whole. It is headed: 'Nature of Punishments'. Section 276 (1) lists, in general terms, various forms of punishment available for consideration and imposition by a court which has convicted a person of an offence either in terms of a particular statute or under the common law. The use of the words 'subject to' at the beginning of subsec (1) indicates that the subsection will be subservient to any provision of the common law, the Act or another statute in case of conflict (cf *S v Marwane* 1982 (3) SA 717 (A) at 747H – 748B).

[10] Subsection (2) states that no provision of the Act (thus including s 276 (1)) should be construed as authorising a court to impose a sentence in lieu of the sentence it may impose for a particular offence nor should the Act be construed as giving authority to a court with limited penal jurisdiction to impose a sentence in excess of such jurisdiction. The subsection provides further that the Act should not be interpreted as derogating from authority specially conferred by any law upon courts to impose other punishments.

[11] The interpretation process does not end with the reading of subsecs (1) and (2). One must take a step further and consider subsec (3). This subsection states that subsec (1) should not be construed as prohibiting a court from imposing correctional supervision in respect of *any* offence. Subsection (1), when read in isolation, does not purport to prohibit a court from imposing correctional supervision in respect of any offence. Subsection (3), insofar as it refers to subsection (1), would thus be meaningless if it were to be construed as referring to that subsection in isolation. In order for the reference in subsection (3) to have any meaning, it must have been intended to refer to subsection (1) as construed in accordance with the provisions of subsection (2). In other words, what subsection (3) must mean – if it is to have any meaning at all – is that the provisions of subsection (1) when construed in accordance with subsection (2) are not to be construed as prohibiting a court from imposing correctional supervision in respect of any offence. It follows that correctional supervision may, in appropriate circumstances, be imposed notwithstanding the fact that the penal provision of a particular enactment provides for other sentences, with no reference being made in such enactment to correctional supervision.

[12] The interpretation of s 276 set out in the preceding paragraph is consistent with a number of decisions of this court. See *S v E* 1992 (2) SACR 625 (A); *S v R* 1993(1) SACR 209 (A); *S v Keulder* 1994 (1) SACR 91 (A); *S v W* 1994 (1) SACR 610 (A) and *S v Siebert* 1998 (1) SACR 554 (A). In the first two cases the accused were convicted of sexual offences in contravention of s 14(1) (b) of

the Sexual Offences Act 23 of 1957. Section 22 (f) of that Act prescribed, for such offences, a sentence of 'imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment'. Notwithstanding the prescribed sentence of imprisonment, this court concluded that correctional supervision was a suitable punishment in those cases.

[13] Having found that correctional supervision is not excluded in matters such as the present one, it becomes necessary to determine whether such punishment is appropriate in this case. Ordinarily this enquiry requires the presence of a report by a probation officer dealing with the suitability of the accused as a candidate for correctional supervision. Since the magistrate held the view that correctional supervision was excluded, we were denied the benefit of such report. However, I shall assume in the appellant's favour that he is a suitable candidate for correctional supervision, and as a result there is no need for referring the matter to the magistrate to enable such report to be presented, before considering the issue of sentence afresh. Indeed, the appellant's counsel conceded that he would suffer no prejudice should such a course be undertaken.

[14] The appellant was 26 years old at the time of his conviction. He was married and had a young child. He was not employed. He made a living from subsistence fishing.

[15] He was not a first offender as he had been convicted of the same offence a month before he committed the present offences. On 10 March 1999 he was sentenced to R8 000 or 8 months' imprisonment, half of which was suspended

for 4 years on condition that he is not convicted of the same offence committed during the period of suspension. However, only one month elapsed before the appellant committed the offences he was warned not to commit for a period of four years in terms of the suspended sentence. Obviously the suspended sentence had no deterrent effect on him. The quantity of abalone found in his possession exceeded a quantity for personal consumption. As a result his counsel had to concede that it can be inferred that the appellant dealt in abalone.

[16] In the circumstances of the present case, I am satisfied that correctional supervision is not a suitable punishment. The sentence imposed by the magistrate is appropriate. Therefore, the appeal must fail.

[17] Accordingly, the appeal is dismissed.

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C N JAFTA
ACTING JUDGE OF APPEAL

STREICHER JA )
NAVSA JA )CONCUR
NUGENT JA )
PATEL AJA )