



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **R06/2023**

In the matter between:

THE STATE

and

TUKISO MASENYETSA	accused 1
TEFO RAMARUMO	accused 2
KGOTSFALANG MAKESI	accused 3
TANKI TSEPO	accused 4

CORAM: RAMDEYAL AJ et CHESIWE, J

REVIEW JUDGMENT BY: RAMDEYAL AJ

DELIVERED ON: 5 MAY 2023

- [1] The Senior Magistrate, Welkom, sent this matter on Special Review in terms of s 304 (4) of the Criminal Procedure Act¹, hereinafter referred to as the "Act". He contended that the trial magistrate committed serious irregularities. The accused were convicted and sentenced as follows:

¹ 51 of 1977

COUNT 1: Accused 1, 2 and 3: Contravening s 36 of the General Law Amendment Act, Act 62 of 1955 (Possession of Suspected Stolen Property). Each accused was sentenced to Four (4) years imprisonment. **COUNT 2:** Accused 1, 2, 3 and 4: Contravention of s 49(1)(a) of the Immigration Act 13 of 2002 (Illegal Foreigners). Each accused was sentenced to Eighteen (18) months imprisonment. The sentences in respect of both counts were ordered to run concurrently.

- [2] The Senior Magistrate pointed out that in respect of Count 1 the magistrate exceeded the penal jurisdiction of the magistrate's court which is three (3) years' imprisonment by sentencing each of the accused to a term of four (4) years' imprisonment and therefore committed an irregularity.
- [3] Additionally, he submitted that in respect of Count 2 the accused were convicted in terms of a guilty plea which should have been dealt with in terms of s 112 (2) of the Act. Only accused 1 confirmed the correctness of his statement and not the other accused and therefore a further irregularity was committed.
- [4] This case was disposed of by an acting magistrate whose judicial contract had been terminated and therefore no comments were received from the magistrate.
- [5] At this stage I wish to point out that only accused 1, 2 and 3 were convicted in respect of count 1. The J4 form for accused 4 is therefore incorrect. Accused 4 was acquitted on count 1.

COUNT 1

- [6] Section 304(4) of the Act reads as follows:

"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of s 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not according to justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

- [7] Upon reading the record of the proceedings accused 1,2 and 3 were correctly convicted in respect of count 1. The sentence however, is clearly an irregularity as s 92 (1) (a) of the Magistrate's Court Act² reads as follows:

"Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years where the court is a court of a regional division..."

- [8] Section 36 of the General Law Amendment Act 62 of 1955 reads as follows:

"Failure to give a satisfactory account of possession of goods

Any person who is found in possession of any goods, other than stock or produce as defined in section *one* of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

- [9] The magistrate's sentence for theft, a common law crime, may not exceed 3 years' imprisonment. The accused are currently serving a custodial sentence and will be prejudiced if the sentence is not corrected immediately as the sentence imposed exceeds the jurisdictional limit of three (3) years. The sentence imposed is not in accordance with justice and should be corrected.

COUNT 2

- [10] The concern raised by the senior magistrate is that the magistrate did not follow the prescribed procedure for a plea of guilty. It is **common practice** that when a guilty plea is tendered by an accused who is legally represented the legal representative hands in a written statement on behalf of the accused signed by the legal representative and the accused, with admissions relating to the elements of the offence and the facts and are generally read out into the record for each accused. The procedure followed emanates from s 112(2) of the Act. Section 112(2) of the Act reads as follows:

"If an accused or his legal advisor hands in a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court

² 32 of 1944.

may in lieu of questioning the accused under subsection (1) (b) , **convict the accused on the strength of such statement** and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement."

- [11] In this case only the statement of accused 1 was read into the record and confirmed by the accused. The statements of accused 2, 3 and 4 were not read into the record, apparently because the contents were the same for all the accused. The statements were then handed in, in respect of all 4 accused and marked as exhibits A, B, C and D respectively. Upon further perusal of the proceedings it appears that the magistrate asked all the accused about their respective statements. The record reads:

"Do you understand the content of your statement, your plea explanation?

Accused 1: Yes your worship

Court: All of, all of you?

Accused: Yes your worship"

- [12] The magistrate then confirmed with the accused the admissions they made and informed them that no further evidence will be led in respect of those admissions. In the judgment the magistrate referred to the guilty plea in respect of count 2 and admissions recorded in terms of s 220 of the Act.

- [13] Indeed the relevant s 112 (2) did not appear on the statements perhaps from an oversight or inexperience of the legal representative. The magistrate too did not clear this important aspect with the legal representative. The procedure followed clearly reflects that the magistrate erred in his application of the relevant section and therefore an irregularity is evident. The magistrate then decided to treat the admissions as admissions made in terms of s 220 of the Act. Admissions made in terms of s 220 of the Act may be made by an accused or this legal adviser in criminal proceedings where any fact placed in issue may be admitted and maybe sufficient proof of that fact. Hence no evidence was led in that respect and the accused were convicted on their admissions as reflected in Exhibits A, B, C and D.
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[14] The main aspect for consideration in this review is whether a gross irregularity was committed which has the effect that the convictions should be set aside. Generally, s 304(4) is used by senior magistrates to send cases on review where they are of the view that conviction or sentence should be corrected or set aside.³ The test is not whether the proceedings are technically sound but whether the practical effect was just; if it is not just then the reviewing court must intervene.⁴

[15] In fact the irregularities which I have highlighted in the preceding paragraphs are of a procedural nature. The accused were legally represented at all times, the statements were signed by the accused, the accused admitted all the elements of the offence as contained in their plea explanation and they did so voluntarily, in their sound and sober senses and without any undue influence.

[16] I am therefore satisfied, that in spite the procedural irregularities, the practical effect of the conviction in respect of all the accused is just and will not be in the interests of justice to set it aside as it could have adverse consequences if illegal persons in the country are released because of procedural irregularities; whereas in fact they have correctly pleaded guilty.

[17] Their right to a fair criminal trial was therefore not infringed.

[18] In the circumstances, I make the following order:

1. In respect of **COUNT 1**:
 - a. The convictions of accused 1, 2 and 3 are confirmed and their respective sentences are set aside and replaced with sentences of three (3) years' imprisonment in respect of each accused.
2. In respect of **COUNT 2**:
 - b. The convictions and sentences in respect of accused 1, 2, 3 and 4 are confirmed.

³ *S v Hoema* 1978 (2) SA 704 (T).

⁴ *S v Mahlangu* 2000 (2) SACR 210 (T) at 211E.

3. The order in terms of s 280 (2) of the Act to the effect that both sentences, in respect of accused 1, 2 and 3 are to run concurrently is confirmed.
4. The sentences are ante dated to 4 January 2023



RAMDEYAL, AJ

I concur:



S. CHESIWE, J