



**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

Review No.: R349/2018

In the review of:-

THE STATE

and

JAMES ISAAC SITHOLE

CORAM: MUSI, AJP

JUDGMENT BY: MUSI, AJP

DELIVERED ON: 24 December 2018

- [1] This matter was sent on special review by the control magistrate, Bloemfontein.
- [2] The accused, a Mozambican, was charged with contravening section 49(1)(a) of Act 13 of 2002 – entering or remaining in the Republic of South Africa without valid documents.
- [3] He was properly convicted in terms of section 112(1)(a) of the Criminal Procedure Act, 51 of 1997¹.

¹ Section 112(1)(a) reads as follows:

“The presiding judge may, if he is of the opinion that the offence does not merit the sentence of death, or the presiding judge, regional magistrate or magistrate may, if he is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a whipping or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he has pleaded guilty on his plea of guilty only and-

- [4] During his address in mitigation of sentence he intimated that his papers are at Maputo. The control magistrate was of the view that the magistrate was supposed to enter in a plea of not guilty in terms of section 113 of the Act.²
- [5] The charge is that the entered and remained in South Africa without documentation. The fact that his papers are in Maputo is not a defence. He was not supposed to enter this country without documentation.
- [6] The magistrate was informed by the prosecutor that the accused “indicated that the wants to speak on his own behalf and finalize the matter”. The magistrate confirmed this with the accused. He said: “You have a right to legal representation, but I understand that you are going to speak for yourself?” The accused confirmed that he would conduct his own defence.
- [7] The magistrate could have elaborated on the right to legal representation. The fact that he did not does not mean that the proceedings are *ipso facto* not in accordance with justice. The fact of the matter is that the accused indicated that he would conduct his own defence. He was told that he has a right to legal representation.
- [8] Section 35(3)(g) of the Constitution 1996 reads as follows:

“Every accused person has a right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”

(i) impose any competent sentence, other than the sentence of death or imprisonment or any other form of detention without the option of a fine or a whipping or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*; or

(ii) deal with the accused otherwise in accordance with law;”

²Section 113 reads as follows:

“(1) If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

(2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.”

[9] If one has regard to the charge, the potential sentence and the actual sentence imposed, the magistrate was correct to proceed with the matter. When the accused pleaded the magistrate was already informed by the prosecutor that the State requests that the matter be finalised in terms of section 112(1)(a). Clearly no substantial injustice would arise when a fine is imposed. The accused was not exposed to imprisonment without the option of a fine.

[10] The magistrate said the following when sentencing the accused:

“You are sentenced to R500 or 25 days’ imprisonment for a period of 4 years on condition that you are not convicted of the same offence during the period of suspension.”

[11] The sentence ought to be amended for the sake of clarity and certainty.

[12] I therefore make the following order.

1. The conviction is confirmed.
2. The sentence is amended to read as follows:
R500 or 25 days’ imprisonment which is suspended for 4 years on condition that the accused is not convicted of contravening section 49(1)(a) of Act 13 of 2002 committed during the period of suspension.

C. J. MUSI, J